RWANDA

I. INTRODUCTION

No report on reparation for torture in Rwanda can ignore the significance of the genocide and massacres that took place in Rwanda in 1994, where up to a million persons were killed. Not only did the genocide decimate a population and cause about two million Rwandans to flee, it also completed destroyed the infrastructure of the country and left the justice system in tatters. The very fabric of society was unhinged, making the process of rebuilding lives and communities ever the more difficult.

Torture was a particular tool of the war, where so many victims were made to suffer in the worst possible ways before they were killed.[1] Torture and ill-treatment continue to be factors in post-genocide Rwanda, the victims reportedly being those suspected of participating in the genocide, others that are perceived to oppose the government and civilians reportedly abused by soldiers in the context of the armed conflict in Democratic Republic of Congo.

The actual practices and policies of the government and the legal system are very much characterised by the fact of genocide, and much remains 'transitional' almost 9 years later, despite the efforts to return the country to 'normalcy'[2] through constitutional and legal reforms aimed at bringing about justice and reconciliation.

1. The Legal Framework

1.1. The Constitution

The Republic of Rwanda is situated in the Great Lakes region of Central Africa and borders Uganda to the North, Burundi to the South, the Democratic Republic of Congo to the West and Tanzania to the East. It has a population of approximately 8 million people, and an area of approximately 26,340 km^2. There are twelve provinces and 116 districts and municipalities.

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[1] See, for example, ***Report on the situation of human rights in Rwanda*** submitted by Mr. R. Degni-Segui, Special Rapporteur of the Commission on Human Rights, U.N. Doc E/CN.4/1995/7. See also, Human Rights Watch. ***Leave None to Tell the Story: Genocide in Rwanda***, March 1999: "Assailants sometimes mutilated women in the course of a rape or before killing them. They cut off breasts, punctured the vagina with spears, arrows, or pointed sticks, or cut off or disfigured body parts that looked particularly "Tutsi," such as long fingers or thin noses. ... Some killers tortured victims, both male and female, physically or psychologically, before finally killing them or leaving them to die. An elderly Tutsi woman in Kibirira commune had her legs cut off and was left to bleed to death. A Hutu man in Cyangugu, known to oppose the MRND-CDR, was killed by having parts of his body cut off, beginning with his extremities. A Tutsi baby was thrown alive into a latrine in Nyamirambo, Kigali, to die of suffocation or hunger. Survivors bear scars of wounds that testify better than words to the brutality with which they were attacked. Assailants tortured Tutsi by demanding that they kill their own children and tormented Hutu married to Tutsi partners by insisting that they kill their spouses. Victims generally regarded being shot as the least painful way to die and, if given the choice and possessing the means, they willingly paid to die that way." [FN 116-118 and accompanying text].

[2] See International Crisis Group**,** Rwanda At The End of the Transition: A Necessary Political Liberalisation, 13 November 2002.

The Republic of Rwanda was established in 1961 following the end of the monarchy. The first Constitution was promulgated in 1962 and contains a specific reference to the Universal Declaration of Human Rights. On 30 May 1991, a new Constitution was adopted. Articles 12-33 provide a catalogue of human rights and freedoms, though the prohibition of torture is not refered to.

On 26 May 1995, the Rwandan Parliament adopted the 'Basic Law' (*Loi Fondamentale de la Republique*). It provides that the 1991 Constitution and the Arusha Peace Agreement of 4 August 1993 between the Rwandan Government and the Rwandese Patriotic Front (RPF), the RPF Declaration of 17 July 1994 on the establishment of institutions and the Protocol of Agreement between the various political parties regarding the establishment of national institutions, dated 24 November 1994[3] together form the Basic Law. It also made provision for the following national institutions: the Presidency of the Republic, a transitional government, transitional national assembly and judiciary. Article 2 of the Basic Law provides that in case of conflict between provisions in different texts, the most recent shall apply. The Basic Law was revised in 1996 providing for a number of amendments to the 1991 Constitution and the Arusha Accords, including an amendment to Article 12 of the Constitution on non-retroactivity, providing that a sufficient legal basis to institue proceedings is general legal principles recognised by all nations.[4] Article 12 was also amended to provide that the principle of inviolability of liberty could be derogated from where the circumstances so demand, and only where an exceptional public danger threatens the nations' existence.[5]

According to Articles 24 and 41 of the protocol of the agreement between the then Government of the Republic of Rwanda and the RPF on power sharing in the transitional government, the country must be governed by a new Constitution after the transitional period. The current government of Rwanda formed a Legal and Constitutional Commission to comply with these provisions and a draft Constitution has been prepared. Referendum on the Constitution is scheduled to take place in mid-2003. Article 16(2) of the draft Constitution sets out the prohibition against torture. It provides that "no one shall be subjected to torture, cruelty or inhuman or degrading treatment."[6]

Article 143 of the Draft Constitution, which basically reflects the actual judicial landscape, provides that: "Under this Constitution, ordinary and specialised courts are hereby established. Ordinary courts are the Supreme Court, the High Court of the Republic, the Provincial Courts and the Kigali city court, the District Courts and the Town Courts. Specialised jurisdictions are military courts and *gacaca* jurisdictions. Other jurisdictions may be established by an organic law. With the exception of the Supreme Court, the ordinary courts may have specialised and/or itinerant Chambers, by order of the President of the Supreme Court on proposal of the Supreme Court of

[3] See, Committee on the Elimination of Racial Discrimination. Twelfth Periodic Report of States due in 1998, CERD/335/Add.1 of 28 June 1999 at par. 11.

[4] This was done in main part to ensure that Rwanda could exercise jurisdiction over the crimes perpetrated in the context of the 1994 genocide.

[5] This amendment was used in 1996 when the Transitional National Assembly adopted Law No. 9/96 relating to provisional modifications to the Criminal Procedure Code, which severely extended deadlines for provisional detention.

[6] The latest Draft is available on the website of the Legal and Constitutional Commission (http://www.cjcr.gov.rw/eng/index.htm; last accessed March 2003).

Magistrates. Courts may sit in any locality within their territorial jurisdiction if efficient administration of justice so necessitates, without prejudice to the executions of their normal business at their usual jurisdiction. No special court shall be created.... "

The Supreme Court, the highest ranking court, is comprised of five divisions: the Court of Cassation, the Council of State, the Constitutional Court, the Court of Audit and the Courts and Tribunals division. It also has the responsibility to direct and coordinate the work of Rwandan courts. The President of the Supreme Court holds the power to appoint judicial officers. In this function of safeguarding the independence of the judiciary and judicial officers, the Supreme Court is assisted by the High Judicial Council (*Conseil superieur de la magistrature*) made up exclusively of judicial officers.[7]

The High Judicial Council has the following powers:

- It decides on the appointment, dismissal and all matters affecting the careers of judges with the exception of the President and Vice-Presidents of the Supreme Court;
- It offers consultative opinions, at its own initiative or upon request, on any matter which it is competent to examine concerning the regulations governing the terms and conditions of service of the judiciary;
- It offers consultative opinions, at its own initiative or upon request, on any matter concerning the administration of justice.[8]

Whike there are six political parties represented in the Government of National Unity of the Republic of Rwanda, much is dominated by the Rwandese Patriotic Front (RPF). It administers the affairs of the State in the interim until the new Constitution is adopted and parliamentary and presidential elections are held.

The judiciary is independent from the other branches of government.[9] Article 28 of Decree-Law No. 06/82 of 7 January 1982 regulating the terms and conditions of service of the judiciary stipulates that: "judges shall have a duty to serve the cause of justice with fidelity, integrity, objectivity and impartiality without any discrimination whatsoever, particularly with regard to race, colour, origin, ethnic group, clan, sex, opinion, religion or social status."

1.2. Incorporation and Status of International Law in Domestic Law

Rwanda has ratified the following relevant international treaties:

- Geneva Conventions, 1949 (5 May 1964);
- Convention on the Prevention and Punishment of the Crime of Genocide (16 April 1975);
- Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity (16 April 1975);

[7] Committee on the Elimination of Racial Discrimination. Twelfth Periodic Report of States due in 1998, CERD/335/Add.1 of 28 June 1999, supra., at para 17.

[8] Ibid., para. 17(a) – (c).

[9] Article 25 of the Arusha Protocol on Agreement on Power-sharing stipulates that judicial independence shall be reflected in the actual organisation of the Courts. See the CERD report, ibid., at para. 17.

- International Covenant on Economic, Social and Cultural Rights (16 April 1975);
- International Covenant on Civil and Political Rights (16 April 1975);
- International Convention on the Elimination of All Forms of Racial Discrimination (16 April 1975);
- Convention Relating to the Status of Refugees (3 January 1980)
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (19 November 1984);
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (19 November 1984);
- Convention on the Elimination of All Forms of Discrimination against Women (2 March 1981);
- Convention on the Rights of the Child (24 January 1991);
- Optional Protocol of the Convention on the Rights of the Child on the Involvement of Children in armed conflict (23 April 2002);
- Optional Protocol of the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (15 March 2002).

Article 190 of the draft Constitution provides that: "Treaties or agreements, which have been regularly ratified or approved, have, as from the date of their publication, greater authority than laws, subject to the reservation, with respect to each treaty or agreement, of compliance by the other party."

2. Practice of Torture: Context, Occurrence, Responses

2.1. The Practice of Torture and Ill-treatment

The genocide and massacres of 1994 resulted in the deaths of up to one million Rwandans and wide-scale destruction of property. The level of violence was extreme, and torture was regularly resorted to. Mr. R. Degni-Ségui, the UN Special Rapporteur appointed to investigate the human rights situation in Rwanda, wrote, in his report of 25 May 1994 that "Generally, the victims are attacked with machetes, axes, cudgels, clubs, sticks or iron bars. The killers sometimes go so far as to cut off their fingers, hands, arms and legs one after another before cutting off their heads or splitting their skulls. Witnesses report that it is not uncommon for the victims to plead with their executioners or offer them money to let them be shot rather than hacked to death. It has also been reported that, when the Tutsi have shut themselves in a room or a church which the militiamen cannot get into, the military come to their aid, breaking down doors, throwing in grenades and leaving it to the militia to finish things off. This barbarism does not spare either children in orphanages or patients in hospital, who are taken away and killed or finished off. Mothers have been forced to beat their children, while Hutu staff working for Médecins sans frontières (Butare, end of April 1994) were obliged to kill their Tutsi colleagues. Those who had the courage to refuse were killed. It has even been reported that the killers, after executing their victims in the open street, in front of everyone, cut them up into pieces, and some do not hesitate to sit on the bodies and drink beer while waiting for

prisoners to come and take the bodies away."[10] Through sadistic acts of sexual violence, "thousands of women were individually raped, gang-raped, raped with objects such as sharpened sticks or gun barrels, held in sexual slavery (either collectively or through forced "marriage") or sexually mutilated.... Rapes were sometimes followed by sexual mutilation, including mutilation of the vagina and pelvic area with machetes, knives, sticks, boiling water, and in one case, acid."[11]

The number of persons who were involved in the perpetration of acts of genocide was unparalleled. With the end of the genocide, and the attempts of the Rwandan Patriotic Army (APR) to establish security, tens of thousands of suspects were detained. At its height, detention levels neared 125,000. But the sheer volume of detainees far outweighed prison capacity and quickly the conditions in Rwanda's prisons, communal detention centres and other places of detention became unbearable. The judicial system had stopped completely, and therefore the detention centres and prisons became extremely overcrowded, unsanitary and breeding grounds for a host of diseases, including AIDS, tuberculosis and typhus.[12] Conditions have been likened to inhuman and degrading treatment.[13]

The use of torture and ill-treatment after the genocide has mainly taken the form of severe beatings of detainees shortly after arrest by police and security forces. There are more sporadic reports of use of electronic shock treatment and rape. The UN Special Rapporteur on Disappearances and summary executions, Ms. Jahangir, transmitted, together with the Special Rapprtuer on Torture a number of cases where victims died as a result of ill-treatment they received while in custody. For example, Felicien Gasana died on 10 August 1999 after having suffered severe ill-treatment by the brigade at Nyamirambo, Kigali. Apparently, medical personnel found him in critical condition in the brigade and ordered his immediate transfer to the hospital, though it took some time to get the transfer approved by the military authorities.[14] The cases of Frodouald Ngaboyisonga, Jean-de-Dieu Hakizimana, Gakezi, Jean-Bosco Byiringiru, Thomas Ngarambe and Cyridion Hakuzimana were also brought to the attention of the Rwandan government. These victims were apprehended and placed in the Mukamira military camp where they were apparently ill-treated by members of the military. One of these victims, Frodouald Ngaboyisonga, eventually died from his injuries after his release.[15] In another case, Michel Ngirumpatse, a 72 year old who, after having been detained in the Huye detention centre for 3 years, was provisionally released in November 1999 due to

[10] Report on the situation of human rights in Rwanda submitted by Mr. R. Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of Commission resolution E/CN.4/S-3/1 of 25 May 1994; at para 28.

[11] Human Rights Watch. ***Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath,*** September 1996, introduction.

[12] ***Report on the situation of human rights in Rwanda*** submitted by the Special Representative, Mr. Michel Moussalli, pursuant to resolution 1998/69, E/CN.4/1999/33, 8 February 1999; ***Report of the Special Representative of the Commission on Human Rights on the situation of human rights in Rwanda,*** A/ 55/ 269, of 4 August 2000.

[13] Amnesty International, ***Gacaca: A Question of Justice***, AFR 47/007/2002, 17/12/2002, at section III(2).

[14] Para 533, Report of the Special Rapporteur, Ms. Asma Jahangir, submitted pursuant to Commission resolution 2001/45 Addendum E/CN.4/2002/74/Add.2, Also reported in Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2001/62 Addendum, Summary of cases transmitted to Governments and replies received. E/CN.4/2002/76/Add.1, at para. 1316 - 18.

[15] Ibid., para. 534.

poor health. He was re-detained the following month, he was brutally beaten by the police and died the same day.[16]

In addition to the cases listed above, the Special Rapporteur on Torture raised a number of further incidents of ill treatment in Musambira. In one case, soldiers beat a detainee until he started vomiting blood because he was walking too slowly, and he was apparently denied medication.[17] Other detainees were pistol whipped by police.[18] In one case, a local official placed a victim in solitary confinement for 4 days over a dispute with his brother – when he emerged he was in critical condition.[19] According to Amnesty International, "detainees in Rwanda's *cachots communaux* (local detention centres), military detention centres and in some *brigades* (gendarmerie detention centres) are often subjected to ill-treatment which in some cases amounts to torture. Testimony gathered by Amnesty International suggests that detainees consider beatings as "normal" by virtue of their frequency, particularly at the time of arrest or in the early stages of detention. Detainees are not usually ill-treated once they are transferred to central civilian prisons."[20] Amnesty International also reported on the use of military containers to detain several hundred persons at Remera, in Kigali, at the end of 1998. Reportedly, they were forced into containers and beaten as they went in. A former detainee apparently described the extreme heat inside the containers as like being "cooked alive", and described how the military made fires in barrels which they placed next or underneath the containers.[21]

Torture and/or ill-treatment have also figured in the actions of members of the military on mission in the Democratic Republic of Congo or otherwise in connection with that conflict. Amnesty International reported the incident of four students who were arrested by Rwandese security forces at Gatuna, on the border between Rwanda and Uganda, and transported to Kigali where they were reportedly detained in an old latrine and denied food for three days. Soldiers held pistols to their heads and threatened them with execution. One soldier beat Lukuta Tshonga on the head with a piece of wood. They were eventually transferred to a detention centre in Goma where they were beaten with military belts.[22]" Incidents of rape have also been reportedly perpetrated by Rwandese soliders in Eastern Congo.[23]

2.2. Domestic Responses

The Rwandan judicial system was devastated by the genocide. Many investigators, prosecutors, judges and other court staff were killed or fled the country. Court buildings were destroyed and basic infrastructures absent. Nonetheless, realising justice and the rule of law and accountability for genocide became stated objectives

[16] Ibid., para 535.

[17] Supra, E/CN.4/2002/76/Add.1 at para. 1312.

[18] Ibid., 1313.

[19] Ibid., 1314.

[20] Amnesty International. ***Rwanda, the troubled course of justice***, AFR 47/11/00, April 2000.

[21] Ibid., Chapter II.6.

[22] Amnesty International: ***Democratic Republic of Congo: Torture: A weapon of war against civilians***. AFR 62/012/2001, 26 June 2001.

[23] Human Rights Watch. ***The War within the War: Sexual Violence Against Women and Girls in Eastern Congo***, June 2002.

of the transitional government. How these issues were handled would determine how other areas, such as national reconciliation, peace-building and national reconstruction and development would fare. However, the lack of infrastructure and the enormity of the task made justice a daunting prospect. In August 1996, the Transitional National Assembly adopted the Organic Law No 8/96 on the organization of prosecutions for offences constituting the crime of genocide or crimes against humanity committed since 1 October 1990. The offence of sexual torture figured in the first category of offences, carrying a mandatory death penalty.

Trials in specialised chambers began in 1996, but quickly it became clear that bringing to justice all of those who had been accused of participation in the genocide in the manner prescribed by the law would not be practicable or feasible, it would take far too long. By the end of 2002, about 7,000 suspects had been tried, while others languished in detention centres, many since 1994, most without ever having been brought before a judge to confirm the charges.

A system of *Gacaca*, a community-based justice system based on traditional dispute resolution techniques, was introduced by the Rwandan government to render justice in a more efficient and participatory way, though it is possibly too soon to judge the impact of proceedings.[24]

The Rwandan government also sought in various ways to ameliorate the deplorable conditions of detention. In addition to seeking funds to build new wings to prisons, it used communal detention centres[25] to house the overflow of detainees for prolonged periods. Also, the government established a number of committees to screen and release pre-trial detainees where there was insufficient evidence to warrant their continued detention. A number of models of committees were formed between 1995 and 1998, though none of the incarnations resulted in more than a handful of releases. [26] Much more recently, it decided to release tens of thousands of detainees, mainly minors, the age or sick, or those who would risk to spend more time in pre-trial detention then what they would otherwise receive as a penalty.[27]

While the RPA has dismissed soldiers for indiscipline and criminal offenses, and does routinely try military offenders in military courts, there has been little acknowledgment of the role of the military in the perpetration of serious violations of human rights, including torture. While it is widely known that Rwandan soliders were responsible for a series of massacres and other abuses when they took control of Rwanda in 1994, there has been little attempt to bring these perpetrators to justice.[28] In fact, the Rwandan government refused assistance to the UN International Criminal Tribunal for Rwanda when it sought cooperation in the

[24] *Loi Organique N. 40/2000 du 26/01/2001 Portant creation des "juridictions gacaca" et organisation des poursuites des infractions constitutives du crime de genocide ou de crimes contre l'humanité, commise entre le 1 Octobre 1990 et le 31 Decembre 1994*.

[25] In fact, the use of communal detention centres did not present an optimal solution given that while they were *de facto* prisons, they were not treated as 'prisons' administratively and thus detainees did not have the same rights and privileges accorded to those found in central prisons – such as provision of food, etc.

[26] The initial screening committees were replaced by the *Commissions de Triage*, then the *Groupes mobiles*. See, Amnesty International, ***Gacaca: A Question of Justice***, AFR 47/007/2002, 17/12/2002.

[27] See, Fondation Hirondelle. *Le Rwanda Va Relacher Plus De 30 000 Suspects De Genocide*, 23 January 2003.

[28] See, for example, FIDH. ***Victims in the Balance: Challenges ahead for the International Criminal Tribunal for Rwanda***, p. 16

investigation and prosecution of offences attributable to the FPR (now RPA).[29] Similarly, there has been little if any acknowledgment of the abuses perpetrated against civilians in the Democratic Republic of Congo and now that most soldiers have been withdrawn, the question of accountability for crimes remains unresolved.

Article 181 of the draft Constitution establishes an office of the Ombudsman. It has a mandate, among others, to receive complaints from individuals against the conduct of officials or public bodies and to draw attention to the complaints in order to find adequate solutions. Particularly, Article 181(4) provides that "it may set aside or temporarily suspend a measure or decision taken against a citizen. The office may not interfere in the investigation or the decisions on cases submitted to the courts of justice but may forward complaints concerning such cases to competent jurisdictions or to the national prosecution authority. These institutions are obliged to respond to those complaints."

2.3. International Responses

Acting pursuant to Chapter 7 of the United Nations Charter, the United Nations Security Council created the International Criminal Tribunal for Rwanda by Resolution 955 0f 8 November 1994. The mandate of the Tribunal set out that the ICTR could prosecute crimes committed by Rwandans in Rwanda and neighbouring states, and non-Rwandans for crimes committed in Rwanda. The tribunal is temporally restricted to crimes perpetrated between 1 January 1994 and 31 December 1994. The crimes within the jurisdiction of the tribunal are: genocide, crimes against humanity, serious violations of common article 3 of the Geneva Conventions, and of Additional Protocol II.[30] While the ICTR has had numerous problems, its jursprudence has in some instances been ground-breaking, particularly in respect of its findings relating to sexual violence: In the Akayesu judgment, for instance, the chamber held that: "Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or others person acting in an official capacity. The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[31]

The United Nations Commision on Human Rights, appointed a Special Rapporteur in May 1994[32] to report on the human rights situation and a peacekeeping mission was

[29] Human Rights Watch noted this problem in its letter to the UN Security Council of 9 August 2002: "Victims of RPA crimes have virtually no chance of obtaining justice in any Rwandan court, whether military court or gacaca court. Failing to provide them justice at the international tribunal as well will feed resentment and desire for revenge, explosive sentiments in a region where armed groups continue to operate in opposition to recognized governments." See also, on this point, the International Crisis Group, ***The International Criminal Tribunal For Rwanda: The Countdown*****,** 1 Aug 2002, where it notes that "not one case has been brought after eight years against members of the Rwandan Patriotic Army for grave violations of human rights allegedly committed on the territory of Rwanda in 1994. There has been no cooperation at all from the Rwandan authorities on these matters. The reluctance and refusal of the current government in Kigali in relation to these cases is the reason for the unprecedented crisis that has existed since June 2002 between the ICTR and Rwanda. The Rwandan government must honour its obligations to cooperate with the Tribunal and stop all forms of obstruction – such as the restriction of access to witnesses living in Rwanda."

[30] The Statute of the Tribunal adopted by Security Council resolution 955 of 8 November 1994

[31] Judgment of 2 September 1998, para 597.

[32] Commission on Human Rights resolution S-3/1 of 25 May 1994, endorsed by the Economic and Social Council in its decision of 1994/223, of 6 June 1994.

reinstated after the conflict, together with a field operation designed specifically to monitor the human rights situation in the country. The international donor community contributed to the rehabilitsation of infrastructure and provided technical assistance in the administration of justice. Additionally, a number of European countries, namely, Switzerland, Belgium and France, instituted criminal proceedings against Rwandans accused of crimes in the context of the genocide, resulting in a number of convictions.

II. PROHIBITION OF TORTURE UNDER DOMESTIC LAW

The Basic Law specifically recognises and guarantees the fundamental rights of the person as stipulated in the Universal Declaration of Human Rights and the African Charter and other laws and regulations based on the respect of fundamental rights,[33] which include the prohibition against torture in their articles. The *Organic Law on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity committed since October 1 1990* does specifically refer to the offence of 'sexual torture'. In this law, suspects are classified into four broad categories based on trheir degree of culpability. Category 1 includes leaders, organisers and perpetrators of genocide, crimes against humanity and acts of sexual torture,[34] and carries a mandatory death sentence.

The new draft Constitution specifically prohibits torture and ill treatment in Article 16(2).[35]

III. CRIMINAL ACCOUNTABILITY OF PERPETRATORS OF TORTURE

1. The Substantive Law: Criminal offences and punishment

The Rwandan government, in its report to the UN Committee on the Elimination of Racial Discrimination, noted that "the law protects the security of the person against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution, by preventing and punishing such offences. Offences are punishable under the section of the Criminal Code dealing with offences against the person (arts. 310-395). Arbitrary detention is also considered an offence, punishable under article 297 of the Criminal Code."[36] Torture is not specifically prohibited by the criminal code and thus is not therein defined, though the offence of torture would be punishable by the offences against the person referred to above.

2. The procedural law

2.1. Immunities

There is no express immunity for public officials for acts of torture.

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[33] See the *Protocole d'accord entre le gouvernement de la Republique Rwandaise et le Front patriotique Rwandais relatif a l'état de droit*, Article 6.

[34] Section 2 of the Organic Law.

[35] See supra, I, 1.1.

[36] CERD report, para 47.

2.2. Statutes of Limitation

Article 37 of the Organic Law on the Organization of Prosecutions for offences constituting the Crime of Genocide or Crimes against Humanity committed since October 1, 1990 provides that the prosecution and punishment for offences constituting crimes against humanity are not subject to a limitation period.

2.3. Investigations into torture

2.3.1. Criminal Proceedings

i) Investigations

A victim of a crime has the right to lodge a denunciation or complaint with the competent authorities.[37] Those with the competence to receive such complaints include judicial police inspectors,[38] judicial police officers[39] officers of the gendarmerie, mayors, officers and sub-officers of the army, and other officers of the office of the prosecutor[40] or, if the complainant is a detainee, either to the director or deputy director of prisons or the mayor (in the case of a communal detention centre).

Upon receiving a complaint or information about the commission of a crime, the competent officer will commence an investigation. Where the offence relates to an allegation against a senior government official, the law provides for the matter to be transferred to a hierarchically superior prosecution service.[41]

The public prosecution service is headed by a Prosecutor General of the Republic, assisted by a deputy prosecutor general, national prosecutors, provincial and Kigali city prosecutors.

In addition, there are also district police operating under the authority of the Ministry of the Interior, under the direct authority of the district mayor. The gendarmerie, a quasi-military organisation instituted to maintain public order and security also has a role in the investigation of criminal acts.

The military prosecution department (*Auditorat Militaire*), operating under the overall jurisdiction of the Ministry of Defence, is responsible for the prosecution of offences committed throughout Rwanda and outside that fall within the jurisdiction of the military. This prosecution department exercises prosecutorial functions before the war councils and military court. Offences are investigated at first instance by the military judicial police.

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[37] Article 2 of the Rwandan Code of Criminal Procedure of 23 Feb 1963, amended by Decree Law n. 07/82 of 7 Jan 1982; amended by law no 31/1985 og 8 nov 1985.

[38] *Inspecteurs de Police Judiciaire* (IPJ), which are attached to the office of the prosecutor.

[39] *Officiers de la Police Judiciaire* (OPJ), which are public servants with other principle public functions, but that are designated with a juridical mandate.

[40] See, generally, *Decret-loi du 7 juillet 1980 portant code d'organisation et et de competence judiciaries; Decret-loi 23/01/1974 portant creation de la gendarmerie nationale; Decree No. 825/05 of 16 August 1984;*

[41] Article 10, Code of Criminal Procedure.

The responsibility for gathering proof relating to a criminal offence is borne primarily by the office of the prosecutor, or should there be a civil party or direct summons, the victim or his/his relations.[42] The judicial police inspector will conduct the preliminary investigation into the infraction, collect the necessary evidence and transmit the file to the competent official of the prosecutor's office. There will then be a preliminary instruction of the case, and should there be sufficient evidence, the matter will be pursued before the competent court.

Evidence can be established by all means of fact and law so long as it is subject to cross-examination.[43] There are liberal rules with respect to the receipt and review of evidence. The Court can freely determine the admissibility and relevance of each element of evidence. Additionally, the Court, in search of the truth has the obligation to seek out supplementary evidence as required to the benefit of any of the parties.[44]

ii) Victims rights

In accordance with Article 71 of the Code of Criminal Procedure, victims have the right to become civil parties to the criminal proceedings and to claim reparations. They, like accused persons, do not have the right to free legal assistance.

The organic law regarding the organisation of genocide proceedings provides in Article 29 that "victims acting either individually or through legally constituted associations for the defence of victims, represented by their legal representative or by a special representative designated according to their statutes, may request the commencement of a public prosecution by submitting a written petition setting out the grounds for the prosecution to the Public Prosecutor of the competent jurisdiction." Furthermore, "where the Public Prosecution Department has not instituted proceedings before the competent jurisdiction within six months of the submission of a petition, the civil party is entitled to commence a private prosecution, in which case the private party bears the burden of proof." This organic law exempts civil parties from the payment of legal costs.[45]

The Code of Criminal Procedure does not specify specific measures for witness protection, nor does the organic law on the organisation of genocide proceedings or the organic law on gacaca proceedings[46]

2.3.2. The National Human Rights Commission

Rwanda has a National Human Rights Commission, with a mandate to examine human rights violations committed by any person in Rwandan territory, with special emphasis on violations by government bodies and agents or any national organisation operating in Rwanda. The Commission, which was initially provided for

[42] Code of Criminal Procedure, Article 16.

[43] Article 17, Code of Criminal Procedure.

[44] Article 18, Code of Criminal Procedure.

[45] Article 29, Organic law.

[46] Organic law establishing the Gacaca Jurisdictions (Organic Law No 40/2000).

in the Arusha Accords, raises awareness of human rights among the Rwandan population and organises relevant training programmes, and initiates legal proceedings against anyone who commits human rights violations. It also transmits its reports on all findings of human rights violations to the President of the Republic, the Government, the National Assembly and the Supreme Court.[47]

The National Human Rights Commission has the capacity to receive petitions from aggrieved individuals and groups and to undertake investigations and mediations.[48]

There is also a National Unity and Reconciliation Commission, responsible for raisinig awareness amongst Rwandans on rights and building a culture of respect and tolerance.

2.4. Trials

Parallel to the ordinary criminal jurisdiction, there is also a specialised military jurisdiction competent to try infractions committed by members of the military and their accomplices.[49] The military jurisdictions are competent in respect of all offences committed by members of the military and their accomplices, regardless of whether or not the infractions are of a military character. For common crimes, the war council and military court apply the principles of the regular penal code, and for military offences, the military penal code. The chambers of the war council act as the courts of first instance and the military court as the appellate jurisdiction, though in certain cases, particularly relating to superior officers, the military court will sit in the first instance. The court of cassation is competent to hear appeals of cases that were heard at first instance by the military court.

The Basic law clearly sets out the independence of the military jurisdictions, however, the manner in which judges are nominated and the provisions relating to the cessation of their functions may in practice impinge on their independence.[50]

3. The Practice

3.1. Complaints and Investigations

[47] CERD report, para 27.

[48] See, ***Report on the situation of human rights in Rwanda submitted by the Special Representative, Mr. Michel Moussalli, pursuant to Commission resolution 1999/20,*** E/CN.4/2000/4125, of February 2000, at para. 61.

[49] See Article 26 of the Protocol of 30/10/92 on power sharing, which provides for the war council (*conseil de guerre*) and the military court (*cour militaire*). See also, articles 19-30 of the Decret-loi n. 9/80 of 7 july *1980 portant code d'organisation et de competences judiciaiires* as modified by decree law N. 002/94 and the *Organic Law on the Oreganization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity committed since October 1 1990 which* provides for the establishment of specialisecd chambers in the *conseil de guerre* to try members of the army accused of genocide.

[50] See for example, article 3 of 002/94, which provides that the president and judges of the war council are named for a 12 month period, renewable by the 'conseil de gouvernement' on the recommendation of the Military High Council and the High Council of the Gendarmerie. Furthermore, it is stated that they can be removed at any moment: "*il peut a tout moment etre mis fin aux functions du president et des juges du Conseil de geurre dans les memes formes que leur nomination s'ils sont juges incompetents ou indignes de leurs functions.*" See also Article 8 for a similar provision relating to the president and judges of the military court.

REDRESS is not aware of recent official statistics about the number of complaints about torture and ill-treatment and has at its disposition only anecdotal information. Without such details it is difficult to comment with any certainty on the nature or prevalence of complaints, however, reports of governmental controls over all forms of opposition[51] would seem to indicate that victims would find it difficult to make allegations against the police or the army.

Human Rights Watch, in its report on sexual violence in Eastern Congo, noted that: "when victims or their families did complain to authorities about the crimes that had been committed, authorities sometimes initially responded appropriately but then failed to prosecute the assailants. ... Victims and their families believed they were especially unlikely to get action from the RCD authorities if the perpetrator was part of the RCD or the Rwandan Patriotic Army. A man who had tried to save a woman from rape by a Rwandan army soldier, himself sustaining serious injuries in the process, delivered a gun taken from the rapist to the local administration. But, he said, he expected no further action because the attacker was Rwandan. "It's just that the authorities won't do anything against these Rwandans," he said."[52]

With respect to the many victims of the genocide, it has been reported that in some cases witnesses do not dare to testify and/or refuse to become civil parties because they fear reprisals from the family and friends of the accused. This is often the case with victims of sexual violence. Problems have also been noted with respect to the investigations undertaken by judicial police investigators and prosecuting magistrates – the complexity and sensitivity of their task cannot be underestimated. The investigation of sexual crimes remains too rare. Also, the prosecution has been said to accept guilty pleas under the procedure stipulated in the Organic law on the organisation of genocide proceedings without fully verifying the facts of the pleas.[53]

3.2. Prosecutions: Indictments, convictions, sentencing

Before the genocide, there had been 785 judges in Rwanda, by November 1994 there were just 244. A mere 12 prosecutors were left out of the previous 70. Only 22 of the former 197 criminal investigation officers had survived.[54] This state of affairs had an impact not only on the speed of trials relating to offences perpetrated in the context of the genocide, but also in the prosecution of common crimes, and in the functioning of the justice system as a whole.

REDRESS does not have comprehensive statistics of the number of investigations that have been opened in respect of allegations of torture or ill treatment by members of the military or the police. FIDH, in a recent report reveals statistics that they were given from Rwanda's Military Auditor General regarding RPA soliders brought to trial between 1996 and 2000: "there were eight cases involving 49 people tried for murder, failure to assist persons in danger, and pillage. There are four other cases in progress involving 30 people. The FIDH also received a list of 29 RPA senior

[51] See, for example, International Crisis Group, supra, at p. 6.

[52] Human Rights Watch: ***The War within the War: Sexual Violence Against Women and Girls in Eastern Congo***, June 2002.

[53] *Avocats sans Frontieres. L'état de la jurisprudence sur l'indemnisation liée au contentieux du génocide. Exposé donné lors du "Séminaire sur l'indemnisation des victims du génocide", organisé par le Ministère de la Justice du 3 au 4 avril 2000.*

[54] CERD report, supra, para. 21.

officers brought to trial by the Military Court of Rwanda between 1995 and 2002. The list contains six cases of 'violations of human rights', but does not mention the legal nature of the acts (murder, war crimes, etc.), six cases of criminal negligence, and one case of murder. Other people were tried for theft, road accidents, etc. One person was convicted of genocide but had clearly been put on the list mistakenly. There is no mention in the statistics or the list of whether the acts were committed in 1994 (ratione temporis jurisdiction of the ICTR). To the knowledge of the FIDH team, the Rwandan military justice system only tried one of the people on the list for acts committed in 1994: Major Sam Bigabiro. All the other people are believed to have committed the crimes after 1994. Another list outlines 20 cases of 'revenge' tried by the Military Council tried between 1995 and 2002. The date was mentioned for some of the cases. There were nine cases of acts committed between June and December 1994. Out of these nine, the Rwandan justice system pronounced three acquittals. All told, twelve people were given prison sentences of between one and three years for murder or bodily harm causing death. When mentioned, the number of victims varies between one and six."[55]

On the question of military prosecution, the former UN Special Rapporteur for Rwanda wrote in 2000 that: "Observers report more rigour as well as more respect of the rights of the accused in the military justice system, together with greater recourse to heavier sentences, including the death penalty. The responsibility of investigating and prosecuting crimes committed by members of the armed forces, including 1,600 ex-FAR genocide cases, belongs to the *Auditorat militaire,* its Department of Military Prosecution and Investigation and its two military courts, one for soldiers and junior officers and the other for senior officers and appeals. The military authorities recognize that a good number of human rights and humanitarian law violations have been committed by members of the RPA which they attribute to a spirit of revenge among some members of the armed forces. The combination of sensitization, information, prosecution and punishment of a number of cases may have contributed to a decline in the number of violations by the military. The Special Representative strongly supports the efforts of the *Auditorat militaire* to prevent and punish violations of human rights and humanitarian law by the military and urges the international community to provide the material and technical assistance needed to continue and expand this work."[56]

Elsewhere, the Special Representative noted that: "Last year the Prosecutor brought 506 cases before military courts; 345 resulted in prison terms. Most concerned common crimes, but the Prosecutor assured the Special Representative's mission that he remained vigilant to the protection of human rights. In general, he said, discipline was good in the Rwandan armed forces. He noted that 5,000 ex-FAR had been integrated into the army, without any problem. He emphasized that there was no longer a culture of impunity in the RPA as everyone knew what the consequences of violation would be. He also indicated that field monitoring was carried out, including in the Democratic Republic of the Congo, and that once a case had been

[55] FIDH. ***Victims in the Balance: Challenges Ahead for the International Criminal Tribunal for Rwanda*** No. 329/2 of November 2002, at p. 16.

[56] ***Report on the situation of human rights in Rwanda submitted by the Special Representative, Mr. Michel Moussalli, pursuant to Commission resolution 1999/20,*** E/CN.4/2000/4125, of February 2000, at para. 46.

reported, it was brought to the attention of the military Directorate and the suspects were brought in for prosecution."[57]

More detailed statistics are available in respect of prosecutions in Rwanda that have taken place pursuant to the organic law on the organisation of genocide proceedings. Out of the 120,000 plus who awaited trial in Rwanda's detention centres, 7,181 individuals were tried by Rwandan specialised chambers, 9.5% of whom were sentenced to death, 27.1% to life imprisonment, 40.5% to varying prison terms, and 19.1% were acquitted.[58]

Persons accused of offences set out in Article 1 of the Organic law on the organisation of genocide proceedings are, on the basis of their acts of participation, classified into one of the following categories:

Category 1:

- Persons whose criminal acts or whose acts of criminal participation place them among the planners, organisers, instigators, supervisors and leaders of the crime of Genocide or of a crime against humanity;
- Persons who acted in positions of authority at the National, Prefectorial, Communal, Sector or Cell level, or in a political party, the army, religious organizations or in a militia and who perpetrated or fostered such crimes;
- Notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed;
- Persons who committed acts of sexual torture or violence

Category 2:

Persons whose criminal acts or whose acts of criminal participation place them among the perpetrators, conspirators or accomplices of intentional homicide or of seriuos assault against the person - causing death.

Category 3:

Persons whose criminal acts or whose acts of criminal participation make them guilty of other serious assualts against the person.

Category 4:

Persons who committed offenses against property.

While serious concerns were expressed with the extent to which the first trials met internationally recognised fair trial standards, there have been notable improvements. Amnesty International, in its recent report, ***Gacaca: A Question of Justice***, noted, in respect of the work of the specialised chambers, that: "Although,

[57] ***Report of the Special Representative of the Commission on Human Rights on the situation of human rights in Rwanda*****,** A/ 55/ 269, of 4 August 2000, at para 154.

[58] These figures are from the organisation LIPRODHOR, reproduced in Amnesty International: ***Gacaca: A Question of Justice***, supra.

the overall quality of trials has improved, the complexity and gravity of the offences, the severity of the sentences and the political environment in which the courts were operating continue to cause problems. Numerous reports call into question the competence, impartiality and independence of judicial personnel. Court proceedings continue to reflect the hostile socio-political environment existing outside of the courtroom. This climate of fear affects judicial personnel, defendants and witnesses. Defence counsel and witnesses are intimidated causing the former to withdraw from trials and the latter to refuse to testify. Some defense witnesses have been accused of complicity or involvement in the crimes committed by the defendant. Conviction sometimes rests more on public acclaim than on the incontrovertible evidence of guilt."

The International Criminal Tribunal for Rwanda, with a mandate to prosecute those persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994; and to prosecute Rwandan citizens responsible for genocide and other such violations of international law committed in the territory of neighbouring States during the same period,[59] has thus far completed 13 cases, with a further 62 in varying stages of preparation.[60] Many have criticised the slowness of proceedings before the Tribunal, and the Tribunal's inability to meet the varying needs of victims. The mandate of the Tribunal, which does not enable victims to be represented or to participate in proceedings, nor does it enable victims to claim reparation, has alienated most victims.[61] Also, the Tribunal, operating from Arusha, has not managed to have a strong impact in Rwanda and it has been said that it has lost much credibility with its principle beneficiaries – Rwandan civil society. Even so, some have argued that the work of the Tribunal has managed to bring legal recognition of the genocide and has ensured that some perpetrators, who would have otherwise escaped justice, were tried.[62]

In Rwanda, it quickly became clear that it would not be possible for the specialised chambers to deal with the huge backlog of cases, nor would it be possible for the International Criminal Tribunal for Rwanda to deal with anything more than a very small fraction of the cases. The growing population of pre-trial detainees had to be dealt with, and measures to bring justice and national reconciliation were urgently needed. Against this background, the Rwandan government developed plans for a new system of justice – the *Gacaca* jurisdictions.[63] On 18 June 2002, at the ceremony inaugurating the opening of the Gacaca jurisdictions, His Excellency Paul Kagame, pointed out the 5 principal objectives of the Gacaca jurisdictions: 1. Find out the truth about what happened during the genocide; 2. Speed up the trials of the presumed guilty of the genocide crimes; 3. Eradicate the culture of impunity; 4.

[59] United Nations Security Council Resolution 955 of 8 November 1994.

[60] Information from the website of the ICTR (www.ictr.org). Last accessed March 2003.

[61] The concerns of victims are aptly explained in the recent report of FIDH, ***Victims in the Balance: Challenges Ahead for the International Criminal Tribunal for Rwanda*** No. 329/2 of November 2002.

[62] On this point, see the report of the International Crisis Group: ***International Criminal Tribunal for Rwanda: Delayed Justice***. ICG Africa Report No. 30 of 7 June 2001, at p. 7. The International Crisis Group notes that a number of countries exhibited reluctance to extradite suspects to face trial in Rwanda.

[63] *Loi organique N. 40/2000 du 26/01/2001 portant creation des "juridictions gacaca" et organisation des poursuites des infractions constitutives du crime de genocide ou de crimes contre l'humanité, commises entre le 1 Octobre 1990 et le 31 Decembre 1994*.

Reconcile Rwandese people; and 5. Prove that the Rwandese are capable of finding themselves solutions to their problems.[64]

The *gacaca* jurisdictions operate on 4 levels: cellule (the smallest administrative district); sector (a grouping of a number of cellules); district and provincial. Each of these levels contains 3 organs:

1. A general assembly: at the level of the cellule, it is comprised of all inhabitants of the cellule of at least 18 years of age. They will contribute to researching the proof relating to those accused. The general assembly of the higher levels are composed of delegates from the lower levels, with a minimum composition of 50 persons.
2. The panel (*siège*): the panel is composed of 19 persons elected by the general assembly.
3. Coordinating committee: Each panel will elects from its members 5 persons to coordinate the activities: a president, 2 vice presidents, and 2 secretaries.

The hearings of the *gacaca* jurisdictions are public and will take place at least once per week. Members of the public will be given the right to speak. The deliberations are secret. Each decision must be written and be based on a dossier. Designated legal advisors may be called upon to assist. A legal manual to assist in explaining the law and the procedure will be provided.

The *gacaca* jurisdictions are competent to judge those accused of crimes that fall within categories 2-4 of the Organic law on the organisation of genocide proceedings. The cellule level *gacaca* jurisdictions are competent to try persons falling within category 4; the sector level are competent to try persons falling within Category 3; the district level are competent to try persons falling within Category 2 as well as appeals from the sector level; and the provincial level is competent for appeals from the district level. Those that fall within the 1st category will be judged by the first instance tribunals in accordance with the law.

Oversight of the *gacaca* jurisdiction is assured by a Department of *Gacaca* jurisdictions created at the level of the Supreme Court. The applicable punishment will depend on the Category of crime, whether or not there has been a confession spontaneous or otherwise. The organic law further provides that persons who had confessed and were sentenced to terms of imprisonment may have their sentences commuted by half, replaced by work in the community.

While many if not most in Rwanda support the *gacaca* jurisdictions, there is some scepticism, owing to the fact that there will be no representation by counsel and the

[64] "*... La voie de la justice constitue dès lors un passage obligé vers cette société où règne l'harmonie sociale. Cependant la justice classique, inspirée des systèmes modernes, n'aurait pu régler ce problème épineux dans des délais acceptable. Les douze chambres spécialisés ont pu statuer sur un peu plus de 6.000 de décembre 1996 à 2001. Il aurait alors fallut plusieurs années pour juger les plus ou moins 115.000 détenus jusqu'à ce jour sans compter ceux qui sont susceptibles d'avoir participé au génocide qui sont encore en liberté.Il s'imposait donc de recourir à une justice unique en son genre, inspirée du système traditionnel rwandais de règlements de différends qui rechercherait, non seulement la répression du coupable, mais aussi et surtout l'entente, la cohésion et l'harmonie sociale. Ce système appelle la participation de tout un chacun à l'œuvre de la justice, ce qui cadre bien avec la manière dont les crimes ont été commis au grand jour.*" This statement figures as part of the introduction on the Government of Rwanda's website relating to the *gacaca* jurisdictions. Available at: http://www.inkiko-gacaca.gov.rw/fr/introduction.html (last visited March 2003).

judges receive minimal training.[65] The committment expected of judges is high, and would necessarily conflict with other work and family responsibilities.[66] In a climate of fear and distrust, it is and will be difficult for communities to perceive the judges as neutral and honest, and to avoid conflicts of interest, when almost all in Rwanda were affected in one way or another by the genocide. There is little in the process to avert coerced confessions.[67] Some survivors view the process as a bitter compromise, and a form of impunity. Many fear for their security.[68] There is no mechanism of protection for witnesses and detainees who testify publicly, and the survivors of genocide, who will often be small minorities in communities around the country, may find it difficult to bear witness and make accusations against those in the majority.

The fact that the gacaca jurisdictions will not tackle the abuses perpetrated by the RPA at the end of the genocide is of concern to some. African Rights, in its recent report ***Gacaca Justice: A Shared Responsibility*** notes as follows: "Numerous *Inyangamugayo* [*gacaca* judges] expressed surprise that they would not be hearing such cases and questioned why the genocide should be treated separately. Again this reflects the lack of public awareness and acceptance of the distinctive aspects of the genocide in terms of its ethnic targeting, planning and implementation, something that perhaps only further education by human rights and civil society groups can help to remedy. But it also suggests that people are either deeply unsatisfied with past judicial responses to these crimes or that they have simply not reported them due to scepticism about the willingness of judicial authorities to bring prosecutions. It appears that some Rwandese were hopeful that gacaca would provide a forum to deal with other human rights violations which have gone unpunished. Raised repeatedly during the training sessions, this was a question which troubled some trainers who were left to compose an answer on the spot."[69]

African Rights has also raised the difficulties that gacaca jurisdictions will face when addressing the problem of persons who are accused to have perpetrated crimes outside of their home areas – the community called upon to judge these persons will be the home community, whereas the witnesses and evidence will be elsewhere.[70]

IV. CLAIMING REPARATION FOR TORTURE

1. Available Remedies

1.1. Civil Law

Civil courts are generally out of reach of most due to the high court fees and relatively complicated procedures. Criminal court judges may refer claims for

[65] The training processes are discussed in detail in the recent report of African Rights. ***Gacaca Justice: A Shared Responsibility***. January 2003.

[66] Ibid.

[67] Gacaca jurisdictions do not have the ability to review confessions received by officers of the prosecution department. See, ibid., p. 36.

[68] Id., 46-48.

[69] Id., p. 24.

[70] Id., pp. 35 –36.

damages to civil jurisdictions where detailed enquiries into the evidence are required. In hearings pursuant to the organic law on the organisation of genocide proceedings, judges referred claims to civil jurisdictions in approximately 18% of the cases.[71] The reason for these referrals is because the civil party did not manage to produce the necessary elements of proof or because the State, named the civil party as civilly responsible, did not defend the action. In cases of referrals, claimants rarely pursued their claims.[72]

Article 163 of the draft Constitution establishes a "committee of mediators" at the Sectoral level. This Committee would "provide a framework for mediation prior to the submission of cases to first instance jurisdictions in civil and criminal cases of certain offences as defined by the law."[73] It is further provided that a statement as to whether reconciliation has been achieved is to be prepared by the mediators, and is a condition to the receivability of the action before the competent court.

1.2. Criminal Law

Article 71 of the Code of Criminal Procedure provides that the injured party may bring an action for reparation before the court seized of the criminal matter by becoming a civil party, either by making a formal declaration at the time of the initial complaint, or at any other time, from the moment that the jurisdiction is seized and up until the close of debates. This is formally incorporated into the Organic law on the organisation of genocide proceedings, where it is specified that: "victims acting either individually or through legally constituted associations for the defence of victims, represented by their legal representative or by a special representative designated according to their statutes, may request the commencement of a public prosecution by submitting a written petition setting out the grounds for the prosecution to the public prosecutor of the competent jurisdiction. The status of civil party shall be given to the petitioner."[74]

In certain situations, civil parties will be entitled to lodge private prosecutions. For instance, Article 29(4) of the Organic law on the organisation of genocide proceedings specifies that "where the public prosecution department has not instituted proceedings before the competent jurisdiction within 6 months of the submission of a petition, the civil party may commence a private prosecution, in which case the private party bears the burden of proof."

Civil claimants registered to participate in proceedings in approximately 2/3 of all criminal cases before the specialised genocide chambers.[75] In accordance with the Organic law on the organisation of genocide proceedings, the officer of the prosecution department is additionally, entitled to apply for reparation on behalf of named individuals or non-identified victims. This follows specifically from the provisions in Article 30 of the Organic law, which provides that those convicted of Category 1 offences "shall be held jointly and severally liable for all damages caused in the country by their acts of criminal participation, regardless of where the offences

[71] ASF, supra.

[72] Ibid.

[73] Article 163(1), draft Constitution.

[74] Article 29(2) of the Organic law.

[75] ASF, supra.

were committed. ... Without prejudice to the rights of civil parties present or represented, and at the request of the public prosecution dept, the court shall award damamges to victims not yet identified." Article 32 provides that damages awarded to victims not yet identified shall be deposited into a victims compensation fund.[76] The office of the prosecutor also represents as of right or upon request, the civil interests of minors or other legally incompetent persons who do not have legal representation.[77]

About half of those who applied for reparation in accordance with the organic law on the organisation of genocide proceedings received an award of damages. Compensation was awarded for moral grief and material prejudice. There is little uniformity in how the specialised chambers arrived at the quantum of damages. In a number of cases, the State was held jointly liable, given that the convicted perpetrators were state agents (police, soldier, mayor...) and/or because the state failed in its duty to end the killings.[78] Civil parties have faced numerous obstacles in lodging these claims: for instance, they lacked information on their rights, and on the procecedures and key dates for trial appearances; there were also difficulties noted in obtaining death certificates and other key evidence; and in getting to the court locations which may be far from their homes.[79] Additionally, some victims feared reprisals and lacked overall confidence in the justice system, given their knowledge that virtually no victims had actually received compensation even when it was awarded, since perpetrators are insolvent or otherwise unable to pay. To REDRESS' knowledge, there has been no ability to enforce judgment against the state when it has been held civilly responsible.

In usual circumstances, the civil party may incur costs as a result of lodging a civil claim. Particularly, any decision taken against the accused or the person civilly responsible will result in an award of costs (court costs and the costs incurred by the civil party).[80] If the accused is not found guilty, the civil party will have to pay a portion of the fees. However, if the civil party lodges a private prosecution, they are required to cover all costs. [81] If the civil party is deemed indigent by the President of the relevant jurisdiction, costs will not be awarded.[82] The Organic law on the organisation of genocide proceedings, however, exempts civil parties from the payment of all legal fees.[83]

V. GOVERNMENT REPARATION MEASURES

The Government of Rwanda has publicly acknowledged its commitment to ensuring the well-being and support of survivors of the 1994 genocide, and to taking positive

[76] The issue of government compensation funds is dealt with in more detail in subsequent pages.

[77] Article 27, organic law on the organisation of genocide proceedings.

[78] ASF, supra.

[79] ASF, supra. Apparently there has been a greater use of itinerant jurisdictions to ameliorate this situation.

[80] Art 84, Code of Criminal Procedure.

[81] Art. 85, Ibid.

[82] Art. 127, Ibid.

[83] Article 29(3) of the Organic law.

steps to ensure that this event is not repeated.[84] In this regard, the draft Constitution includes a number of innovative statements and provisions. For instance, Article 15(1) of the draft provides that "the state, shall, within the limits of its capacity, take appropriate measures to ensure the welfare of the survivors of genocide of 1994, disabled, the destitute and the elderly, as well as other vulnerable groups." In respect of protection against genocide, Article 14(b) provides that "revisionism, negation and trivialisation of genocidee are punishable by the law," and the Constitutional mandates of the National Human Rights Commission (Article 178), National Unity and Reconciliation Commission (Article 179), the Commission for the Fight against Genocide (180) and the Office of the Ombudsman (181) should ensure their strength and support in the longer term.

In 1998, the Government adopted Law No. 02/98 establishiong a national assistance fund for needy victims of genocide and massacres committed in Rwanda between 1 October 1990 and 31 December 1994. The law importantly recognises the duty of the government to provide assistance to survivors. Article 12 of the law explains the sources of assets, including an amount equal to 5% of the state's ordinary budget, money from abandoned properties, reparation from abroad, 2% of reparation funds arising out of related genocide claims, as well as sums from salaried earners, companies, organsations and others.

The fund's beneficiaries are survivors of genocide and massacres who are in special need, especially orphans, widows and handicapped persons. The assistance focuses on education, health and housing. The fund is extra-judicial, having no bearing on claims before civil or criminal courts. Importantly, this enables it to reach 'all' victims, without requiring attachment to a particular perpetrator that has been convicted by the courts. While the fund did provide critical assistance to a number of survivors, it is understood that difficulties in the management and administration of the fund have inhibited its activities.

The law on reparation

The Government has drafted a second law on reparation for survivors of genocide. The premise of the law was the understanding that reparation in the form of material and moral damages could not practically be enforced exclusively through perpetrators.[85] Initially the law was to work in conjunction with the Organic law on the organisation of genocide proceedings, but with the introduction of the *Gacaca* jurisdictions, this law is set to play an important role in these proceedings as well. The former UN Special Rapporteur on Rwanda, commenting on the draft law, noted that "Legislation on the Reparation Fund is currently being drafted and the Minister of Justice informed the Special Representative of his intention to hold a conference to consult with all those involved, including prisoners. The issue of non-payment of reparations under the present legal system and how this may detract from the

[84] Guarantees of non-repetition are an important element of reparation, figuring among the main principles of reparation set out in United Nations draft basic principles of the right to a remedy and reparation for victims of violations of international human rights and humanitarian law. See, ***The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms***, Final report of the Special Rapporteur, Professor M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33, UN Doc. E/CN.4/2000/62, 18 January 2000

[85] This has been borne out of the practice, where no beneficiaries of court ordered reparation have been able to enforce their judgments.

legitimacy of *gacaca* if not addressed is of major concern."[86] The law, though still in draft form, is referred to specifically in the legislation relating to both the specialised chambers and the *gacaca* jurisdictions.[87] In particular, Article 90 of the Organic law creating the *gacaca* jurisdictions provides that the jurisdictions will send copies of the decisions and judgments rendered to a reparations fund, indicating the identity of the persons who suffered material prejudice and an inventory of the damage caused, the list of victims and the relevant details and level of award in accordance with the scale of damages set out in the law.

Article 2 of the draft law specifies that the purpose of the fund is the 'regularisation' of reparation, and more specifically the partition of the funds collected from genocide and *gacaca* judgments. The sources include payments received from the relevant jurisdictions, yearly allocations from the state, national and international donations and others. The beneficiaries are victims of genocide and/or crimes against humanity or family members where victims have died.

The law will replace the fund for the most needy victims referred to above.[88]

VI. LEGAL REMEDIES IN CASES OF TORTURE COMMITTED IN THIRD COUNTRIES

There have been no cases in which universal jurisdiction was exercised or extradition sought or granted in respect of torture. Similarly, there are no known cases when Rwandan courts have been used to adjudicate claims for reparation for acts of torture committed in a third country.

However, a number of foreign courts have instituted legal proceedings against Rwandan nationals in relation to crimes perpetrated in Rwanda. For instance, in July 1998 a Rwandan was charged with crimes against humanity, war crimes and genocide in Switzerland. He was accused of taking part in the killings in 1994 whilst mayor of a community in the Gitarama province of Rwanda, including inciting his fellow citizens to kill. Granted political asylum in Switzerland, he was subsequently arrested in August 1996 after allegations were raised against him. An investigation ensued by Swiss military magistrates when the International Criminal Tribunal for Rwanda did not seek his referral. His trial commenced in the Military Tribunal of Lausanne on 12 April 1999. Two rogatory missions had been to Rwanda to collect testimony and other evidence, and the court itself visited Rwanda. Exceptional measures were taken to ensure the protection of witnesses, who came from Rwanda and elsewhere in Europe to give evidence at the trial.

[86] Observations and Recommendations Concerning Recent Human Rights Developments in Rwanda of the Special Representative of the Commission on Human Rights, Michel Moussalli, Following his Visits to Rwanda in October 2000 And February/March 2001, E/CN.4/2001/45/Add.1, 21 March 2001, at para. 23.

[87] Projet de Loi No x of x portant creation, organisation et fonctionnement du fonds d'indemnisation des victims des infractions constitutives du crime de genocide ou de crimes contre l'humanite commisses entre le 1 oct 1990 et le 31 dec 1994.

[88] There were apparently discussions as to whether the draft law should replace or complement the fund for the most needy victims. The draft law may, in practice, not reach the same scope of victims, given its direct link to court and *gacaca* proceedings, and consequently to the conviction of perpetrators. However, the sources for both funds would ultimately be the same.

On the eve of the trial, several applications were made by victims to join as *parties civiles*, as permitted by Swiss law. The Court permitted only one person, whose spouse died during the genocide, to be constituted as *partie civile*. The others, the Court decided, had come forward too late and too ill prepared, and it was not right to delay the trial in order to accommodate them. However, later in the trial the one individual permitted to become *partie civile* withdrew, preferring to maintain their status as a witness in order to be eligible for witness protection measures. *Parties civiles* were not entitled to such measures. On 30 April 1999, N was found guilty of war crimes in breach of the Geneva Conventions, and sentenced to life imprisonment.

In Belgium, four Rwandan nationals were arrested in Brussels in relation to massacres in Rwanda of persons protected by the Geneva Conventions of 1949 and the Additional Protocols of 1977. They were convicted by the Belgian *Cour d'Assises* and sentenced to prison terms of between 12 and 20 years. An appeal to the Court of Cassation was rejected in January 2002. An appeal to the European Court of Human Rights is pending.