IBUKA

Submission to
Parliament of Rwanda
on
Draft Organic Law Terminating Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes against Humanity, Committed Between October 1, 1990 and December 31, 1994

Submitted 26 March 2012

Introduction

IBUKA welcomes this opportunity to comment on the Draft Organic Law Terminating Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes against Humanity, Committed Between October 1, 1990 and December 31, 1994 ("Draft Law"). Survivor organisations were not consulted by the Ministry of Justice or any other Ministry in the drafting of this law, yet this law is of great concern to survivors, who have lived with and participated in Gacaca for the past ten years.

We therefore urge the Parliament and relevant Parliamentary Commissions to take our concerns and recommendations into account. IBUKA hopes that this Submission will assist the Parliament of Rwanda in its deliberations on the Draft Law and that the Draft Law can further be strengthened to ensure that the rights, needs and perspectives of survivors are adequately reflected in the adopted law terminating Gacaca.

We present our concerns in regards and alternatives to Articles in the order of the Draft Law. The concerns and alternatives were discussed with a wide range of survivor organisations during two workshops organised by IBUKA, SURF and REDRESS in Kigali on 20 and 21 March 2012. Subsequent discussions took place among a group of experts on 23 March 2012. Concerns and experiences of individual survivors with Gacaca were also taken into account for this Submission.

We would welcome the opportunity to discuss this Submission further with members of the Parliament and stand ready to assist in further deliberations.

Submission of IBUKA to the Parliament of Rwanda on the

DRAFT ORGANIC LAW TERMINATING GACACA COURTS CHARGED WITH PROSECUTING AND TRYING THE PERPETRATORS OF THE CRIME OF GENOCIDE AND OTHER CRIMES AGAINST HUMANITY, COMMITTED BETWEEN OCTOBER 1, 1990 AND DECEMBER 31, 1994

CHAPTER ONE: GENERAL PROVISIONS

Articles 1 and 2 of the Draft Law set out the purpose and effect of the Draft Law, the termination of Gacaca. We understand that Gacaca was always meant to be a temporary mechanism designed to help deliver justice for survivors and the truth about crimes committed during the genocide. We acknowledge the important contribution of Gacaca in delivering justice and truth through the prosecution of almost 2 million cases.[1] However, a law terminating Gacaca must also address the issue that Gacaca was unable to deliver, and that survivors continue to grapple with, in particular the

[1] IBUKA interview with the Executive Secretary of the National Gacaca Secretariat, Kigali, 24 March 2012.

lack of adequate reparation,[2] including access to rehabilitative services to help survivors deal with severe re-traumatisation as a result of their participation in Gacaca, as well as the enforcement of compensation awards issued by Gacaca jurisdictions for (property related) crimes committed during the genocide.

It is important that a mechanism is put in place that enables survivors to access counselling services at no cost. Such services are currently only provided to a limited extent through the funding that FARG makes available to AVEGA to retain a team of 36 counsellors to provide psychosocial support to the most vulnerable survivors. Yet, with just one counsellor for each district, this support is not accessible to the vast majority of survivors. As such, survivor's organssations consider it critical at the very least to sustain this funding to enable this network of counsellors to maintain their support, or preferably to make further support available, either through FARG, or other mechanisms (such as CNLG) to enable greater access to trauma counselling. This is particularly vital at the time of the anniversary of the commemoration of the Genocide against the Tutsi.

The National Gacaca Secretariat does not have any statistics on the enforcement rate of Gacaca compensation awards,[3] yet research carried out by IBUKA and other organisations strongly suggests that the vast majority of compensation awards by Gacaca remain yet to be enforced.[4] It is therefore pertinent that a law terminating Gacaca includes a provision on how the outstanding compensation awarded to survivors by Gacaca will be enforced, as otherwise survivors may believe that the termination of Gacaca also puts an end to their right to compensation and to the awards by Gacaca that have yet to be enforced.

Furthermore, we acknowledge that in Chapter II on the Prosecution, hearing and execution of judgments on the crime of genocide perpetrators against Tutsi and other crimes against humanity, current draft Article 3, paragraph 2, provides that:

"However, suing for damages resulting from the crime of genocide perpetrated against Tutsi and other crimes against humanity committed between October 1st, 1990 and December 31st, 1994 shall be determined by a law."

We appreciate the acknowledgment that survivors have yet to be compensated for crimes committed against them. However, we respectfully submit that this issue is too significant to be incorporated in a sub-paragraph. We further underline that survivors have been promised continuously over the past 16 years that a law on compensation will be adopted. While Gacaca was only competent to hear compensation claims related to property offences by virtue of Article 8 of the Gacaca Executive Secretary's Order no.14/2007 relating to compensation of damaged property, Gacaca also heard cases as listed in Article 5, including cases involving serious international crimes such as rape or sexual torture, homicide, torture, yet did not have the competence to decide on reparation measures in regards to such crimes.

We therefore suggest including a separate Article in Chapter I on the General Provisions, following Article 2. Such an Article could read:

[2] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN General Assembly Resolution 60/147 of 16 December 2005, providing for different forms of reparation in Articles 15-24.

[3] IBUKA interview with the Executive Secretary of the National Gacaca Secretariat, 24 March 2012, Kigali.

[4] Survivors Fund (SURF) carried out interviews with 57 survivors across Rwanda. While all were awarded compensation, none of these compensation awards have been fully enforced by March 2012.

CHAPTER ONE: GENERAL PROVISIONS

Article 3: Right to Reparation

The termination of Gacaca Courts as provided for in Articles 1 and 2 of this law does not affect the right of survivors to reparation, including rehabilitation and compensation, for all crimes committed during the genocide perpetrated against the Tutsi and other crimes against humanity committed between October 1st 1990 and December 31st, 1994.

A separate law on the right to reparation will be adopted to implement the rights of survivors to reparation for all crimes committed during the genocide perpetrated against the Tutsi and other crimes against humanity committed between October 1st 1990 and December 31st, 1994. Until the adoption of the law on reparation, a transitional mechanism will be established within CNLG to address outstanding claims for compensation awarded to survivors by Gacaca Courts. CNLG will be mandated to ensure that a sample survey will be carried out by AVEGA in the Southern Province of Rwanda, examining the number of compensation awards that have not yet been enforced.

CHAPTER TWO: PROSECUTION, HEARING AND EXECUTION OF JUDGMENTS ON THE CRIME OF GENOCIDE PERPETRATED AGAINST TUTSI AND OTHER CRIMES AGAINST HUMANITY

Article 6: Offences constituting the crime of genocide perpetrated against Tutsi and other crimes against humanity which are in the jurisdiction of Mediation Committee.

The current draft of Article 6 reads:

"Offences related to looting and damaging of property committed between October 1st, 1990 and December 31, 1994, shall be tried by the Mediation Committees applying laws governing these committees regardless that they are committed by a civilian or a soldier and shall be punished by compensation of the looted, destroyed or damaged property."

We appreciate the provision for compensation of looted, destroyed or damaged property. Meditation Committees have the advantage over courts that the claims procedure involved is cheaper and faster, and the Committees are closer to the population as they operate on the cell and sector level.

However, there are a number of concerns in regards to the applicability of the laws governing the Mediation Committees as well as the expertise of the Mediation Committee to hear cases involving offences such as looting, destruction and damaging of property committed during the genocide.

(1) **Competence of the Mediation Committee**: Articles 9 and 10 of the Law Governing the Mediation Committees limit the competence of the Committees to hear civil/criminal cases involving property claims to claims not exceeding RWF 3 million in value. In the case of property looted or destroyed during the genocide, the damage caused often exceeds RWF 3 million. To ensure that Mediation Committees are competent to hear property cases related to the genocide, we therefore recommend to amend Article 6 of the Draft Law and expressly provide that Articles 9 and 10 of the Law Governing the Mediation Committees are not applicable in relation to cases involving looting and damaging of property committed between October 1st, 1990 and December 31st, 1994.

(2) **<u>Access to Mediation Committees:</u>** Article 10 (3) of the Law Governing Mediation Committees furthermore limits the jurisdiction of the Mediation Committees to cases where the claimant and defendant live within the jurisdiction of the Mediation Committee. This may prevent survivors who no longer live in the same cell/sector as before the 31st December 1994 to effectively access the Mediation Committee.

We therefore recommend amending Article 6 of the Draft Law to ensure the competence of Mediation Committees and adequate access of survivors to the Mediation Committee. Such an amendment could read (changes highlighted in bold):

<u>Article 6:</u> Offences constituting the crime of genocide perpetrated against Tutsi and other crimes against humanity which are in the jurisdiction of Mediation Committee.

(1) "Offences related to looting and
(2) damaging of property committed between October 1st, 1990 and December 31, 1994, shall be tried by the Mediation Committees applying laws governing these committees, ***subject to Article 6 (2),*** *regardless that they are committed by a civilian or a soldier and shall be punished by compensation of the looted, destroyed or damaged property."*

(2) Articles 9 and 10 of the laws governing the Mediation Committees shall not be applicable in regards to offences related to looting and damaging of property committed between October 1st, 1990 and December 31st, 1994. In relation to these offences, the Mediation Committees will therefore be competent to try cases exceeding the value of the property claim of RWF 3 million, and claimants in such cases will have access to Mediation Committees within the cell and, in case of appeal, sector, of their current residence.

(3) **<u>Expertise of the members of the Mediation Committee</u>**: while we appreciate that Mediation Committees have several advantages over ordinary courts in adjudicating property claims in regards to relevant offences committed between October 1st, 1990 and December 31st, 1994, we are concerned that decisions by the Mediation Committees will not carry the same legal recognition as decisions rendered by courts. This concern is based on our experience in regards to decisions by Gacaca Courts when survivors sought to enforce a compensation award, which often were not sufficiently clear / detailed so as to be easily enforced. Our concern is exacerbated by the fact that to date, Mediation Committees were only competent to hear cases up to RWF 3 million, and therefore less complex cases. Furthermore, at present, members of the Mediation Committee are persons of integrity elected for five years by the council of the relevant cell / sector, yet may not have the relevant legal expertise to decide on such complex cases. To ensure that decisions of the Mediation Committees are legally sound and detailed, thereby faclitating their enforcement, we therefore recommend to include a seperate provision within current draft Article 6 providing for the training of members of the Mediation Committees on the adjudication of large compensation claims by experts from the Ministry of Justice and the establishment of a code of conduct for members of the Mediation Committee. To ensure a transparent, professional and impartial operation of Mediation Committees, Committees will be obliged to produce Annual Activity Reports, with data on the outputs and outcomes of their work. We recommend that a monitoring mechanism which formally includes a representative of a survivor's organisation be established at cell and sector level to ensure professional and impartial working methods of the Mediation Committees.

We therefore recommend amending Article 6 of the Draft Law to provide for the training of members of the Mediation Committees and the monitoring of its activities. Such an amendment could read:

Article 6 (3):

(4) ***The expertise of the Mediation Committees to hear cases involving offences related to looting and destruction of property between October 1st, 1990 and December 31st, 1994, will be established through the training of its members by experts of the Ministry of Justice. Such training is to begin immediately upon the adoption of this law and be provided to all Mediation Committees. Mediation Committees will produce an Annual Activity Report on their progress to be published one year after the adoption of this law on the website of CNLG.***

Article 11: Modalities of restitution of property

The current draft of Article 11 reads:

Compensation shall be paid by the offender himself/herself or through its (sic) property.

However, if it is evident that the offender of looting and damaging is insolvent, he/she shall do compensation by the way of community service as alternative penalty to imprisonment.

Both paragraphs of Article 11 raise serious concerns.

(1) The first paragraph only provides for compensation by the offender himself/herself or through his/her property, yet it is unclear whether this provision includes the possibility that the offender may be unwilling to pay (for instance, the offender may have escaped abroad) or unable to pay (in cases where the offender has died). It would therefore be important that paragraph 1 makes clear that compensation shall be paid by the successors to the offender, in cases where the offender is not present or otherwise unwilling or unable to pay.

Article 11 (1) should therefore be amended and could read (amendments highlighted in bold):

Compensation shall be paid by the offender himself/ herself or through his/ her property. **Subject to subsequent paragraph (2), the law on succession will regulate payment of compensation in instances where the offender is unwilling or unable to pay.**

(2) We are also concerned by the second paragraph of Article 11 providing modalities of compensation of property to be problematic for a number of reasons. The evidence of the insolvency of the offender is dependent on the agency that will be making that assessment. It is critical that the agency (or agents thereof) charged of doing so is not at risk of bribery or corruption. Survivor's organisations identified that this issue had arisen on a number of occasions.

As such, it is recommended that the Mediation Committee makes that assessment.

In those cases where the offender is genuinely insolvent, and has no property or other assets that can be sold to compensate, the proposal of compensation in the form of community service (TIG) as an alternative penalty to imprisonment is unacceptable. Though it is recognised that imprisonment

is not in the interests of society, there is considered to be better alternatives that are more favourable to the claimants.

It is recommended that the value equivalent to the community service shall be paid to the survivor, as ultimately the community service is not directly of benefit to the survivor, but is to all intent and purposes, public works. This can be made possible through the monetary equivalent of the days served for TIG by the offender being disbursed directly to the claimant from the VUP public works programme. As such this then does not need to be funded through a new mechanism as the budget is already secured, available and being disbursed through the National Social Protection Strategy.

This process is favourable to the offender, who is not then serving a custodial sentence, and is free to live back with and care for his family, and it is favourable to the survivor, who then receives monetary compensation to which otherwise they would be denied. It is favourable to the Government as the funds for the compensation do not have to be raised or requisitioned from any budget, as they are already available through VUP, and it is favourable to society as the offender is undertaking public works.

We therefore recommend amending Article 11 (2). Such an amendment could read (highlighted in bold):

However, if it is evident that the offender of looting and damaging is insolvent further to an assessment by ***the Mediation Committee, compensation up to the value of the community service the offender must undertake as an alternative penalty to imprisonment, will be awarded to the claimant through VUP.***

Article 12: Execution of decisions related to property

The current draft Article 12 reads:

The decisions rendered by Gacaca courts on the damaged or looted property must, prior to their execution, be stamped with a writ of execution by the Primary Court of the place where the decision has been rendered upon approval by the Executive Secretary of the Cell where the case has been adjudicated through a written document submitted to the head of that Court.

The survivor's organisations are concerned that the requirement to secure a stamp by writ of execution will pose a number of challenges to survivors in particular those living in the most rural and isolated communities.

For many, even the cost of transport to the Primary Court in the District is too great to afford. For others, particularly the old and disabled, the physical means of accessing the Primary Court is an obstacle that they cannot overcome. Others will not know where the Primary Court is located.

We recommend then that the Article should be amended to enable claimants to secure the stamp of a Secondary Court in the Sector where the decision has been rendered. This will ensure that the cost of transport to the Court is affordable, and even that the claimant has the knowledge of where the Court is located in order to access it.

We therefore recommend amending Article 12 to reflect these concerns. Such an amendment would read (amendments highlighted in bold):

Article 12:

*The decisions rendered by Gacaca courts on the damaged or looted property must, prior to their execution, be stamped with a writ of execution by the **Secondary** Court of the place where the decision has been rendered upon approval by the Executive Secretary of the Cell where the case has been adjudicated through a written document submitted to the head of that Court.*

Article 14: Auctioning procedure

The current draft Article 14 reads:

Upon the maturity of the time for auction, the property subject to the auction shall be sold, and the money shall be distributed among beneficiaries with copies of the judgment bearing the writ of execution.

Before giving to the beneficiary the money raised from the auction, the court bailiff shall give notice to call persons holding a copy of judgment condemning the person to whom the property is subject to the auction, to announce their debts within a period not exceeding fifteen (15) days.

If the period referred to under paragraph two (2) of this Article expires, the money is given to the persons that have been identified.

Survivor's organisations welcome the provision on the sale of property and the distribution of the proceeds. However on the basis experiences by survivors, we are concerned that the specified period of fifteen (15) days for the announcement of the debts of the person to whom the property is subject to the auction is too short. A period of thirty (30) days is proposed to ensure that there is adequate time for eligible beneficiaries to be identified, and to register their claim.

We therefore recommend amending Article 14 to reflect these concerns. Such an amendment would read (amendments highlighted in bold):

Upon the maturity of the time for auction, the property subject to the auction shall be sold, and the money shall be distributed among beneficiaries with copies of the judgment bearing the writ of execution.

*Before giving to the beneficiary the money raised from the auction, the court bailiff shall give notice to call persons holding a copy of judgment condemning the person to whom the property is subject to the auction, to announce their debts within a period not exceeding **thirty (30)** days.*

If the period referred to under paragraph two (2) of this Article expires, the money is given to the persons that have been identified.

Article 15 Opposition against the auction

The current draft Article 15 (2) reads:

In case of request for opposition to the execution of the judgment the auction shall be suspended until a decision is made on the opposition.

Article 15 (2) is silent on the time period in which the President of the Primary Court has to decide on the request for opposition. There is a risk that this failure may cause significant delays in the enforcement of compensation awards. We therefore suggest and amendment to paragraph 2 by providing that the President of the Primary Court should decide within fifteen (15) days on the opposition.

The amended Article 15 (2) would read:

In case of request for opposition to the execution of the judgment the auction shall be suspended until a decision is made on the opposition. ***The President of the Primary Court shall decide upon the request for opposition within fifteen (15) days from the date of the filing of the opposition.***

We would welcome the opportunity to present our views further to Parliament on any of the aforementioned articles, and we hope that the views of the survivor's organisations represented by IBUKA will be considered in the process of finalising the Draft Organic Law Terminating Gacaca Courts.

<u>For further information, please contact IBUKA representatives:</u>

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