

IBUKA

SUBMISSION ON THE DRAFT PRESIDENTIAL ORDER DETERMINING THE MODALITIES OF IMPLEMENTATION OF COMMUNITY SERVICE AS AN ALTERNATIVE PENALTY TO IMPRISONMENT

Submitted on September 2012

Executive Summary

IBUKA expresses significant concerns regarding the draft Presidential Order determining the modalities of implementation of Community Service (TIG) as an alternative penalty to imprisonment. It puts on record dissatisfaction on not being consulted on the draft, as a number of the articles negatively impact on the survivors of the Tutsi genocide, especially their right to reparation (in the form of both restitution and compensation) that otherwise may have been made possible through the implementation of TIG. Also, the draft potentially infringes on the right of survivors to claim restitution or compensation for looted or damaged property in future from convicted perpetrators in cases where they become solvent. IBUKA calls for a meeting with MINIJUST so that the views of the survivors will be considered in the process of strengthening the implementation of the new Presidential Order if it is enacted in its current form.

Introduction

IBUKA takes this opportunity to comment on the draft Presidential Order determining the modalities of implementation of Community Service (TIG) as an alternative penalty to imprisonment (“the Presidential Order”).

We understand that the draft of the Presidential Order is already at an advanced stage, and will soon be promulgated by the President and published in the Official Gazette. As such, we recognise that it may be too late to intervene to change the articles that we highlight below which we believe can be strengthened in order to better address the concerns and views of survivors of the genocide, which are disproportionately affected by TIG – economically, socially and psychologically – resulting from the unprecedented number of convicted genocide perpetrators that have been given TIG as an alternative penalty to imprisonment.

However, we make this submission to put on record these concerns, as well as our dissatisfaction that from the outset, civil society organizations, and survivors organizations in particular, were not consulted during the elaboration of the Presidential Order, and as such did not have the opportunity to determine or influence the articles included in this draft. This proves now problematic, as a number of the articles negatively impact on the survivors, especially their right to reparation (in the form of both restitution and compensation) that otherwise may have been made possible through the implementation of TIG.

We seek to raise awareness of these concerns in this submission for consideration by the Ministry of Justice (MINIJUST) with a view to address these points in the execution of the Presidential Order once enacted. As well, to put on record our appeal for IBUKA and our member organisations to be consulted on any current or future Presidential Orders that directly impact the genocide survivors that we represent.

This submission is one of a number of submissions, which IBUKA has tabled in recent months, including:

- A submission in April 2012 on Law 69/2008 relating to the establishment of the Fund for the support and assistance to the survivors of the Tutsi genocide and other crimes against humanity committed between 1st October 1990 and 31st December 1994, and determining its organisation, powers and functioning
- A submission in March 2012 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

Concerns with TIG were discussed with a wide range of survivor organisations during two workshops organised by IBUKA, in partnership with SURF and REDRESS, in Kigali on 20 and 21 March 2012. As we were not aware at the time that a new Presidential Order on TIG was in development, we did not discuss TIG in detail. However it was discussed in general in light of concerns conveyed on issues around the termination of gacaca and FARG as addressed in the two aforementioned submissions.

Due to the haste that this submission has been drafted, as we only received a draft of the Presidential Order on Friday 31st August, we have not been able to consult as widely as we ordinarily would do with all IBUKA member organisations. However, the submission does incorporate the concerns and experiences of individual survivors with TIG which have been conveyed to IBUKA and our member organisations over a number of years.

As such, we would welcome the opportunity to discuss this submission further with MINIJUST to further convey the views of our member organisations, and stand ready to assist in further deliberations.

Submission of IBUKA to MINIJUST on the draft Presidential Order determining the modalities of implementation of Community Service (TIG) as an alternative penalty to imprisonment

Article 2: Persons eligible for TIG

The current Article 2 reads:

TIG shall be executed by a person:

- 1° sentenced to it by Gacaca Courts which were charged with prosecuting and trying the perpetrators of the crime of genocide perpetrated against the Tutsi and other crimes against humanity, committed between October 1, 1990 and December 31, 1994;*

- 2° *who committed an offence of looting or damaging property during the period of genocide committed against the Tutsi and other crimes against humanity, committed between October 1, 1990 and December 31, 1994 when it is evident that he/she is insolvent;*
- 3° *guilty of an offence punishable by an imprisonment not exceeding five (5) years;*
- 4° *convicted to pay a fine, Court fees or to effect any payment into the Public Treasury, restitutions or pay damages for the benefit of the party to civil case when he/she has failed to comply with the judgment imposed against him/her by the Court;*
- 5° *who has not paid in whole the debt arising from an offence.*

This article is a landmark, as it recognizes for the first time that TIG will be a punishment applicable for offences other than genocide-related crimes. This is not an issue to genocide survivors, however there is a significant problem in the general categorization of the person required to execute TIG in point 2. It leaves a number of unresolved questions, which are then open for interpretation.

In the English version of the article above, unlike the Kinyarwanda or French version, the second categorization does not specify that TIG shall be executed by a person who committed an offence of looting or damaging property *belonging to someone else* during the period of the genocide. This is specified in the Kinyarwanda version (w'undi) and the French version (d'autrui), however it is left unspecified in the English version.

The problem therein lies with the lack of specification. The specification is necessary, as this categorization is particular to crimes against private property, not only to public property. As such, where possible, the victim of looted or damaged property should be the beneficiary of that punishment, not the state.

This is the principal tenet of this submission, in more closely aligning TIG with restorative justice, so that the victims of crimes during the period of genocide committed against the Tutsi and other crimes against humanity, committed between October 1, 1990 and December 31, 1994 can receive reparation in the form of restitution, the restoration of a victim to his or her situation before the gross violations took place, as well as compensation, monetary awards for any economically assessable damage as appropriate and proportional to the gravity of the violation and circumstances of each case.

In specifying the right of the individual to restitution of looted or damaged property from TIG, the Presidential Order will recognize:

1. That damaged property should be restored, and looted property should be returned, to the victim, not to the state.
2. The right of individuals to claim and be awarded compensation for looted or destroyed property should not be infringed upon or curtailed by the state, in that the issue of private property is specific to private parties and civil matters. The state should not benefit from TIG executed for such cases, and in so doing jeopardize the victim's chance, and indeed right, to receive reparation in the form of either restitution or compensation now or in the future.

3. That the current insolvency of convicted genocide perpetrators will not change in future. As a result of the Government of Rwanda poverty alleviation efforts, it is likely that such perpetrators will become solvent, and thus will have the ability to honor awards made at gacaca sometime in the future. If that eventuates, victims should retain their right to seek the enforcement of compensation awards made to them at gacaca, equivalent to the monetary sum not paid through services executed through TIG.

Clarification on this point is critical to ensure that victims of crimes during the period of genocide committed against the Tutsi and other crimes against humanity, committed between October 1, 1990 and December 31, 1994 do not forfeit their right to restitution or compensation now or in the future.

Article 4: Correctional centres for persons sentenced to TIG

The current Article 4 reads:

RCS can determine its own works to be done and employ persons sentenced to TIG for its productivity purpose.

Public administration, public institutions, civil organisation and members of private sector who wish to use persons sentenced to TIG shall apply by writing to RCS.

The beneficiary of the authorisation of using persons sentenced to TIG must sign a memorandum of understanding with the Commissioner General of RCS or his/her delegate.

There is a critical issue of inadequate shelter for genocide survivors, many of which continue to live in damaged dwellings which have never been adequately rehabilitated since the genocide¹. This issue has been well documented, and the challenges experienced by FARG in addressing the matter have also been widely publicized.

This Presidential Order presents an opportunity to address this issue, either through an addendum to this article, or through the policy of the article's implementation, in recognizing the right of genocide survivors to be prioritized by TIG for house building and repairs to damaged property. Aware that this has been undertaken to some degree to date through TIG, there is still the critical need to undertake this work at scale. The Rwanda Correctional Service (RCS) should utilize its mandate as determined in this article to systematically address this issue for the benefit of genocide survivors, and ensure as well the supervision of the works to guarantee the quality of building or repair work undertaken.

Due to perceived problems, the victim of the damaged property need not be the direct beneficiary of the work undertaken by the person sentenced to TIG for the crime committed against them. However, collectively, these victims will benefit from the works.

Also, if there is financial remuneration payable to RCS from "public administration, public institutions, civil organisation [sic] and members of private sector" requesting use of persons sentenced to TIG, this should ultimately benefit the victims of the crimes. Such a process could in

¹ The Independent, *Genocide survivors' housing funds lost*, 8th August 2012
<http://www.independent.co.ug/rwanda-ed/rwanda/6236-genocide-survivors-housing-funds-lost>

fact directly benefit individual victims awarded compensation during gacaca, which has not been enforced due to the insolvency of the person sentenced to TIG, for crimes committed against them.

This very issue was raised in the IBUKA submission in March 2012 on the draft of the law on the termination of gacaca, in particular relating to Article 11: Modalities of restitution of property

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.

In the submission, the following proposal was made, which we reiterate again:

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 under MINALOC.

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.

However, we recognize the logistical challenges of establishing such a process. An alternative will be the payment of the equivalent value of remuneration by the party using the services of the persons sentenced to TIG into a compensation fund which will collectively benefit genocide survivors, or which will have the means to disburse individual compensation awards.

The value of the works executed persons sentenced to TIG is considerable, as noted by the former Executive Secretary of TIG, Eng. Evariste Bizimna, last year this amounted to more than FRW 30 billion.² This sum could arguably address the outstanding and unresolved issue of inadequate shelter for genocide survivors, which has resulted from the crimes committed by those persons sentenced and serving TIG.

² The New Times, Rwanda: TIG worth more than Rwf 30 billion, 2nd August 2011
<http://allafrica.com/stories/201108020979.html>

Article 10: Responsibilities of the Organ in charge of TIG at the District level

The current Article 10 reads:

In order to enhance TIG implementation, the Security Council at the District level shall:

- 1^o determine, in its territorial limits, all projects and works which must be carried out through TIG and produce a report to the Governor of the Province or Mayor of Kigali City with a copy to the Commissioner General of RCS;*
- 2^o order those sentenced to TIG in its territorial limits to get in their respective areas where they are supposed to execute TIG works;*
- 3^o make regular follow up in its territorial limits of the implementation of TIG for those executing it while staying home or in TIG camps;*
- 4^o request re-imprisonment of those who refused to execute their punishment of TIG as provided for, who were advised by the authorities of the Sector but became adamant;*
- 5^o take, in its territorial limits and in conformity to the law and regulations in force, all of decisions enhancing TIG implementation;*
- 6^o produce a monthly report on TIG implementation at the District level and send it to the Governor of the Province or Mayor of Kigali City with a copy to the Commissioner General of RCS.*

There are serious concerns as to the capacity of Security Councils at the District Level in enhancing the implementation of TIG. It is ambitious to expect such Councils to “make the regular follow up in its territorial limits of the implementation of TIG” and to “request re-imprisonment of those who refused [sic] to execute their punishment of TIG” as they are made up of volunteers who have many competing duties. It is estimated that over 4,000 persons sentenced to TIG evaded their sentence last year³. An officer with RCS recently said that the fact that the current guards of TIG camps throughout the country are not given firearms makes it difficult, if not impossible, to prevent people sentenced to TIG from escaping⁴. This responsibility can be enhanced by expressly assigning to the National Police or Prison Guards the task of follow-up in order to secure each and every TIG camp, whilst the Security Councils at the District Level will assume the decision-making responsibilities as outlined in the article.

Article 15: Daily work for a person sentenced to TIG

The current Article 15 reads:

The daily work for a person sentenced to TIG shall be equivalent to the daily working hours of a Government official.

The article determines the daily working hours of a person sentenced to TIG, but fails to specify the equivalent monetary value for that work. This should be specified in the Presidential Order, either

³ *Komisiyo y'igihugu y'Ubumwe n'Ubwiyunge (NURC), Inyandiko mvugo y'inama Nyungurana bitekerezo Ku Bumwe n'Ubwiyunge, Ugushingo 2011*

⁴ Intervention of Mr.B.N., NURC meeting, 30th August, 2012, Kigali.

under this article or in a new article. The equivalent monetary value should be pegged to the agreed sum for VUP public works, accounting for the same principles utilised to underpin wage levels⁵:

- Wages are set locally (at sector level)
- Wage rates should be less than or equal to market rates for similar work
- Wages are set on a project by project basis according to project type

This would equate to an average of around RWF 1,000 a day. This remuneration level would determine the equivalent sum paid to compensate the victim of crimes as determined in the response to articles 2 and 4 above.

We would welcome the opportunity to present our views further to MINIJUST 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 strengthening the implementation of the new Presidential Order if it is enacted in its current form.

For further information, please contact IBUKA representatives:

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⁵ Justine Gatsinzi, Setting and resetting wage levels in the public works component of VUP , Accessed 3rd Sep 2012 http://siteresources.worldbank.org/SAFETYNETSANDTRANSFERS/Resources/281945-1131468287118/1876750-1274296604081/7084037-1277739749889/D2S4_Gatsinzi_Rwanda_Wage_Setting.pdf