

Rwanda: Suspects must not be transferred to Rwandan courts for trial until it is demonstrated that trials will comply with international standards of justice

Amnesty International is calling on the International Criminal Tribunal for Rwanda (ICTR) and states that have been requested to extradite individuals accused of genocide, crimes against humanity and war crimes to Rwandan courts for trial not to do so until Rwanda demonstrates that it can and will conduct the trials fairly and impartially and that victims and witnesses will be protected. The organization believes that so far it has failed to do so.

On 11 June 2007, the Prosecutor of the ICTR filed a request to the Trial Chamber to transfer the case of Fulgence Kayishema, who has been charged by the ICTR with genocide and crimes against humanity and remains at large, to Rwandan courts. Requests to transfer three other persons were submitted to the Trial Chamber on 7 September.¹ If successful, it is likely that a number of other cases will also be transferred to Rwanda in accordance with the strategy announced by the Prosecutor for the ICTR to complete its work by 2010. In addition, in recent months, the Rwandan government has issued informal requests or formal extradition requests to Canada, France, Finland, New Zealand and the United Kingdom for the extradition of individuals accused of serious crimes under international law in Rwanda.

The initiatives to transfer cases to Rwandan courts follow the enactment of legislation abolishing the death penalty in Rwanda in July 2007, one factor that has obstructed previous transfers to the country. Amnesty International has publicly welcomed Rwanda's decision to abolish the death penalty. The organization, which campaigns against impunity around the world, also acknowledges the importance for national courts to investigate and prosecute persons accused of the heinous crimes committed in Rwanda in 1994. However, national trials must be conducted justly,

¹ Separate applications were submitted for the transfer of Ildephonse Hategekimana, Gaspard Kanyarukiga and Yussuf Munyakazi. Instead of prosecuting the two men promptly before the ICTR, they have been held in detention by the ICTR since 2004 with no progress in their cases, raising serious concern that their right to a trial within a reasonable time is being violated. Further delays will no doubt result from the attempt of the ICTR to transfer their cases to Rwanda.

fairly and effectively, ensuring that the rights of the accused and victims and witnesses are fully respected.

In this statement, Amnesty International sets out criteria which it calls on the ICTR and national courts to consider in deciding whether to transfer cases to Rwanda. In doing so, it urges the Rwandan government to take immediate steps to address these concerns to demonstrate that it can prosecute the crimes in accordance with international standards of justice.

1. It must be demonstrated that the Rwandan justice system can operate impartially by investigating and prosecuting crimes by all sides

For any justice system to operate effectively, it must be impartial. Amnesty International remains deeply concerned that, to date, crimes committed by members of the Rwandese Patriotic Army (RPA), during 1994 have not been adequately investigated and prosecuted by national authorities.² The RPA was the armed wing of the Rwandese Patriotic Front (RPF), the current ruling party, until July 1994 when it became the Rwanda's national army. This failure raises serious concerns about the ability of the national justice system to address all crimes committed in the conflict justly, fairly and impartially. The ICTR and other states should not transfer persons to Rwanda for trial, until the national justice system has demonstrated its impartiality by investigating and prosecuting crimes committed by individuals associated with all parties, regardless of which group suspects are a member.

2. It must be demonstrated that the Rwandan justice system will conduct trials in accordance with international fair trial standards

No person, regardless of the seriousness of the charges against them, should be transferred to any country for prosecution where they will not receive a fair trial.³

² Amnesty International is also concerned that the Prosecutor of the ICTR has to date failed to announce the outcome of investigations it has conducted into crimes committed by the RPA. The failure for the 13 years of the ICTR's existence to investigate these crimes promptly, thoroughly, independently and impartially and, where there is sufficient admissible evidence, to prosecute persons suspected of these crimes risks undermining the credibility of the ICTR.

³ In the *Soering v. United Kingdom* case, the European Court of Human Rights ruled in para.113:

The right to a fair trial in criminal proceedings, as embodied in Article 6 (art. 6), holds a prominent place in a democratic society (see, inter alia, the Colozza judgment of 12 February 1985, Series A no. 89, p. 16, § 32). The Court does not exclude that an issue might exceptionally be raised under Article 6 (art. 6) by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country.

For more than a decade, Amnesty International has consistently raised concerns about the fairness of trials before Rwandan courts, including the gacaca system.⁴ Amnesty International strongly disagrees with contentions that have been made by some commentators that the decision not to apply all fair trial guarantees to the gacaca system is not relevant to the issue of whether to transfer persons to Rwanda, on the basis that transferred persons will not be prosecuted under the gacaca system. On the contrary, consistent reports that fair trials guarantees are not being applied in the gacaca process, which is investigating and prosecuting a massive amount of the crimes committed during the 1994 genocide, undermines the whole legal system and raises concerns about the importance that will be attached to these rights by other sectors of the justice system.

Following this case, both United Kingdom courts (in *R v Secretary of State for the Home Department, ex parte Rachid Ramda* (2002) [2002] EWHC 1278) and French courts (Cour d'Appel de Pau, *Irastorza Dorransoro* No 238/2003 Judgment of 16 May 2003) have ruled against the extradition questioning the validity of extradition to other EU countries on the basis of potential breach of fair trial rights due to evidence based on information allegedly extracted through torture. Furthermore, Guideline XIII (4) of the Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism provides:

When the person whose extradition has been requested makes out an arguable case that he/she has suffered or risks suffering a flagrant denial of justice in the requesting State, the requested State must consider the well-foundedness of that argument before deciding whether to grant extradition.

Paragraph 61 of the Explanatory Notes to the Protocol amending the European Convention on the Suppression of Terrorism provides

Article 4 does not preclude the refusal to extradite on grounds other than the political character of the offence. A requested Contracting State may refuse extradition on other grounds, such as the requirement of double criminality, not specifically provided for by this Convention but contained in its domestic legislation or in applicable international treaties.

These principles apply with equal force to international, as well as to regional, standards of fair trial.

⁴ See: Rwanda: Further information on Fear for safety/Legal concern: François-Xavier Byuma (m) (URGENT ACTIONS) (AFR 47/012/2007); Annual Report 2007; Rwanda: Gacaca: A question of justice (AFR 47/007/2002); Rwanda: Gacaca tribunals must conform with international fair trial standards AFR 47/005/2002; Rwanda: The troubled course of justice (AFR 47/010/2000).

Indeed, concerns about fair trials are not limited to the gacaca system. In its 2007 Annual Report, Amnesty International reports that approximately 48,000 detainees were awaiting trial for alleged participation in the genocide. Another 10,000 persons are detained awaiting trial for other crimes not related to the genocide. Many of these people have been in detention awaiting trial before national courts for grossly unreasonable periods of time. In fact, many persons have been detained without trial in excess of 10 years.⁵ The delays clearly violate the right to be tried within a reasonable time and the right to liberty and demonstrate that the Rwanda justice system is overloaded with cases.⁶ There is, therefore, a real risk that any person transferred to Rwanda may find himself or herself in custody for an inordinate length of time before their trial begins, in violation of their rights. Although Rwandan authorities may offer guarantees to the ICTR and states requested to extradite suspects that such cases will be fast tracked, once the person is transferred there would be no available remedy if the undertaking were not fulfilled.

Other concerns about the national justice system's ability to provide fair trials have been reported. For example, the U.S. State Department country report for 2006 states:

In a few cases viewed as politically sensitive, including those dealing with "genocide ideology" (the promotion of the tenets of genocide), "divisionism," and the killing of genocide survivors, indirect public pressure may have influenced the judiciary.

⁵ In its 2007 Annual Report, Amnesty International highlights three cases:

Dominique Makeli, a former journalist for Radio Rwanda, remained in detention without trial after almost 12 years. The charges against him have repeatedly changed. The authorities' latest accusation was that in 1994 he had incited genocide in a programme for Radio Rwanda in 1994.

Two Catholic nuns, Sisters Bénédicte Mukanyangezi and Bernadette Mukarusine, remained in detention without trial after more than 12 years

In July 2007, the two sisters were finally tried. The gacaca court that took up their cases, decided to release them for lack of evidence.

⁶ In early 2007, according to a Rwandese newspaper, the Rwandese government announced the upcoming provisional release of 8 000 detainees, many of which would have confessed to participation in the genocide. Since 2003, this was the third wave of releases in an attempt to address the overcrowding of the country's prisons, See Hirondelle News Agency, RWANDA/PRISONERS – RWANDA ANNOUNCES UPCOMING RELEASE OF 8 000 PRISONERS, 25. 01 07.

Amnesty International notes that, in an attempt to address concerns about the ability of the national courts to conduct fair trials, on 16 March 2007, Rwanda adopted the Organic Law which includes fair trial guarantees for those transferred by the ICTR to Rwanda, including those rights contained in Article 14 of the International Covenant on Civil and Political Rights. The Organic Law also adopts some rules of evidence applied by the ICTR. The Organic Law, which is applicable only to cases transferred from the ICTR, will be applied *mutatis mutandis* to cases of persons extradited from other countries. It is, however, only limited to some crimes and would not apply if separate proceedings relating to other offences against the transferred persons were commenced.

Despite the positive aspects of the Organic Law, Amnesty International does not consider that the legislation on its own fully addresses fair trial concerns. The fact that the Organic Law does not apply to prosecutions of all crimes, but only to prosecutions of a small number of cases, raises some serious concerns about how the rights contained in the Organic Law would be applied in practice. It is not clear what level of training police, investigators and judges will receive to ensure the safeguards in the Organic Law are applied effectively.

In the absence of a comprehensive nationwide program to guarantee fair trials before all courts, Amnesty International urges the ICTR and states requested to extradite persons to Rwanda to consider the new Organic Law in the context of how fair trial guarantees are applied throughout the whole of Rwandan national justice system. Until it has been demonstrated that the Rwandan justice system has taken effective measures to ensure that all national trials meet international standards of fairness, the ICTR or other states should not transfer persons to its courts for trial.

3. Trials of any person transferred to Rwanda must be observed by independent experts to ensure that they are fair

If effective measures are taken by Rwanda to ensure fair trials (and other criteria in this paper are met) and it is decided to transfer persons to Rwanda for trial, steps should be taken to ensure that, in practice, the trial is conducted fairly. The ICTR and states extraditing persons to Rwanda should, therefore, attach conditions requiring that the full trial will be observed by independent experts who will be granted access to all proceedings and all items in the case file and that, in the event that the rights of the accused are violated, Rwanda will transfer the person back to the ICTR for trial or to the relevant country to face trial before their national courts exercising universal jurisdiction.

For trial observations to be effective, experts must be able to observe all aspects of the trial, including transcripts if they are not able to attend all sessions. The current proposal for the African Commission on Human and Peoples' Rights (African Commission) to observe the trial of Fulgence Kayishema, if it is transferred from the ICTR to Rwanda, should only be accepted if it can be demonstrated that the experts at the African Commission will be available to monitor the full trial and allocated adequate resources to perform the function.

4. It must be demonstrated that persons transferred to Rwanda for trial are not at risk of torture or subjected to other cruel, inhuman or degrading treatment

International law requires that a person shall not be transferred to a state where they are at risk of torture or other cruel, inhuman or degrading treatment.⁷ The ICTR and other states will, therefore, need to consider this issue carefully taking into account the facts of each case.

Although no direct conclusions should be drawn from the fact alone, it is important to note that despite torture being prohibited by the constitution and national

⁷ Article 3 (1) of the Convention against Torture and Other forms of Cruel, Inhuman and Degrading Treatment states:

No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

Concluding observations of the Human Rights Committee: Canada, UN Doc. CCPR/C/CAN/CO/5, 2 November 2005, para. 15:

No person, without any exception, even those suspected of presenting a danger to national security or the safety of any person, and even during a state of emergency, may be deported to a country where he/she runs the risk of being subjected to torture or cruel, inhuman or degrading treatment.

Sir Elihu Lauterpacht and Daniel Bethlehem, *The Scope and Content of the Principle of Non-refoulement*, Opinion for UNHCR's Global Consultations, UNHCR, June 2001, para. 253:

No person shall be rejected, returned or expelled in any manner whatever where this would compel them to remain in or return to a territory where substantial grounds can be shown for believing that they would face a real risk of being subjected to torture, cruel, inhuman or degrading treatment or punishment. This principle allows of no limitation or exception.

See also: for instance, Guy S. Goodwin-Gill, *The Refugee in International Law* (Oxford: OUP, 1996), pp. 167-170; Jean Allain, "The *Jus cogens* Nature of Non-refoulement," 13 *IJRL* 538 (2001).

law, Rwanda has not ratified and implemented the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) and its Optional Protocol. The failure demonstrates a lack of commitment to ensure that the crimes can never be committed in Rwanda and the government's unwillingness to accept the scrutiny of the expert Committee against Torture and the Subcommittee on Prevention. It also denies the ICTR and states requested to extradite persons to Rwanda the benefit of considering country reports of the Committee against Torture on the effectiveness of national systems to prohibit, prevent and punish the crime and to provide reparations to victims and their families.

Amnesty International is concerned that torture takes place in Rwanda.⁸ Although some cases have been confirmed by foreign courts and reported by civil society and media, the extent of the practice is not fully known. For example, secret detention centres are reported to exist in the country, which have been denied by the Rwandan government.⁹

In addition to reports of torture, Amnesty International is particularly concerned that prison conditions in Rwanda fail to meet international standards and

⁸ In August 2006, the United States District Court for the district of Colombia ruled in a case of a Rwandan man who had been extradited to the US having been charged with the murder of a US national in Rwanda in 1999 that the "defendants' statements were extracted only after countless hours of repetitive questioning over a period of many months, during which time they were subjected to periods of solitary confinement, positional torture, and repeated physical abuse" *The United States of America v. Francois Karake et al. Criminal Action No. 02-0256(ESH)*, 18 August 2006, p.149. The US State Department 2006 Report on Rwanda notes "local media reported allegations of torture by the LDF during the year and a local NGO providing assistance to victims of torture reported that it received between 180 and 240 clients during the year." In May 2007, the BBC reported that Francois Rukeba (URGENT ACTION Rwanda / Uganda: Forcible return/ fear of torture or ill-treatment PUBLIC AI Index: AFR 47/004/2007 16 March 2007) who was recently extradited from Uganda to Rwanda had been tortured. To date it has not been possible to confirm the report.

⁹ The 2006 US State Department Report states:

During the year the Senate investigated reports of secret detention centers allegedly run by security officials, and questioned the ministers of justice and internal security in an open session. During a February hearing senators cited repeated NHRC reports (dating back to 2002) about the existence of government-run secret detention centers; the ministers claimed they were unaware of such centers. Police officials denied the existence of any secret detention centers.

See also: Human Rights Watch: *Rwanda: Hundreds Illegally Detained in Former Warehouse* 14 May 2006.

amount to cruel, inhuman and degrading treatment.¹⁰ In its 2007 Annual Report, Amnesty International reports:

Approximately 69,000 people were reportedly held in prisons during 2006. All prisons were overpopulated with the exception of Mpanga Prison. For example, Gitarama prison reportedly held 7,477 detainees although its official capacity was 3,000.

Detention conditions remained extremely harsh and amounted to cruel, inhuman or degrading treatment. Underground cells were reported to exist in some prisons and detention centres.

The organization notes reports that a new prison facility which is designed to meet international standards – the Mpanga prison – has been opened in recent years and that a special area has been established within that prison for persons transferred from the ICTR or extradited from other countries. Although welcoming the investment in these new prison facilities which are designed to meet international standards, Amnesty International notes that the new prison is the exception and that it does not form part of a broader comprehensive nationwide strategy to ensure that immediate steps are taken to bring all detention facilities in line with international standards. Most detainees in Rwanda continue to be housed in appalling conditions. This raises concerns on two grounds:

- Firstly, it would be undesirable for states and international organizations to condone the establishment of a two-tier system of detention in Rwanda by transferring persons on the basis they will be housed in special facilities, while the rest of the prison population suffers appalling conditions. Indeed, the International Criminal Court prohibits special provisions for the enforcement of sentences of persons it convicts.¹¹
- Secondly, there are currently no mechanisms to monitor the enforcement of sentences of prisoners transferred to Rwanda to ensure that they are not transferred to other facilities which fail to meet international standards or to ensure that their detention does not deteriorate below international standards.

¹⁰ See: Amnesty International's annual report 2007. See also: Hirondelle News Agency, GREAT LAKES/PRISONS - AN ORGANIZATION DENOUNCES THE CONDITIONS OF DETENTION IN BURUNDI, RWANDA AND THE DRC, 7 November 2006.

¹¹ Article 106 (2) of the Rome Statute of the International Criminal Court states: "in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement."

Amnesty International is concerned that ineffective measures are in place to ensure that any transferred to Rwanda will not be tortured or subjected to cruel, inhuman or degrading treatment or punishment, including appalling prison conditions. Until these concerns are adequately addressed and it is demonstrated that there is no such risk, the ICTR and other states must not transfer persons to Rwanda. In particular, Rwanda must ratify the Convention against Torture and its Optional Protocol, implement them into national law and accept the full scrutiny of the Committee against Torture and the Subcommittee on Prevention.

5. Victims and witnesses must receive protection and support

In prosecuting mostly high-ranking individuals for their role in crimes of genocide, crimes against humanity and war crimes, victims and witnesses are exposed to serious risk of threats, intimidation and attacks. The ICTR, like other international criminal courts, addressed the risk by establishing a victims and witnesses unit to provide essential protection and support services before, during and after the trial. Many national legal systems, including those in countries where extradition requests are pending, have established victims and witness protection services.

Amnesty International is seriously concerned that victims and witnesses appearing in cases before Rwandan national courts would face a significantly greater risk than appearing before the ICTR or other national courts. Indeed, there have been numerous reports of victims and witnesses being killed or harmed after cooperating with investigations and prosecutions in the ICTR or before gacaca processes.¹² Furthermore, in the absence of effective support systems for victims participating in gacaca, there have been reports of suicides among genocide survivors.¹³ Trials located

¹² The U.S. State Department 2006 Report highlights the inadequacy of the gacaca protection systems:

The government held local communities responsible for protecting witnesses, and relied on the LDF, local leaders, police, and community members to ensure the safety of witnesses. Early in the year the government established a task force to review the situation of genocide survivors. Despite these efforts, however, unidentified individuals killed between 12 and 20 genocide survivors and injured 32 in attacks during the year (see section 1.a.).

See also: Human Rights Watch, Rwanda: Killings threaten justice for genocide, 22 January 2007; and ARI-RNA, IBUKA bitter over continued murders, 4 October 2007.

¹³ See U.S. State Department Report 2006: “Nevertheless there were reports of more than 20 suicides among genocide survivors.”

in Rwanda will have much greater national coverage and victims and witnesses participating in the country where the crimes were committed will be more vulnerable. It is, therefore, essential that the national justice system provides for comprehensive protection and support services conducted by persons with expertise in the field. At present, it is not clear whether protection and support systems exist for trials before national courts and if any such systems are effective. The ICTR and states requested to extradite persons for trial should conduct a detailed analysis of the national protection and support systems and be satisfied that Rwandan authorities can perform these tasks effectively. In particular, it should be clear who is responsible for providing protection and support, that they have the necessary expertise to perform their functions, that effective systems are in place to provide protection and support to victims and witnesses and adequate resources are available.

Conclusion

In conclusion, although Amnesty International fully supports the development of the national justice system in Rwanda, it remains concerned that the national justice system has not demonstrated its ability to conduct trials in accordance with international fair trials, applying international standards of detention and ensuring effective protection and support to victims and witnesses. The organization urges the ICTR and states that have been requested to extradite persons to Rwanda not to transfer any person to Rwanda until these concerns have been satisfactorily addressed.

Until these issues have been addressed, the ICTR should inform the United Nations Security Council of the need to extend the exit strategy to enable it to complete all its cases. Where possible, cases could be transferred to other national courts exercising universal jurisdiction over the crimes. Indeed, Amnesty International encourages other states with effectively functioning legal systems to volunteer to accept transfer cases before their national courts exercising universal jurisdiction. Noting the problems the ICTR has faced in transferring cases to Norway and the Netherlands, Amnesty International calls on all states to review their laws and, if necessary, amend them to ensure that they can prosecute crimes under the jurisdiction of the ICTR before their national courts.

National courts of states that have been requested to extradite persons to Rwanda should immediately start national proceedings exercising universal jurisdiction to investigate and prosecute the crimes on behalf of the international community or extradite these persons to states able and willing to do so in fair trials without the death penalty, torture or ill-treatment or other human rights violations.