

## TABLE OF CONTENTS

1. INTRODUCTION .....	2
1.1 Achievements and vital role of Tribunal.....	3
1.2 Strengthening the Tribunal .....	4
1.3 Response of Tribunal officials .....	7
1.4 Trials in the Rwandese Courts .....	8
2. CREATION OF THE TRIBUNAL.....	8
2.1 Statute of the Tribunal .....	10
2.2 The first prosecutions .....	12
3. DELAY OF TRIALS .....	12
4. PROSECUTION STRATEGY.....	14
4.1 Relations with the Rwandese Government .....	15
4.2 Prosecuting RPF abuses.....	16
4.3 Investigation and prosecution of sexual violence crimes .....	17
5. WITNESS PROTECTION .....	18
6. DELAYS IN BRINGING DETAINEES BEFORE A JUDGE .....	21
6.1 Detainees must be brought before a judge without delay .....	21
6.2 Tribunal procedures for appearance before a judge.....	22
6.3 Cases of delay .....	23
7. DELAYS IN INDICTING SUSPECTS .....	25
8. DELAYS IN HEARING MOTIONS .....	28
8.1 Urgent protection of witnesses in former Zaire - Rutaganda case .....	29
8.2 Delays in <i>habeas corpus</i> motions of Jean Bosco Barayagwiza and Laurent Semanza .....	29
8.3 Reform of procedures .....	31
9. DETENTION OF JEAN KAMBANDA OUTSIDE THE DETENTION UNIT OF TRIBUNAL .....	32
9.1 Whereabouts of Jean Kambanda.....	32
9.2 Why international standards demand only recognized places of detention.....	34
9.3 Appointment of counsel as “friend of the Tribunal” .....	35
10. UNLAWFUL DETENTION OF ESDRAS TWAGIRIMANA .....	36
10.1 Denial of access to legal counsel .....	36
10.2 Failure to bring him before a judge.....	37
10.3 Right to compensation .....	38
11. ASSIGNMENT OF DEFENCE COUNSEL .....	39

12. PUBLIC INFORMATION: CONFUSED AND UNINFORMED .....	40
13. STATE COOPERATION .....	41
13.1 Relocation of witnesses .....	42
13.2 Prison facilities .....	43
14. SUMMARY OF RECOMMENDATIONS .....	44

14.1 Shared responsibility . . . . .  
45

# INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

## Trials and Tribulations

*“In accordance with the well-known maxim, ‘Justice must not only be done, but must be seen to be done’, it is not enough for the International Tribunal simply to administer international criminal justice impartially and with due regard for the rights of the accused. It must also carry out this activity under the scrutiny of the international community”<sup>1</sup>.*

### 1. INTRODUCTION

In April 1994 mass killings began in Rwanda and within a few months as many as one million people were killed in a genocide and other crimes against humanity which shocked the world and shamed the international community. Thousands more were tortured, raped and beaten.<sup>2</sup> The United Nations (UN) Security Council failed to take adequate steps to prevent the killings. The small and lightly armed UN peace-keeping force in Rwanda at the time of the killings was not given the powers to act effectively and the decision was taken to withdraw it from Rwanda at the height of the massacres.

In the aftermath of the mass killings, the UN Security Council created an international criminal tribunal to prosecute those responsible.<sup>3</sup> Modelled on the previously established International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (the Tribunal) was set up to prosecute the main perpetrators of the most serious crimes, such as genocide and other crimes against humanity. The objectives for establishment of the Tribunal expressed by the Security Council included putting an end to impunity and contributing to the process of national reconciliation which would lead to lasting peace in Rwanda.

#### 1.1 Achievements and vital role of Tribunal

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<sup>1</sup>Foreword by Judge Antonio Cassese, former President of the International Criminal Tribunal for the former Yugoslavia, in the *International Review of the Red Cross*, No. 321, Nov.-Dec. 1997, at 602.

<sup>2</sup>The events in Rwanda in 1994 and the preceding periods are documented in Amnesty International reports: *Rwanda: Persecution of Tutsi and repression of government critics* (AI Index AFR 47/02/92); *Rwanda: Mass murder by government supporters and troops in April-May 1994* (AI Index AFR 47/11/94), 23 May 1994; *Rwanda: Reports of killings and abductions by the RPA, April-August 1994* (AI Index AFR 47/16/94), 20 October 1994; and in reports by other organizations, including the UN.

<sup>3</sup>Security Council Resolution 955 (1994), adopted on 8 November 1994.

The Tribunal has faced many difficulties in establishing a complex, international judicial process from the ground up. There was a delay of one year before the Tribunal could occupy its premises in Arusha, Tanzania, in November 1995. For several months thereafter it had very limited staff and communications facilities. Crucial staff positions remained empty and the Tribunal lacked basic resources. Its location in Arusha, far away from the travel hubs of Africa, meant that it received scant attention from the media and the international community. The failure of states to cooperate with the Tribunal and delays in handing over suspects added to its difficulties. The tribunal is still facing many difficulties in operating a court under UN regulations in an isolated location, including great difficulty in attracting and keeping qualified staff and obtaining quick decisions by the UN bureaucracy on critical staffing and policy issues.

With the commencement of the first trial in January 1997, public information about the activities of the Tribunal increased. Yet little is known about the Tribunal and the lack of information fails to convey the achievements of the Tribunal. The Tribunal has more accused in custody than the ICTY; those in detention in Arusha include some of the most senior officials of the former Rwandese Government allegedly implicated in the genocide and other crimes against humanity, including the former Prime Minister; greater cooperation from states, especially African states, has meant that those who are wanted by the Tribunal have less chance to obtain refuge, unlike those wanted by the ICTY who continue to evade arrest. Despite the many challenges, witnesses for both the prosecution and defence have testified in the first three trials and the first trial is nearing completion with judgment expected soon.

Amnesty International strongly supports the Tribunal as an instrument to help end impunity and restore respect for human rights in the Central African region. The Tribunal is also an essential component of efforts to end the cycle of violence and killings in Rwanda. As the President of the Tribunal, Judge Laity Kama stated in his speech to the UN General Assembly:

*“If justice is not done, there may be no end to hatred, and atrocities could go on and on, with the executioners believing they are immune to prosecution and the victims’ thirst for revenge fuelled by a sense of injustice and the idea that an entire ethnic group was responsible for the atrocities committed against them. In this regard it is of paramount importance that justice be done, because it will help replace the idea of collective responsibility with the idea of individual criminal responsibility”.*<sup>4</sup>

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<sup>4</sup>Speech by Judge Laity Kama, President of the International Criminal Tribunal for Rwanda, before the General Assembly of the United Nations, 10 December 1996.

Amnesty International has consistently argued that states and the UN must give the Tribunal sufficient financial and political support for it to carry out its vital work. The Organization of African Unity (OAU) should also provide this political support. In the early months Amnesty International focused on the lack of political will of UN member states which resulted in substantial delays in the Tribunal starting to function.<sup>5</sup> The organization has urged states to fulfil their legally binding obligation to cooperate with the Tribunal and the ICTY. In 1997 Amnesty International published a four volume handbook (also available in French and Spanish), *International criminal tribunals: Handbook for government cooperation* (AI Index IOR 40/07/96, IOR 40/08/96, IOR 40/09/96 and IOR 40/10/96) which explains practically how states should ensure their judicial and law enforcement authorities are able to cooperate with the tribunals. It also includes the text of cooperation legislation passed by 20 states.

The Tribunal, like the ICTY, is a crucial step towards the establishment of a permanent international criminal court. Amnesty International, together with a worldwide coalition of non-governmental organizations (NGOs) is campaigning for a just, fair and effective court to be established by the intergovernmental meeting taking place in Rome in June/July this year. A series of Amnesty International documents, *The international criminal court: Making the right choices* (in four parts, AI Index IOR 40/01/97, IOR 40/11/97, IOR 40/13/97, IOR 40/04/98), set out recommendations for ensuring the court will be just, fair and effective.

## **1.2 Strengthening the Tribunal**

The importance of justice for all Rwandese and the world means that every aspect of this judicial process at the Tribunal must be unquestionably impartial, prompt and effective. A court created by the UN must be expected to abide strictly by all the highest standards laid down by the UN itself. Every aspect of the Tribunal's work sets precedents which will be examined closely by national authorities and by the future permanent international criminal court. The Tribunal's work will therefore help to strengthen or erode the fairness and justice of the judicial process worldwide. For all these reasons Amnesty International scrutinizes the Tribunal's work closely against international standards and best practice and makes recommendations on issues that affect the fairness and effectiveness of its work. It also raises individual cases where it considers their rights to have been violated and from which lessons should be drawn for the future. Moreover, if

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<sup>5</sup>See *Rwanda: Tribunal assistance welcomed but much more needed*, AI Index: AFR 47/12/95, News Service 99/95, 2 June 1995.

justice is seen to be done it will help ensure that the decisions of the Tribunal are accepted by all persons, no matter what their background, in Rwanda and, thus, contribute to national reconciliation.

Judge Antonio Cassese, former President of the ICTY, recently wrote:

*“In accordance with the well-known maxim, ‘Justice must not only be done, but must be seen to be done’, it is not enough for the International Tribunal simply to administer international criminal justice impartially and with due regard for the rights of the accused. It must also carry out this activity under the scrutiny of the international community”.*<sup>6</sup>

Amnesty International representatives visited the Tribunal in Arusha, Tanzania and the Office of the Prosecutor (OTP) in Kigali, Rwanda at the end of October and beginning of November 1997. While the Tribunal has overcome a difficult beginning and the first trials have commenced, there are still many shortcomings which are of serious concern.

In this report Amnesty International sets out its concerns about weaknesses in court procedures and management and policies and practices that in some cases fall short of UN standards and the Tribunal’s own Rules of Procedure and Evidence (Rules of Procedure)<sup>7</sup>. Some shortcomings undermine the rights of detainees or aspects of the right to a fair trial; others damage the effectiveness of the Tribunal in bringing perpetrators to justice.

Notwithstanding the objective difficulties faced by the Tribunal Amnesty International was concerned about the manner in which aspects of the Tribunal’s judicial process were managed. A court is not like any other UN bureaucracy or operation - it requires rich experience of administering criminal trials. The lack of experience in running a court have led to inefficiency and confusion, unacceptable delays and in at least one case breach of confidential information. Amnesty International is also concerned about the insufficient regard in some cases of the Tribunal’s own Rules of Procedure and UN standards on the rights of detainees and accused.

Amnesty International has been informed that staff with prior experience of court management, including a Deputy Registrar, have been very recently recruited. It is hoped that these new appointments will rapidly result in the improvement of court

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<sup>6</sup>Foreword in the *International Review of the Red Cross*, No. 321, Nov.-Dec. 1997, at 602.

<sup>7</sup>Adopted on 5 July 1996, amended 6 June 1997, ICTR/3.Rev.2.

procedures and better application of the Rules of Procedure and international standards for fair trial.

The concerns raised in this report include the following:

- ◆ Some of the accused have been in custody for more than 30 months and some may spend several years in detention before their trials are complete, potentially compromising their right under international law to be **tried within a reasonable time**. Some of the delays are the responsibility of the Tribunal, including delays in indicting suspects, delays in hearing motions (ie applications by the defence or prosecution for the court to make a particular order) and the fact that the Tribunal was in recess for four months over a 12 month period in 1997-1998.
- ◆ The **witness protection** scheme is weak and lacking in relevant experience. It may be putting witnesses at risk, discouraging witnesses from testifying and therefore putting justice in jeopardy.
- ◆ Witnesses could be at risk because no African or other state has agreed to allow witnesses who cannot return safely to Rwanda to be relocated to their country and protected. Policies of the Rwandese Government in handling witnesses who must leave the country to testify in Arusha fail adequately to protect their identity and their future.
- ◆ There are unacceptable **delays in the court hearing motions** or applications for orders. In one case an urgent motion for protection of witnesses was delayed for so long it became redundant when the refugee camp where the witnesses were located was attacked and the witnesses dispersed. In another case an urgent *habeas corpus* application was just never heard.
- ◆ In a few cases there has been insufficient regard to international standards and the Tribunal's Rules of Procedure, which has compromised **the rights of detainees** and **set dangerous precedents**. In one case an accused has been held in an **unrecognized place of detention**. In another case a detainee who had been mistakenly arrested in Nairobi was held in **unlawful detention** for almost two months in Arusha, denied access to a lawyer, not brought before a judge at all and then returned to Nairobi where he was promptly arrested by local police.
- ◆ There is a disturbingly and sometimes dangerous **lack of competent or coherent strategy for the dissemination of public information**. Court documents that should be available publicly are not. Worse was a case where the Registry distributed a document which included names of witnesses ordered by the court



to be kept confidential and a case where an indictment was publicly distributed which contained charges the Tribunal had ordered to be struck out.

It is important for the shortcomings to be addressed. The President of the Tribunal and the other judges, the Registrar, as well as the Prosecutor, Deputy Prosecutor and their staff, have distinct or shared responsibility for tackling these problems. In this report Amnesty International makes recommendations for tackling these issues and strengthening the work of the Tribunal so the highest standard of justice is delivered in Arusha.

### **1.3 Response of Tribunal officials**

During the visit to the Tribunal and to the OTP, the Amnesty International delegates received the utmost cooperation from officials and staff who readily met with them and discussed issues pertaining to the work of the Tribunal. The willingness of judges and senior officials of the Tribunal to meet at short notice indicated the importance they attached to the dialogue with outside observers such as Amnesty International.

In February 1998, Amnesty International conveyed its concerns and recommendations in writing to the President of the Tribunal, Judge Laity Kama, the Registrar, Agwu Okali, and the Deputy Prosecutor, Bernard Muna, and requested a response. A copy of the letter to the Deputy Prosecutor was also sent to the Prosecutor, Judge Louise Arbour.

The response of the Deputy Prosecutor, Bernard Muna, welcomed the criticisms and suggestions but indicated that “as an organ set up by the Security Council, we remain directly accountable to that world body...”. He also stated that “it would be impossible to undertake our work with the independence required of us by our mandate if we have to respond or comply with the various opinions and views that may be expressed by the hundreds of NGOs that are interested in this Tribunal ...”.

As of the end of March 1998, no response had been received from Judge Laity Kama, the President of the Tribunal. A detailed response from the Registrar, Agwu Okali, was received on 3 April 1998. While we have incorporated relevant facts from that letter into this report, we have abided by the Registrar’s request that we do not selectively quote parts of that letter.

### **1.4 Trials in the Rwandese Courts**

**The Tribunal will only ever be able to try a small handful of those responsible for the atrocities in Rwanda. Trials before Rwandese courts are as important to the process of securing justice for the victims, their families and Rwandese society.**

In Rwanda, trials before the specialized chambers of national courts of people accused of participation in the genocide began in December 1996. Since that date, more than 300 people have been tried and more than 100 sentenced to death, some after unfair trials. For example, some defendants in the first trials did not have access to a lawyer, others did not have adequate time to prepare their defence; in other cases, defence witnesses were threatened and effectively intimidated from testifying.<sup>8</sup>

In subsequent months, aspects of the conduct of some of the trials improved and officials began paying greater respect to procedures. However, significant variations were observed from region to region, and several trials during the latter part of 1997 still failed to conform to international standards of fairness. In addition, the dramatic shortage of human resources - in particular the shortage of Rwandese defence lawyers - and the relative inexperience of many judicial officials has affected both the quality and the speed of the trials. Meanwhile, more than 130,000 prisoners continue to languish in conditions amounting to cruel, inhuman and degrading treatment, in prisons and detention centres which are filled to several times beyond their capacity. Some have been detained without trial - and some without charge - for more than three years.

## **2. CREATION OF THE TRIBUNAL**

Acting pursuant to its authority under Chapter VII of the UN Charter, the Security Council recognized the situation in Rwanda in 1994 as a threat to international peace and security and established the Tribunal. The Security Council adopted resolution 955 (1994) creating the Tribunal on 8 November 1994. The Tribunal was established

*“for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states, between 1 January 1994 and 31 December 1994...”*

Resolution 955 also requires all states to “cooperate fully with the International Tribunal and its organs ...” and “to take any measures necessary under their domestic law

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<sup>8</sup>For details of Amnesty International’s concerns about the first trials in Rwanda, see the Amnesty International report *Rwanda - Unfair trials: justice denied* (AI Index AFR 47/08/97), 8 April 1997.

to implement the provisions of the present resolution and the Statute...”, making compliance with the Tribunal a legally binding obligation for all UN member states.

The Security Council decided in resolution 977 (1995) of 22 February 1995 to establish the seat of the Tribunal in Arusha, Tanzania. However, it was not until November 1995 that the Tribunal was able to occupy the premises made available to it by the Tanzanian Government at the International Conference Centre in Arusha. In the meantime, on 25 May 1995, the General Assembly elected the judges of the Tribunal for a four-year term of office. Those elected were Judges Lennart Aspegren (Sweden), Tafazzal Hossain Khan (Bangladesh), Yakov A. Ostrovsky (Russian Federation), Navanethem Pillay (South Africa), William Hussein Sekule (Tanzania) and Laity Kama (Senegal). Presently, Judge Kama is the President of the Tribunal and Judge Ostrovsky the Vice-President, having been re-elected in June 1997 after completion of a two-year term.

Under the statute of the Tribunal the Prosecutor of the ICTY, Judge Louise Arbour, also serves as prosecutor for the Tribunal. The Prosecutor is assisted by a Deputy Prosecutor, Bernard Muna, who is based at the OTP in Kigali. The five judge Appeals Chamber of the ICTY also serves as Appeal Chamber for the Tribunal. The Registrar of the Tribunal is Agwu Okali and his responsibilities include providing administrative support to the OTP and the judges' chambers and overseeing the Victim and Witnesses Unit and the Detention Facility of the Tribunal.

After the publication on 12 February 1997 of a report by the UN Office of Internal Oversight Services<sup>9</sup> (OIOS) criticizing the management and administration of the Tribunal, both the former Registrar, Dr Andronico O. Adede, and the former Deputy Prosecutor, Judge Honoré Rakotomanana resigned. Agwu Okali and Bernard Muna were appointed in March 1997 and May 1997 respectively, to replace these two court officials.

A follow-up review of the Tribunal was conducted by OIOS in September and October 1997 and its report acknowledges that there has been an overall improvement in the working practices of the Tribunal but finds several areas in which improvements still need to be made by the Registry.<sup>10</sup>

## **2.1 Statute of the Tribunal**

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<sup>9</sup>Financing of the International Criminal Tribunal, Report of the Secretary-General on the Activities of the Office of Internal Oversight Services, UN Doc. A/51/789, 6 February 1997.

<sup>10</sup>Report of the Office of Internal Oversight Services on the follow-up to the 1997 audit and investigation of the International Criminal Tribunal for Rwanda, UN Doc. A/52/784.

The Statute of the Tribunal<sup>11</sup> (the Statute) establishes its jurisdiction, defines the crimes to be investigated and prosecuted, sets out its structure, stipulates the rights of the accused, provides for witness protection, sets out the appeal procedure and deals with enforcement of sentences. By setting up both the ICTY and the Tribunal, the Security Council was reaffirming that individuals can be held criminally responsible for acts that violate international criminal law, regardless of whether their national laws criminalize the acts. It reaffirmed the responsibility of the international community to hold perpetrators responsible for these crimes under international law. In most respects the statute is the same as that of the ICTY but with a few significant differences.

The Tribunal has jurisdiction to try people for **genocide** and other **crimes against humanity**. Genocide is defined as killing or causing serious bodily or mental harm to members of a national, ethnic, racial or religious group, or when physical conditions of living are imposed on a group, with the intention of completely or partly destroying the particular group as such. Crimes against humanity are inhumane acts which involve widespread or systematic violations aimed at a civilian population. These crimes include genocide, extrajudicial executions, “disappearances”, torture (including rape), slavery, deportation or forcible transfer, arbitrary imprisonment and persecutions on political, racial or religious grounds. Crimes against humanity can be committed at any time, in peace or war.

Armed conflict in and around Rwanda had elements of both an international and non-international - or internal - armed conflict. The Tribunal is able to prosecute people suspected of committing **war crimes** (also known as grave breaches of the Geneva Conventions of 1949), which relate only to international armed conflicts. These include crimes such as wilful killing, torture or inhumane treatment, wilfully causing suffering or serious injury to body or health and extensive destruction of property, not justified by military necessity. Unlike the ICTY, the Tribunal was also given jurisdiction over acts that violate **common Article 3 of the 1949 Geneva Conventions** and **Additional Protocol II** to those conventions. These provisions apply to internal armed conflict and include such crimes as killings, torture, taking of hostages, slavery and humiliating and degrading treatment, including rape, forced prostitution and indecent assault. This step marked a welcome affirmation of the sensible trend towards holding individuals criminally responsible under international law for acts committed in internal armed conflict. There should be little difference in the criminal consequences of a soldier committing rape or killing of civilians in internal or international armed conflicts; for victims the legal distinction is meaningless.

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<sup>11</sup>Annexed to Security Council Resolution 955 (1994), adopted on 8 November 1994.

In respect of serious violations of international humanitarian law committed by Rwandese citizens, the territorial jurisdiction of the Tribunal extends beyond the territory of Rwanda to that of neighbouring states. This permits the Tribunal to investigate and prosecute such violations by Rwandese citizens committed in refugee camps in (former) Zaire (now the Democratic Republic of Congo) and other neighbouring countries where violations are alleged to have been committed in connection with the events in Rwanda.

Many of the crimes committed in Rwanda in 1994, such as crimes against humanity, are international crimes subject to universal jurisdiction. This means that any country in the world is able to try those suspected of having committed these acts. The Tribunal also has jurisdiction over these crimes - ie. it has concurrent jurisdiction with national courts - so a suspect could be tried either by the Tribunal or by courts in the country where a suspect is arrested. A suspect could also be arrested in one country and extradited to another country to be tried, in the exercise of universal jurisdiction.

The Statute, however, also gives the Tribunal primacy over national courts, which means that the Tribunal can ask national authorities at any stage in the national proceedings not to try a suspect they have in custody but to transfer them to the Tribunal for trial. The country receiving such a request is obliged to transfer the person to the Tribunal. Most states, such as Belgium, Cameroon, Kenya, Switzerland and Zambia, where suspects or accused sought by the Tribunal were arrested, have deferred to the competence of the Tribunal and transferred these persons to Arusha. However, a Federal court in the United States refused to allow Elizaphan Ntakirutimana who has been indicted by the Tribunal to be transferred to Arusha on the basis that an agreement between the US Government and the Tribunal for transfer of suspects or accused was unconstitutional. Ntakirutimana has been rearrested by the US authorities who are attempting once again to have him transferred to Arusha. In the case of Froduald Karamira (see below), the Tribunal seems not to have vigorously pursued its request for his transfer, allowing the Ethiopian authorities to extradite him to Rwanda.

Article 19 of the Statute provides that proceedings have to be conducted “with full respect to the rights of the accused” and stipulates that all hearings shall be public unless the Trial Chamber decides to close the proceedings. In addition, Article 20 incorporates the provisions of Article 14 of the International Covenant on Civil Political Rights (ICCPR) which protect the fair trial rights of accused, including the right to counsel, the right to remain silent and the right to be tried without undue delay. Article 23 provides only for a punishment of imprisonment. Like the Statute of the ICTY and consistent with the worldwide trend to abolish the death penalty<sup>12</sup>, it precludes the

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<sup>12</sup>See *Death Penalty: List of Abolitionist and Retentionist Countries (as of 31 March 1998)*, AI Index: ACT 50/08/98.

imposition of the death penalty. In contrast, those standing trial in the national courts in Rwanda have already been convicted and sentenced to death, though no executions have yet been carried out.

## **2.2 The first prosecutions**

The first indictment of eight suspects was confirmed by Judge Pillay on 28 November 1995 and the first three detainees, Jean-Paul Akayesu, Georges Rutaganda and Clément Kayishema, who were arrested in Zambia were transferred to the Detention Unit of the Tribunal on 26 May 1996. Initially, the Tanzanian authorities made part of their prison at Arusha available to the Tribunal for detention facilities but subsequently, a separate building consisting of 50 cells, attached to the Arusha prison, was constructed. As at March 1998 there were 23 accused presently detained in Arusha. The Tribunal has confirmed 22 indictments against 35 individuals.

As at March 1998 there were currently three trials proceeding before the two chambers of the Tribunal. The first trial, that of Jean-Paul Akayesu, former mayor of *Taba commune*, commenced on 9 January 1997 before Trial Chamber 1 consisting of Judges Kama, Aspegren and Pillay. The prosecution and defence have completed their closing arguments in the Akayesu trial and judgment is expected in May or June 1998. The trial of Georges Rutaganda, former vice-president of the *Interhamwe* militia, which commenced on 18 March 1997, resumed before Trial Chamber 1 on 4 March 1998 and the prosecution indicated its intention to call 21 additional witnesses. The joint trial of Clément Kayishema, former *Prefect* of Kibuye, and Obed Ruzindana, a former businessman in Kibuye, began on 11 April 1997, before Trial Chamber 2 consisting of Judges Sekule, Ostrovsky and Khan. The prosecution completed presenting its evidence in this trial with the testimony of René Degni-Segui, former UN Special Rapporteur on Rwanda, and the hearings have been postponed until 11 May 1998 for the presentation of defence witnesses.

## **3. DELAY OF TRIALS**

Amnesty International is concerned at the delays in the commencement of trials of accused who are detained in Arusha. Some accused have been in custody for over 30 months, including the period of detention before transfer to Arusha, without their trials having commenced. The first accused were transferred to the Tribunal in May 1996.

The delays raise questions about whether the requirements of the Statute and of international law that trials be held within a reasonable time will be respected. The lengthy delays at Arusha have also had significant negative effect on the perception of the Tribunal both inside and outside Rwanda. These delays have further eroded the faith of

many Rwandese in the will and commitment of the international community to deliver justice with respect to crimes committed during 1994. The combined effect of delays in trials at Arusha and delays in the national trials in Rwanda has been a sense of a continuing vacuum in achieving justice.

While it is appreciated that steps have been taken to speed up trials by the building of a second court room, it remains of concern to Amnesty International that some of the accused may spend several years in custody before they are tried by the Tribunal. While there may not be any simple solutions to these delays, they are certainly exacerbated by the Tribunal being in recess for more than three months during 1997. Amnesty International was informed that the Tribunal was in recess for almost three months from June to August 1997 and a further six weeks in December 1997 and January 1998. At least one Trial Chamber should be in session at any time. Amnesty International is concerned that with trials not proceeding for more than four months in a 12 month period, trials of accused detained in Arusha may not commence for several years. Article 19(1) of the Statute directs the Trial Chambers to “ensure that a trial is fair and expeditious ...” and the right to a prompt trial.

International law requires a trial to be held within a reasonable time to ensure that people are not held in pre-trial detention for any longer than is reasonable and to ensure that people awaiting trial, who are presumed to be innocent, do not suffer unduly prolonged uncertainty. The accused indicted by the Tribunal should, as far as it is practically possible, be assured a speedy trial as is required by Article 9(3) of the ICCPR which states that “Anyone arrested or detained on a criminal charge ... shall be entitled to trial within a reasonable time”, and Article 14(3)(c) of the ICCPR which states that an accused has the right “to be tried without undue delay”. In the case of a murder suspect in Panama, held without bail for more than three and a half years before his acquittal, the Human Rights Committee found that the delay between the indictment and trial “cannot be explained exclusively by a complex factual situation and protracted investigations.” It stated that “...in cases involving serious charges such as homicide or murder, where the accused is denied bail by the court, the accused must be tried in as expeditious a manner as possible”.<sup>13</sup>

**The accused indicted by the Tribunal should be assured a trial within a reasonable time without avoidable delays.**

#### **4. PROSECUTION STRATEGY**

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<sup>13</sup>*Del Cid Gómez v. Panama*, (473/1991), 19 July 1995, Fin. Dec. UN Doc. CCPR/C/57/1, 1996 at 46. The Human Rights Committee is a body of independent experts which monitors compliance by states parties to the ICCPR.

So far trials have involved one, or at most two, accused. The prosecution has indicated its intention to apply for the joinder of the trials of several accused. The Deputy Prosecutor intends grouping several accused together to show how the genocide and other crimes in Rwanda were planned and carried out in an organized way by political and military leaders working together.

Amnesty International welcomes the prosecution strategy to join several accused together in order to show the magnitude of the genocide and other crimes against humanity in Rwanda in 1994 and to provide evidence that the killings and other atrocities were carried out by several persons acting in concert. If accepted by the Trial Chambers the appearance of several accused in joint trials should assist in reducing the long delays in bringing the accused to trial. Furthermore, such a strategy could provide focus and direction to the investigations by the OTP. Experience in national courts, however, shows that it is often notoriously difficult to prove that many accused in a large trial acted together in a conspiracy or joint enterprise. The prosecution has said that it is confident that it has ample evidence to substantiate the charges.

During a press conference in Arusha on 24 February 1998, the President of the Tribunal, Judge Laity Kama, warned against raising expectations of mass trials. He stated that the judges had to carefully consider the joinder of accused and assess whether it is in the interest of a fair administration of justice.<sup>14</sup> Such vigilance by the judges is necessary to ensure that the rights of individual accused to their own defence is not prejudiced in joint trials, as the interests of each accused is different and sometimes in conflict with those of other accused.

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<sup>14</sup>Ubutabera No. 31, 2 March, 1998, <http://persoweb.francenet.fr/~intermed/uk>.



The Prosecutor's strategy to join several accused received a setback when the first application seeking confirmation of a new indictment against Théoneste Bagosora and others was dismissed by Judge Tafazzal Khan on 31 March 1998. Judge Khan dismissed the indictment on the grounds that it could not be maintained in its present form and as a single judge he lacked the jurisdiction to confirm the indictment with respect to certain individuals who were named therein and who have already been indicted.<sup>15</sup> Amnesty International understands that the Prosecutor intends to appeal against this decision.

#### **4.1 Relations with the Rwandese Government**

The effective cooperation of the Rwandese Government is crucial to the functioning of the Tribunal. The investigators of the OTP have to work primarily in its territory and under the watchful gaze of its authorities. Witnesses testifying at the Tribunal travel from Rwanda with the government's cooperation. Relations between the Tribunal and the Rwandese Government have been tense from its inception. Although the Government of Rwanda originally requested the UN Security Council to create the court, as a non-permanent member of the Security Council in November 1994 it voted against its establishment and has remained critical of the Tribunal ever since.

The relationship between the Rwandese authorities and the OTP has been strained. Froduald Karamira, former vice-president of the Hutu-dominated *Mouvement démocratique républicain* party (MDR, Democratic Republican Movement) and leading figure of its hardline faction known as MDR Power, was arrested in Addis Ababa, Ethiopia, in June 1996 after being deported from India. He was a leading political figure in Rwanda in 1994. The Tribunal did not strenuously pursue its request for his transfer to Arusha and allowed the Rwandese Government to have him extradited to stand trial in Kigali. Karamira was subsequently convicted by a court in Kigali in January 1997 and sentenced to death.

Despite the concession by the Tribunal in not pursuing the transfer of Karamira, relations with the Rwandese Government remained strained with the government calling several times for the Tribunal to have its own Prosecutor, for the Tribunal to be based in Rwanda and for the links with the ICTY to be severed. Relations with the Tribunal reached an all-time low when there was a demonstration in Kigali on 8 April 1997 against the Tribunal by Rwandese organizations representing survivors and victims of the 1994 genocide.

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<sup>15</sup>International Criminal Tribunal for Rwanda Press Release No. 115, ICTR/INFO-9-2-115, 1 April 1998.

The appointment of Deputy Prosecutor Muna seems to have resulted in improvements in the OTP's relationship with the government. There seems to be greater cooperation with the Rwandese allowing some access to official documents. The arrest of leaders of the former Rwandese regime, including the former Prime Minister, in Kenya in July 1997 indicated the serious intent of the OTP to bring to justice the main perpetrators and won cautious approval from the Rwandese authorities who appeared to soften their criticism of the Tribunal.

#### **4.2 Prosecuting RPF abuses**

The real test for the relationship between the Tribunal and the Rwandese Government will come when the OTP begins prosecuting abuses committed by the Rwandese Patriotic Front (RPF) (which went on to form the current Government of Rwanda and its army, the Rwandese Patriotic Army) during 1994. The mandate of the Tribunal covers certain crimes committed by anyone during 1994 in Rwanda, and by Rwandese citizens in neighbouring countries, including members of both the former government's security forces or militia and of the RPF. Indeed, the Tribunal is obliged to investigate and prosecute abuses by the RPF as well as the former government. The former UN Special Rapporteur, René Degni-Segui, indicated in his reports to the UN Commission on Human Rights that the RPF committed serious human rights abuses, a conclusion he repeated during his recent testimony at the trial of Clément Kayishema and Obed Ruzindana. Amnesty International has also documented allegations of crimes and human rights abuses committed by the RPF during 1994.<sup>16</sup>

For the moment, it appears that the OTP is concentrating exclusively on crimes committed by the former government of Rwanda and its associates. Amnesty International is concerned that there are no indictments arising out of the alleged crimes committed by the RPF and none apparently imminent. Even though many reports of crimes committed by the RPF in 1994 have been made available to the OTP, whether in confidential submissions by individuals, in public documentation by non-governmental organizations and others, and in testimony provided by some of its own expert witnesses in Arusha.

Given the scale of the genocide, it is appropriate for the OTP to accord a high priority to investigating crimes committed by the former government of Rwanda and its associates. Victims of the genocide and other crimes against humanity demand justice, as soon as possible. Nevertheless justice must be impartial; it must be done and seen to be done for all, regardless of who the victims or perpetrators are. True reconciliation in

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<sup>16</sup>See *Rwanda: Reports of killings and abductions by the RPA, April-August 1994* (AI Index 47/16/94), 20 October 1994.

Rwanda must involve showing that the rule of law does not discriminate for or against anyone. The Tribunal's work should contribute to this process.

The failure of the OTP to initiate cases against members of the RPF has had at least two major consequences. One concerns the increasing difficulties in gathering evidence so long after the events and the risk of evidence having been destroyed. The other is the impression given - not only to those responsible for these crimes within the RPF but also to the broader public - that the Tribunal is only interested in judging one group of perpetrators. The Tribunal would certainly face political difficulties in maintaining good cooperation with the Rwandese Government while investigating reports of crimes by the RPF. It is nevertheless essential that it fulfils its mandate with respect to all crimes, maintains its independence and delivers justice to all.

**Amnesty International urges the OTP not to delay initiating cases concerning RPF abuses.**

### **4.3 Investigation and prosecution of sexual violence crimes**

All investigators of the OTP have some basic training in investigating sexual violence and when they come across evidence of sexual violence, they are required to refer that part of the investigations to the sexual violence investigations team in the OTP. The small sexual violence investigations team, consisting initially of two investigators assisted by interpreters, is expected to be enlarged with the recruitment of four female investigators and a medical officer. The work of this team has led to charges of sexual violence being brought against two accused.

In June 1997, three new charges pertaining to sexual violence were added to the indictment against Jean-Paul Akayesu and witnesses on these charges completed their testimony by the end of 1997. It is encouraging to see that the Prosecutor has begun pursuing charges of sexual violence where there is evidence that the accused committed such crimes or did not intervene to prevent such crimes being committed by subordinates.

However, in her most recent report the UN Special Rapporteur on violence against women, Radhika Coomaraswamy, criticized the Tribunal for failing to investigate and prosecute with vigour those responsible for sexual violence. The Special Rapporteur questioned why "despite the existence of an extensive legal framework for action with regard to rape and sexual violence during the genocide, only very few individuals have been charged with these crimes".<sup>17</sup>

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<sup>17</sup>Report of the Special Rapporteur on violence against women, its causes and consequences, Addendum: Report of the mission to Rwanda on the issues of violence against women in situations of armed conflict, E/CN.4/1998/54 Add 1.

Although two workshops on the investigation of crimes of sexual violence arranged by the Prosecutor, in March and October 1997, went a long way to provide training for investigators, there is still a need for more training of investigators in gender sensitive investigations and support. Training, for example, on Rwandese legal culture and in relation to the attitude of victims to providing testimony on experiences of sexual violence and gynaecological examinations may be particularly beneficial. Such training is particularly important as the Special Rapporteur noted that one of the reasons for the reluctance of victims of sexual violence to come forward was that “there seems to exist a cultural wall between the victims and witnesses on the one hand, and the investigators on the other”<sup>18</sup>.

In its recent document, *The international criminal court: ensuring justice for women* (AI Index: IOR 40/06/98), Amnesty International made a number of recommendations for the investigation and prosecution of crimes involving violence against women and urged that a gender perspective be fully incorporated into the statute and procedures of the international criminal court to ensure justice for women and their families.

**Additional training of investigators in gender sensitive investigations and support is necessary.**

## **5. WITNESS PROTECTION**

Witness protection and assistance is one of the most crucial aspects of the Tribunal’s functions and unless it functions effectively, peoples’ lives will be put at risk and witness testimony may be unreliable, putting the trials and justice in jeopardy. The lapses in the security and protection of witnesses which Amnesty International delegates saw in October 1997 in Arusha and Kigali caused tremendous concern.

The Victims and Witnesses Unit is responsible for the protection of witnesses identified by the prosecution and defence, for transporting these witnesses to Arusha when their testimony is required and to ensure their safety in Arusha. Witnesses are accommodated in safe houses in Arusha and protected by security officers who are in the employ of the Unit. Medical and psychological assistance is available to witnesses and they have access to witness support officers. On the return of witnesses to Rwanda, the Unit maintains contact and addresses complaints of threats. However, the Unit relies heavily on the Rwandese Government for the protection of witnesses in Rwanda as it does not have the resources to provide continuous protection. Furthermore, it is very

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<sup>18</sup>*Ibid.*

difficult to relocate witnesses within Rwanda without the knowledge of the authorities and local communities.

- ◆ In October 1997 the Victims and Witnesses Unit did not have any person who had expertise and experience of witness protection at a national level and Amnesty International understands that this has not changed. However, Amnesty International has been informed that more staff with the relevant expertise and experience will soon be recruited to the Unit. While the process for protecting witnesses at the Tribunal is different from protection of witnesses at national level, much can be learnt from national witness protection programs in various countries. In developing an effective protection program, the Tribunal should draw on the successful witness protection programs in states, such as Australia, Italy and the United States. At the national level it is often police officers who are responsible for witness protection and it would be advisable for the Tribunal to recruit such experience and expertise onto the staff of the witness protection unit. The recent OIOS report states that the most critical deficiency in the Unit is the lack of staff members with experience in witness protection in criminal trials and that “in the absence of qualified staff the ability to provide basic protection will not be available to important prosecution and defence witnesses”.<sup>19</sup>

**The Tribunal should recruit persons with experience and expertise in witness protection and urgently develop an effective witness protection program.**

- ◆ The procedure demanded by the Rwandese Government to enable witnesses to travel to Arusha from Rwanda makes it impossible to protect the identity of witnesses and to prevent possible repercussions on their return. They are required to register at different administrative levels, *cellule*, *secteur*, *commune*, *préfecture* and national, within Rwanda and to complete departure forms, providing details of their names, residential addresses, destination and reason for travelling, at the airport. These procedures expose witnesses to serious and unnecessary risks. Witnesses are also required to apply for temporary travel documents from the Rwandese authorities. Thus the details of the witnesses, their reasons for travelling and their destination becomes known to several officials and civil servants and could possibly be acquired by other individuals. Amnesty International believes that the Tribunal should enter into negotiations with the Rwandese authorities to change the procedures. The Registrar has explored the possibilities of witnesses travelling to Arusha on *laissez passer* issued by the UN and without having to follow the usual procedures for travel from Rwanda. Unfortunately UN officials have rejected such proposals. The

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<sup>19</sup>See OIOS report, *supra* note 9, at 11.

Tanzanian authorities have insisted that such documents reflect the ethnicity of the witness, although the Rwandese authorities have removed all references to ethnicity in their travel documents.

**The Tribunal should enter into negotiations with the Rwandese Government to change the procedures to better protect witnesses who travel to Arusha.**

- ◆ The Rwandese Government requires that every witness who is taken out of Rwanda by the Tribunal be returned to the country. Most witnesses choose to return to Rwanda. There may, however, be some witnesses who will not want to return to Rwanda as they risk being targeted. It would seem almost impossible in the current climate in Rwanda for defence witnesses to return without risk to their safety. Some witnesses should be relocated to other countries.

Amnesty International is aware of ongoing negotiations with the Rwandese Government and with potential host governments, some of whom have offered to relocate witnesses. However, Amnesty International has been informed that no formal agreements have been concluded.

**The Tribunal should be able to relocate to other countries witnesses who are at risk if they returned to Rwanda.**

- ◆ While Amnesty International representatives were in Arusha witnesses of sexual violence were testifying in the Akayesu trial. On two occasions they were able to see the witnesses who were testifying from the corridor which leads from the judges' chambers to the courtroom on the fourth floor. A simple measure such as a tinted glass on the door leading into the courtroom would have prevented this. In addition, by overhearing the conversation on the radio which all Tribunal staff carry, it was easy to determine when witnesses were being brought up or taken down in the elevator. In contrast to national witness protection programs, adequate measures are not being adopted to protect the identity of witnesses. Amnesty International urges that measures be taken, if these have not yet been adopted, to tighten security in Arusha.

**Measures should be taken to improve the security of witnesses in Arusha.**

- ◆ Amnesty International is also concerned that unlike at the ICTY, equipment to scramble the voices and/or images of the witnesses, which would contribute to their protection, has not been installed in the court rooms. At present it is possible for persons in the public gallery to identify the witnesses from their voices. The French Government had offered to provide voice and image scrambling equipment, as it had done at the ICTY. While voice scrambling

equipment is available at the Tribunal, it has not been used. No image scrambling equipment has been installed.

**Voice and image scrambling equipment should be installed in the court rooms as soon as possible.**

- ◆ In March 1997, the Prosecutor arranged a workshop on crimes of sexual violence which allowed OTP staff to discuss the problems they encountered in the investigation and prosecution of these crimes. The second workshop, held in Arusha in October 1997 dealt with the role of the interpreter during investigations and the protection of the victim or witness during investigations. While these two internal workshops on sexual violence arranged by the Prosecutor touched on witness protection, Amnesty International considers that a workshop on international witness protection would help to deal with the challenges facing the Tribunal in this regard and to obtain the advice of experts from different parts of the world. This workshop could also provide an opportunity for those involved with witness protection in The Hague to share their experiences with colleagues in Arusha and Kigali.

**The Tribunal should arrange an international workshop on witness protection to help it deal with the challenges facing it.**

## **6. DELAYS IN BRINGING DETAINEES BEFORE A JUDGE**

### **6.1 Detainees must be brought before a judge without delay**

The Rules of Procedure and international law require that detainees be brought before a judge promptly or without delay in order to ensure that their rights are being respected such as their right to counsel and their right to remain silent. Such an appearance also provides an opportunity for the judge to provide independent supervision of their conditions of detention and for detainees to bring to the attention of the judge any complaints they may have regarding their treatment. It is a basic safeguard against ill-treatment. In several cases there have been long delays before detainees appear before a judge of the Tribunal for the first time.

Article 9(3) of the ICCPR provides that:

*“Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power...”*

In its General Comment on this provision, the Human Rights Committee has

stated that “delays must not exceed a few days”.<sup>20</sup> The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (the Body of Principles) also requires that a detainee be brought promptly before a judicial authority in order to enable such authority to decide on the lawfulness of the detention.<sup>21</sup>

## 6.2 Tribunal procedures for appearance before a judge

There are separate procedures in the Rules of Procedure for ensuring that suspects and accused in the custody of the Tribunal are brought before a judge without delay and for the judge to ensure that they are being afforded their rights.

Rule 40 *bis*, which was adopted as an amendment to the Rules of Procedure, provides for the “Transfer and Provisional Detention of Suspects”. It allows suspects to be arrested, transferred to the Tribunal and provisionally detained where there is some evidence against them, but before a proper indictment is issued. They can be detained for a period of 30 days which can be extended to a maximum period of 90 days during which time they must be indicted. Detainees are entitled to challenge their detention through an application under Rule 40 *bis* (K).

Rule 40 *bis* (J) of the Rules of Procedure requires all such suspects who are provisionally detained under Rule 40 *bis* to be brought “without delay, before the Judge who made the order, or another Judge of the same Trial Chamber, who shall ensure his rights are respected”. This provision echoes international human rights law and standards.

Rule 62 of the Rules of Procedure, entitled “Initial Appearance of Accused”, applies to persons already indicted by the Tribunal who are transferred to Arusha. It states:

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<sup>20</sup>General Comment No. 8, para. 2, UN Doc. CCPR/C/21/Add.1.

<sup>21</sup>**Principle 4 of the Body of Principles requires that:**

“Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by or be subject to the effective control of a judicial or other authority”.

**Principle 11(1) states:**

“A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority.”

**Principle 37 provides:**

“A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention.”



*“Upon his transfer to the Tribunal, the accused shall be brought before a Trial Chamber without delay ...”*

This provision also requires the Trial Chamber to ensure that “the right of the accused to counsel is respected”, to have the charges read to the accused and ask the accused to plead to the charges.

### **6.3 Cases of delay**

While in some cases detainees have been brought before a Trial Chamber within a few days, in others these principles of international law and the Rules of Procedure have not been followed by the Registrar, the prosecution and the judges. The examples below show the delays in bringing suspects and accused before a judge for the first time.

- ◆ Obed Ruzindana was transferred to the Detention Unit of the Tribunal on 22 September 1996, but he did not make his “initial appearance” before the judges until 29 October 1996, more than one month later. This, despite the fact that two indictments against the accused had been confirmed by the Tribunal prior to his transfer to Arusha.
- ◆ Similarly, the “initial appearance” before a Trial Chamber of Elie Ndayambaje and Joseph Kanyabashi who were transferred on 8 November 1996 took place on 29 November 1996, three weeks after their transfer to Arusha.
- ◆ Anatole Nsengiyumva, Ferdinand Nahimana, Théoneste Bagosora and André Ntagerura who were transferred from Cameroon on 23 January 1997 did not make their first appearance before a Trial Chamber until 19 and 20 February 1997.
- ◆ In the case of those arrested during the operation conducted jointly by investigators of the OTP and the Kenyan authorities and code named “NAKI” (Nairobi-Kigali), on 18 July 1997, the suspects were brought before a judge only when the prosecution applied for the detention order under Rule 40 *bis* to be extended for a further 30 days. This first appearance before a judge was 30 days after their transfer to Arusha.
- ◆ Pauline Nyiramasuhuko, arrested during the “NAKI” operation, and her son, Arsène Shalom Ntahobali, arrested a few days later, did not make their “initial appearance” until 3 September 1997, almost seven weeks after their arrest, in contravention of Rule 62 that accused “be brought before a Trial Chamber

without delay". Due to the absence of his legal counsel, the "initial appearance" of Ntahobali was postponed to 16 October 1997.

- ◆ Delays in bringing detainees before the Trial Chambers continue. Alfred Musema who was transferred from Switzerland to Arusha on 20 May 1997, after his legal challenge to prevent his transfer was rejected by the Swiss courts, was due to make his "initial appearance" on 16 June 1997, almost a month after his transfer. As a result of the absence of his legal representative, Alfred Musema did not make his "initial appearance", which was postponed until 3 September. On that date Judge Kama again postponed the matter as the defence counsel did not appear. The accused explained the absence of his counsel by informing the Trial Chamber that the notification of his appearance had been received by his legal counsel two days before the date set for the hearing. Alfred Musema finally made his "initial appearance" under Rule 62 of the Rules of Procedure on 18 November 1997, almost six months after his transfer to Arusha.

The delay may have been occasioned by a dispute between the Tribunal and Musema's legal representative regarding payment of the legal fees incurred during the court proceedings in Switzerland. However, the appearance of Musema before the Trial Chamber should not have been delayed pending the settlement of such a dispute.

In fact, Musema's appearance before the Trial Chamber in November 1997 was without legal representation and at this appearance, the indictment was read to him and he was asked to enter a plea. In this case not only has there been a violation of the Rules of Procedure in regard to appearance without delay, but also a violation of the right of the accused to counsel. Article 20 of the Statute guarantees the accused the right "to defend himself or herself in person or through legal assistance of his or her choosing ... and to have legal assistance assigned to him or her, in any case where the interests of justice so require". This is a repetition of the provisions of Article 14(3)(d) of the ICCPR. In addition, Rule 62 of the Rules of Procedure places an obligation on the Trial Chamber to "satisfy itself that the right of the accused to counsel is respected".<sup>22</sup>

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<sup>22</sup>See also Principle 1 of The Basic Principles on the Role of Lawyers which states that: "All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings".

- ◆ Laurent Semanza and Jean Bosco Barayagwiza were transferred from Cameroon to the Detention Unit of the Tribunal on 20 November 1997. Semanza did not make his first appearance before a Trial Chamber until 16 February 1998 and Barayagwiza had his “initial appearance” on 23 February 1998, almost three months after their transfer to Arusha. Both accused had engaged legal representatives to file *habeas corpus* motions before their transfer to the Tribunal (see below, section 8.2).

In response to these concerns, the Registrar explained to Amnesty International delegates that the delay in bringing a detainee before a judge was often caused by delays in assigning defense counsel and waiting for them to arrive in Arusha.

The Tribunal has the responsibility to ensure that *all* detainees are brought before a judge without delay after their transfer, to ensure their rights are respected. Accused who are transferred to Arusha should make their first appearance before a judge no later than a few days after their transfer and should not be required to wait until their “initial appearance” when they are required to plead to the charges.

Amnesty International recommended to the Registrar the creation of a system of duty counsel, possibly using local lawyers, with proper training who would represent detainees, at least at the preliminary appearance, to ensure their rights were being protected until assignment of defense counsel. Such a procedure could have prevented many of the problems faced by Esdras Twagirimana (see below, section 10). Amnesty International has been informed that the Registry is now considering introducing a duty counsel system. The organization welcomes this recent development though there is no information yet on how this will function and whether it will adequately protect the rights of detainees.

The OTP also has a responsibility to ensure that detainees are brought before a judge without delay and not wait until their “initial appearance” under Rule 62. The OTP could ensure fulfilment of this responsibility by incorporating in a request for a Rule 40 *bis* or other order for transfer the requirement that the suspect or accused be brought before a judge immediately after transfer to Arusha.

**All detainees should be brought before a judge without delay (in the first days) after transfer to Arusha and a system of duty counsel should be created so that the rights of detainees are protected pending the assignment of defence counsel.**

## 7. DELAYS IN INDICTING SUSPECTS

Any person arrested on suspicion of having committed a crime has a right to be informed promptly of any charges against him or her. At the Tribunal, the OTP prepares an indictment on the basis of evidence it has gathered and presents the draft indictment to a judge for confirmation. In some cases judges have refused to confirm some charges for lack of evidence. Unreasonable delays in confirming indictments against individuals arrested contravene the guarantees established in the Statute, the Rules of Procedure and international law. Such guarantees also help to ensure that there are good reasons to keep a person in detention.

Indictments were confirmed in most cases prior to the arrest and transfer of individuals to the Tribunal. However, suspects transferred to the Tribunal under Rule 40 *bis* orders were held in detention in most cases for 90 days before indictments against them were confirmed.

- ◆ There were very long delays in indicting five of those arrested in Nairobi on 18 July 1997 during the “NAKI” operation. Pauline Nyiramasuhuko and her son, Arsène Shalom Ntahobali, were the only ones indicted by the Tribunal at the time of their arrest. The other five, Jean Kambanda, Sylvain Nsabimana, Hassan Ngeze, Gratien Kabiligi and Aloys Ntabakuze, were arrested as suspects on the authority of orders of transfer and provisional detention issued by Tribunal judges under Rule 40 *bis*. On two occasions the prosecution requested their Rule 40 *bis* detention orders to be extended for 30 days each time and this request was granted. Each application for extension of the Rule 40 *bis* detention orders set out the same basis for the request: complexity of the investigations; difficulty in conducting investigations in Rwanda; necessity to analyze and assess all materials seized during the suspect’s arrest; the necessity to analyze the involvement and role of the suspect in the events in Rwanda in 1994; the need to amend existing indictments in order to join the suspect with other accused. In almost every case the judges accepted the prosecution’s contentions and extended the detention orders for 30 days.

In almost all the “NAKI” cases the indictments were confirmed at the very end of the 90 day detention period permitted by Rule 40 *bis*, and in at least one case a few hours before the expiry of this period. In confirming the indictment against Jean Kambanda, Judge Yakov Ostrovsky noted that it is “unacceptable that this indictment was filed on 15 October 1997, a day before expiry of the suspect’s detention under Rule 40 *bis* (G) on 16 October 1997 as ordered by Judge Navanethem Pillay on 16 September 1997”. Judge Ostrovsky also declared “that such late submission of indictment is incompatible with the due process and the

interests of justice and is an irresponsible conduct of the Office of the Prosecutor”<sup>23</sup>.

- ◆ In the case of Georges Ruggiu, the final period of detention was extended for 20 days after the defence counsel challenged the request by the Prosecutor on 15 September 1997 for the provisional detention order to be extended for a further 30 days. Judge Pillay refused the defence counsel’s submission that the suspect should be released and ordered the detention of Ruggiu until 11 October 1997. The indictment against Ruggiu was confirmed by Judge Aspegren on 9 October 1997 and he made his “initial appearance” on 24 October 1997.
- ◆ The Prosecutor filed a request for the extension of the detention of Samuel Imanishimwe, who had been arrested in Nairobi on 11 August 1997 and detained under a Rule 40 *bis* order issued by Judge Kama on 22 July 1997. On 8 September 1997, Judge Pillay accepted defence counsel’s contention that the possibility of joining the suspect with other accused should not be an obstacle for the preparation and service of the indictment. Nevertheless, the order of detention of Imanishimwe was extended for 30 days on the basis that the other reasons advanced by the Prosecutor warranted such an extension. The indictment against Samuel Imanishimwe was confirmed on 10 October 1997 and he made his “initial appearance” on 27 November 1997.
- ◆ Gratien Kabiligi, who was arrested during the “NAKI” operation on 18 July 1997 and transferred the same day to the Tribunal, made appearances in August and September 1997 when the Prosecutor requested his detention order to be extended. The indictment against him was confirmed during October 1997 but he did not make his “initial appearance” before a Trial Chamber, under Rule 62, until 17 February 1998, seven months after he was received into the custody of the Tribunal’s Detention Unit.

The complexities of carrying out investigations are recognized. Nevertheless, if the prosecution deems it necessary to take suspects into custody, it should seek to have indictments confirmed against them without undue delay. This is a requirement not only of the Rules of Procedure but also of international law. Rule 62 of the Rules of Procedure requires that “the accused shall be brought before a Trial Chamber without delay, and shall be formally charged”. The provision in Rule 62 is in keeping with Article 20(4)(a) of the Statute of the Tribunal which requires an accused:

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<sup>23</sup>*The Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23, Decision to Confirm the Indictment, 16 October 1997.

“To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her”.

Article 9(2) of the ICCPR states that:

“Anyone who is arrested ... shall be promptly informed of any charges against him”.

Principle 10 of the Body of Principles is in similar terms. Article 14(3)(a) of the ICCPR requires that a person be “informed promptly ... of the nature and cause of the charges against him”.

In interpreting Article 14(3)(a) of the ICCPR the Human Rights Committee has stated:

“In the opinion of the Committee this right must arise when in the course of an investigation a court or an authority of prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such”.<sup>24</sup>

**The prosecution should confirm indictments against suspects detained under provisional detention orders without undue delay.**

## **8. DELAYS IN HEARING MOTIONS**

The Rules of Procedure allow the prosecution and defence to request a Trial Chamber for orders on various issues including the release of detainees, witness protection, disclosure of evidence or the taking of evidence through conference calls. Some motions, such as those for protection of witnesses, may need an urgent decision by the Trial Chamber. Most, however, while not requiring urgent response, should be heard within a reasonable time to enable the prosecution or defence to prepare its case and avoid delay in the trial proceedings. The Tribunal had no procedure for the setting of dates for motions which are filed with the Registrar’s office to be heard. This caused considerable delays, especially with urgent motions.

It appears that delays in the hearing of motions have been reduced since the resumption of proceedings in February 1998, after the judges returned from recess. Most of the motions heard during February and March had been filed at the beginning of the year. In a few instances, motions may have been heard by the judges shortly after being filed. Amnesty International was informed recently that two days per week

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<sup>24</sup>General Comment No. 13, para. 8, UN Doc. CCPR/C/21/Add.3.

(Mondays and Fridays) have been set aside for the hearing of motions and that a Directive for Court Management to improve overall court management is under review by the judges. The appointment of staff with previous experience of court management is also expected to reduce delays. Amnesty International hopes that these changes will result in motions being heard without unnecessary delay.

### **8.1 Urgent protection of witnesses in former Zaire - Rutaganda case**

An extremely urgent motion filed by the defence counsel for the protection of witnesses in the case of Georges Rutaganda, was heard by the court almost three weeks after it was filed. Defence counsel filed the urgent motion on 17 February 1997 requesting that the deposition of 16 defence witnesses be taken urgently in writing or by video-conferencing as the defence was of the opinion that the witnesses were living in precarious security conditions in Tingi-Tingi refugee camp in eastern Zaire. The urgency of the application became a moot point when the Tingi-Tingi refugee camp was attacked on 2 March 1997 and as a result of the attack, the defence was no longer able to locate the witnesses. The application was heard on 6 March 1997. The defence submitted that the delay in examining its request constituted a violation of the rights of the accused to a fair trial, particularly rights allowing him to call defence and alibi witnesses. Whilst the Tribunal in its decision expressed “regrets that the extremely urgent motion filed by the Defence was not transmitted to it in sufficient time by the Registry”, it provided no guidance to the Registry as to how urgent motions should be dealt with in the future.<sup>25</sup> The Tribunal also failed to address the defence’s contention that the delay in hearing the application affected the accused’s right to a fair trial.

### **8.2 Delays in *habeas corpus* motions of Jean Bosco Barayagwiza and Laurent Semanza**

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<sup>25</sup>*The Prosecutor v. Georges Anderson Nderumbumwe Rutaganda*, Case No. ICTR-96-3-T, Decision on the Extremely Urgent Request Made by the Defence for the taking of a Teleconference Deposition, 6 March 1997.

International law allows detainees to challenge the lawfulness of their detention and to request the court to order their release if their detention is found to be unlawful.<sup>26</sup> The Rules of Procedure allow a detainee who is being detained under the authority of a Rule 40 *bis* detention order to bring an application challenging the provisional detention and requesting release.<sup>27</sup> Applications for release filed by the lawyers of Jean Bosco Barayagwiza and Laurent Semanza were never heard at all by the Tribunal.

Barayagwiza and Semanza were arrested by the Cameroonian authorities on 27 March 1996 suspected of having committed genocide and crimes against humanity in Rwanda in 1994. They were held together with Théoneste Bagosora, André Ntagerura, Ferdinand Nahimana and Anatole Nsengiyumva, who were transferred to Arusha on 23 January 1997 after much delay by the Cameroonian authorities. At that time the transfer of Barayagwiza and Semanza was not requested by the Tribunal. Subsequently, on 24 February 1997, the Prosecutor requested the Tribunal to issue orders for the transfer and provisional detention of Barayagwiza and Semanza, under Rule 40 *bis* and on 3 March 1997 the orders were issued by Judge Lennart Aspegren.<sup>28</sup> From that day onwards and once the orders were transmitted to the Cameroonian Government, Barayagwiza and Semanza were held in detention in Cameroon under the terms of an order of the Tribunal.

On 29 September 1997 legal counsel acting for Barayagwiza and Semanza filed motions at the Tribunal requesting orders for *habeas corpus*, for the two suspects to be produced before the Tribunal, and for their immediate release from custody in Yaounde.<sup>29</sup>

<sup>26</sup>**Article 9(4) of the ICCPR states:**

“Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is unlawful”.

**Principle 32 of the Body of Principles states:**

“A detained person or his counsel shall be entitled at any time to take proceedings ... before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.”

**This Principle also states:**

“The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means”.

<sup>27</sup>Rule 40 *bis* (K).

<sup>28</sup>*The Prosecutor v. Jean Bosco Barayagwiza*, Case No. ICTR-97-19-DP, Order for Transfer and Provisional Detention (Rule 40 BIS), 3 March 1997; *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-DP, Order for Transfer and Provisional Detention (Rule 40 BIS), 3 March 1997.

<sup>29</sup>*The Prosecutor v. Jean Bosco Barayagwiza*, Case No. ICTR-97-19-DP, Extremely Urgent Motion by the Counsel for the Suspect for Orders for Immediate Release of Jean Bosco Barayagwiza.



Attached to the motion of Barayagwiza is a letter written by him on 20 August 1997 to the Chief Prosecutor (*sic*) of the Tribunal and copied to the Prosecutor in the Hague in which he indicates that he had written several letters complaining about his continued detention and that these letters had remained unanswered. A response to Barayagwiza's legal counsel by the President of the Tribunal dated 8 September 1997 expresses concern at the delay in indicting the suspect and indicates that if a motion is filed, it will be "referred to one of the Tribunal's Chambers for consideration".

By the end of October 1997, almost one month after the motions were filed and six months after their detention without charge, the *habeas corpus* applications had not been referred to a Trial Chamber for consideration. Instead, on 23 October 1997 indictments against Barayagwiza and Semanza were confirmed by Judge Lennart Aspegren.<sup>30</sup> The indictments were served on the accused in Cameroon and they were subsequently transferred on 20 November 1997 to Arusha. The confirmation of the indictment and the transfer of Barayagwiza and Semanza meant that the motions filed by them became moot and therefore did not require consideration by the judges.

The UN Commission on Human Rights and its Sub-Commission on Prevention of Discrimination and Protection of Minorities have called on all states "to establish a procedure such as *habeas corpus* by which anyone who is deprived of his or her liberty by arrest or detention shall be entitled to institute proceedings before a court, in order that that court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is found to be unlawful".<sup>31</sup>

The Registry informed Amnesty International that it was the judges who had not set a date for hearing of the motions. The judges were apparently unsure whether the Tribunal had jurisdiction to hear the motions. This uncertainty seemed to be the reason for the delay. It is inappropriate for judges only to consider the issue of jurisdiction informally, in the corridors of the Tribunal, instead of hearing the motion as a matter of urgency. The issue of jurisdiction could have been resolved during the hearing. In national courts such applications are heard urgently, often in the middle of the night or during weekends if necessary. The failure of the Tribunal to hear the *habeas corpus* motion "without delay" undermines the guarantee in Article 9(4) of the ICCPR for detainees to challenge the lawfulness of their detention.

### **8.3 Reform of procedures**

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<sup>30</sup>*Ibid.*, Decision Confirming the Indictment, 23 October 1997.

<sup>31</sup>Resolution 1992/35 and Resolution 1991/15, respectively.

Amnesty International recommends that the Rules of Procedure should set out clear time periods for the hearing of motions with an accelerated procedure for urgent motions. The judges should direct the Registrar to inform them immediately of all motions filed by witnesses, suspects, accused or other persons. One method would be for one afternoon every week to be set aside for the hearing of motions. An urgent motion should be set down for hearing no later than the first motion day after it is filed, provided that there is sufficient time (for example, at least 3 days) between the date of filing and the first motion day to allow the defence counsel to travel to Arusha. Some might need to be heard even faster and may require linking up with the defence counsel through telephone conferencing facilities. Alternatively, urgent motions should be set down for hearing within three days of filing, and an interim order could be issued by a Judge of a Trial Chamber with a later date being set for the interim order to be confirmed by the Trial Chamber. There should be a requirement for ordinary motions to be filed by a set day of the week, for responses to be filed with sufficient time for the other side to consider the response, (for example at least 7 days prior to the date of hearing) and for the date of hearing to be, for example, the second motion day from the date on which it is filed, thus allowing both prosecution and defence counsel at least two weeks to prepare.

Once the Rules of Procedure require this time frame, both prosecution and defence counsel would be required to abide by these rules and delays not only in consideration of the motions, but also in regard to the trials themselves would be reduced.

Judges would also know at least two weeks in advance what motions were to be heard by them. In the interim, awaiting the amendment of the Rules of Procedure, this suggestion should be implemented through a notice from the Registrar so that it comes into effect immediately.

**Amnesty International recommends that clear time periods for the hearing of motions should be set out, with an accelerated procedure for urgent motions.**

## **9. DETENTION OF JEAN KAMBANDA OUTSIDE THE DETENTION UNIT OF TRIBUNAL**

### **9.1 Whereabouts of Jean Kambanda**

Jean Kambanda, Prime Minister of the Interim Government of Rwanda during the genocide in 1994, was arrested during the “NAKI” operation in Nairobi on 18 July 1997, under the authority of a Rule 40 *bis* order issued by the Tribunal on 16 July 1997. All the documents at the Tribunal create the picture that Kambanda was transferred after his arrest to the Detention Unit of the Tribunal in Arusha and that he is currently held there. However, since his arrest he has been detained, except for a few days, outside the Detention Unit of the Tribunal. Amnesty International is concerned that the holding of

Kambanda in an unrecognized place of detention contravenes public court orders, the Rules of Procedure and international standards.

Under the terms of the Rule 40 *bis* order, the Tribunal granted “the request submitted by the Prosecutor and, order[ed] that, as soon as possible after his arrest, Jean Kambanda be transferred to the *Detention Facility of the Tribunal*, and be placed in provisional detention for a maximum period of thirty days from the day after his transfer”.<sup>32</sup> Jean Kambanda was transferred to Arusha on the day of his arrest. Upon the request of the Prosecutor, the provisional detention order was extended twice by the Tribunal for periods of 30 days. In the request for an order extending the provisional detention dated 12 August 1997, the Prosecutor, Judge Louise Arbour, requested the Tribunal to “Decide that the needs of the present investigation warrant the extension of the detention of Jean Kambanda at the *detention unit of the Tribunal*”<sup>33</sup> [emphasis added]. In support of the request by the Prosecutor for the extension of the provisional detention of Jean Kambanda, Oyvind H. Olsen, Commander of Investigations at the OTP submitted an affidavit in which he confirmed that “On the same date as mentioned in paragraph 2 above, this suspect, following his provisional arrest, was transferred to and detained in Arusha, Tanzania, in compliance with an order dated 16 July 1997 made by the President of the Tribunal, the Honorable Justice Laity Kama, under Rule 40 *bis* for Transfer and Provisional detention”.<sup>34</sup>

At the expiry of the 90 days detention permitted under Rule 40 *bis*, the indictment against Jean Kambanda was confirmed by Judge Ostrovsky on 15 October 1997, hours before the final detention order was due to expire. As stated above, Judge Ostrovsky severely criticized the OTP for the delay in bringing the indictment before a judge for confirmation. In confirming the indictment, Judge Ostrovsky took note “of the Prosecutor’s prayer that a warrant of arrest be issued against the said accused, who is currently detained in the *Tribunal’s Detention Unit*”<sup>35</sup> [emphasis added].

The detention of Jean Kambanda in the Detention Unit would have been in accordance with not only the Rule 40 *bis* order issued by the Tribunal but also with the

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<sup>32</sup>The Prosecutor v. Jean Kambanda, Case No. ICTR-97-23-DP, Order for Transfer and Provisional Detention (in accordance with Rule 40 bis of the Rules, 16 July 1997).

<sup>33</sup>*Ibid.*, Request for an order for an Extension of a Provisional Detention Order under Article 40 bis of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda.

<sup>34</sup>*Ibid.*, Affidavit of Oyvind Olsen in support of an Application by the Prosecutor under Rule 40 bis(F) to extend detention for a further period of 30 days.

<sup>35</sup>See *supra* note 22.

provisions of Rule 40 *bis*(A) which permits the Prosecutor to transmit “a request for the transfer to and provisional detention of a suspect in the premises of the detention unit of the Tribunal”. It is the general understanding that there is only one Detention Unit of the Tribunal, located at the official prison outside Arusha, initially a section of that prison, and currently a specially constructed building attached to that prison.

However, contrary to the picture created by the orders of the Tribunal, the request of the Prosecutor and the affidavit of Oyvind Olsen, Jean Kambanda has not been held, except for a few days from 18 July 1997, at the Detention Unit of the Tribunal. According to information available, Jean Kambanda was detained at a safe house upon his arrival in Arusha. He was later transferred to the Detention Unit of the Tribunal where he was detained for a few days when the staff of the OTP feared for his safety. Thereafter he was removed from the Detention Unit and has been held at an unknown safe house. While the safe house may be a facility provided by the host country, it has been made clear by Tribunal officials that it was necessary that the public not know where Jean Kambanda is being detained.

## **9.2 Why international standards demand only recognized places of detention**

Amnesty International is concerned that the manner in which Jean Kambanda was held in an unofficial place of detention contravened court orders and supporting documents, the Rules of Procedure and international standards. It is an accepted principle of international law that detainees should be held only in officially recognized places of detention.

The Human Rights Committee in its General Comment on Article 7 of the ICCPR stated:

“To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention...”<sup>36</sup>

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<sup>36</sup>General Comment No. 20, para. 11, UN Doc. CCPR/C/21/Add.6.

These international standards are unambiguous on the question of recognized places of detention because it is seen as a most basic safeguard against arbitrary detention, “disappearance”, ill-treatment and being compelled to confess.<sup>37</sup> It helps to prevent undue advantage being taken of detainees, who are considered under international law and practice to be inherently vulnerable because they are under the total control of the state (or in this case an international authority). It allows detainees to be visited by relatives and others, including lawyers, from the outside world. It is clear that failing to respect such a safeguard cannot be justified in individual cases by a faith in the sense of responsibility of the prosecution and guards, that no harm will come to the detainee. The rule applies at all times.

There may have been practical reasons for the OTP wishing to hold Jean Kambanda in a safe house. If there were security risks there are other ways consistent with the Rules of Procedure to protect him. Amnesty International is concerned that a dangerous precedent has been set for national authorities also to argue that they can overlook these international standards in some cases.

Amnesty International was informed that a motion had been filed requesting the Tribunal to provide directives on the detention of Jean Kambanda outside the Detention Unit of the Tribunal. The Registrar has indicated that he was not aware of any such motion being filed. Just as in the case of Tihomir Blaskic before the ICTY, there could have been an open and legitimate process under the Rules of Procedure for the judges to authorize a change in Jean Kambanda’s place of detention. Such a place of detention would have to be an officially recognized place of detention.

As at the end of March 1998, Jean Kambanda had not made an “initial appearance” under Rule 62 and has yet to plead to the charges against him.

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<sup>37</sup> **Article 10 of the Declaration on the Protection of All Persons from Enforced Disappearance states:**

“Any person deprived of liberty shall be held in an officially recognized place of detention ...”

**Principle 6 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions states that:**

“Governments shall ensure that persons deprived of their liberty are held in officially recognized places of custody, ...”

**Principle 16(1) of the Body of Principles requires that:**

“Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody”.

**The Tribunal should hold detainees only in officially recognized places of detention.**

### **9.3 Appointment of counsel as “friend of the Tribunal”**

The risks associated with holding a detainee in an unacknowledged place of detention were exacerbated in this case because Jean Kambanda had no legal counsel to advise him throughout the time he was being questioned by the prosecution. Amnesty International is aware that Jean Kambanda waived his right to counsel in a letter dated 11 August 1997 and that under Rule 42(B) this enabled the Prosecutor to question him without the presence of counsel. Nevertheless, the charges he might face are so serious it is particularly important to ensure that justice is both done and seen to be done. Amnesty International believes that the judges should have considered appointing legal counsel, as a “friend of the Tribunal” who would act on behalf of the judges, to provide Jean Kambanda with at least some independent advice on the charges against him and to ensure that no undue advantage was taken of him by the Prosecution.

**The Tribunal should consider appointing legal counsel as “friend of the Tribunal” for detainees who waive their right to counsel.**

## **10. UNLAWFUL DETENTION OF ESDRAS TWAGIRIMANA**

Esdras Twagirimana was arrested during the “NAKI” operation after he was mistaken for an accused wanted by the Tribunal. He was unlawfully held in detention for almost two months after the mistake became clear. The detention of Esdras Twagirimana became unlawful when he was not released within a reasonable time after the mistake was discovered. Throughout his detention in Arusha he was denied access to counsel and was not brought before the judges so that he could challenge his unlawful detention.

After being arrested in Nairobi on 18 July 1997 together with other suspects, Esdras Twagirimana was transferred the same day to the detention facility of the Tribunal at Arusha. Within at least three days of his arrival in Arusha it was discovered that he had been wrongly arrested after having been mistaken for another suspect, Arsène Shalom Ntahobali (who was subsequently arrested). Nevertheless, he was detained in Arusha until 20 September 1997, when he was released and returned to Nairobi. He was immediately detained without charge by the Kenyan authorities. He was released uncharged, during October. Amnesty International received no written response to a letter to the President of the Tribunal and the Deputy Prosecutor expressing concern at his unlawful detention and requesting further information.

### **10.1 Denial of access to legal counsel**

During his entire period of detention, Esdras Twagirimana was denied access to a lawyer. Amnesty International understands that this was despite repeated requests for access to a lawyer, including in writing to the President of the Tribunal, and even after a lawyer had agreed to act for him free of charge. Amnesty International delegates were informed by the Registrar, Agwu Okali, that as Esdras Twagirimana was neither a suspect nor an accused and had no charge to answer, it was not necessary for him to have the assistance of legal counsel. This explanation does not take into account the provisions of Rule 40 *bis* (J) of the Rules of Procedure of the Tribunal and of international law which are designed to protect the rights of all detainees, not only suspects or accused persons. The Registrar also failed to comply with Rule 45 *bis* which makes the requirement of assignment of defense counsel to indigent suspects or accused applicable to “any person detained under the authority of the Tribunal”.

The denial of access to legal counsel is contrary to Article 14(3)(d) of the ICCPR which requires that legal assistance be assigned “in any case where the interests of justice so require”. This provision is repeated in Article 20(4)(d) of the Statute of the Tribunal. The Human Rights Committee in its General Comment on Article 14 has stated that:

“...state parties fail to recognize that article 14 applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law”.<sup>38</sup>

Legal counsel should have been available to Esdras Twagirimana not only to ensure that he was brought promptly before the Tribunal to determine the legality of his detention, but also to advise him on any recourse he may have regarding his unlawful detention. The right to counsel cannot be suspended or restricted save in exceptional circumstances.<sup>39</sup> Amnesty International is not aware of any cogent or lawful reason for denying Esdras Twagirimana access to legal counsel.

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<sup>38</sup>General Comment No. 13, para. 2, UN Doc. CCPR/C/21/Add.3.

<sup>39</sup>**Principle 17(1) of the Body of Principles states that:**

“A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after his arrest and shall be provided with reasonable facilities for exercising it”.

**Principle 18(1) provides:**

“A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel”.

**Principle 18(3) stipulates:**

“The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law

## **10.2 Failure to bring him before a judge**

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or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order”.



If Esdras Twagirimana had been brought before a judge without delay, as required by Rule 40 *bis* (J), the judge could have put an end to his unlawful detention and given directions to the Registrar regarding steps which should be taken to protect his rights. The right of a detainee to challenge the lawfulness of his detention is guaranteed by Article 9(4) of the ICCPR and the Human Rights Committee has stated that this right is applicable to “all persons deprived of their liberty by arrest or detention”.<sup>40</sup>

Esdras Twagirimana was denied the right to challenge the lawfulness of his detention by the failure of the Registrar or the OTP to bring him before a judge. Although it is the primary responsibility of the Registrar in such a case to ensure that detainees are brought before a judge, the OTP could have ensured his appearance before a judge by making a formal request to the Registrar, especially as it was due to an error on the part of the investigators of the OTP that Esdras Twagirimana found himself in unlawful detention.

It is of concern to Amnesty International that Esdras Twagirimana was unlawfully held in detention for two months after the mistake was revealed, while his status either to remain in Tanzania or to return to Kenya was being sorted out by the Registrar. Esdras Twagirimana should have been released immediately after it became known that he was wrongly arrested and arrangements should have been made for him to be accommodated in Arusha, including with adequate security arrangements if that was required by the Tanzanian authorities, whilst negotiations with the Tanzanian and Kenyan authorities and the UN High Commissioner for Refugees were proceeding.

Furthermore, Esdras Twagirimana was returned to Nairobi without adequate arrangements being made to ensure his safety and liberty. Despite the Registrar having been informed by the Kenyan Attorney-General of the possibility of him being arrested on arrival in Nairobi and despite a well-documented pattern of arbitrary arrests of Rwandese and other refugees by Kenyan police, adequate measures were not taken to ensure that Esdras Twagirimana was not arrested and detained or that he would receive any protection he was entitled to as a refugee on his return to Kenya.

### **10.3 Right to compensation**

Amnesty International has been informed that Esdras Twagirimana was given US\$1,500 by the Registrar on his release. Amnesty International is not aware of the reasons for such payment and whether it was intended as an *ex gratia* payment or as compensation for his unlawful detention. However, the Registrar has clarified that the money given to Esdras Twagirimana was not compensation and referred to the case of Gora Lajic in the

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<sup>40</sup>General Comment No. 8, para. 1, UN Doc. CCPR/C/21/Add.1.

ICTY where legal counsel for the UN indicated that compensation by the UN in these circumstances was out of the question.

*While Article 9(5) of the ICCPR guarantees an enforceable right to compensation, there is no express provision in the Rules of Procedure to enable persons who have been unlawfully arrested or detained to file claims for compensation. This omission may prevent Esdras Twagirimana from obtaining compensation as he is precluded from filing a claim for compensation in the Tanzanian courts as the Agreement between the UN and the United Republic of Tanzania provides immunity to the officials and staff of the Tribunal from legal proceedings before the national courts.<sup>41</sup> Amnesty International would recommend that the Rules of Procedure be amended to comply with the provisions of Article 9(5) of the ICCPR.*

*The Rules of Procedure should be amended to allow persons who are unlawfully detained to file claims for compensation with the Tribunal.*

## **11. ASSIGNMENT OF DEFENCE COUNSEL**

*Amnesty International welcomes improvements in the system established to assign defence counsel and notes that all accused have been provided with defence counsel, except those who have waived their right to counsel or who have decided to engage counsel at their own cost. However, there are still concerns that the system of assigning defence counsel has changed several times and has aspects*

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<sup>41</sup>Agreement between the United Nations and the United Republic of Tanzania Concerning the Headquarters of the International Tribunal for Rwanda, 31 August 1995, Annex: UN 96-25167(E).

that appear to rely more on the subjective judgment of individuals than on the application of transparent, clear and rational guidelines. Originally, the accused could choose counsel from the entire list of lawyers who have requested to defend accused. Then the accused was given no choice and the Registrar assigned a counsel of his choice. Later, a list of six counsel selected by the Registrar was being presented to the accused to choose from. There seem to be no clear criteria for selecting the six counsel and no explanation was advanced as to how the selection is made.

While international law does not guarantee the accused the right to choose defence counsel where they are indigent, it is good practice to allow the accused the widest possible choice in order to ensure that the accused has trust in his or her counsel and that representation can be effective. In addition, Amnesty International believes it would be appropriate to explain to the accused the basis on which the choice was made. There must be trust and confidence between a lawyer and an accused. The seriousness of the offences and the possibility of being sentenced to lengthy terms of imprisonment, including life, should require that the accused be entitled to the lawyer of their choice. However, it is also crucial that appointed counsel have the experience and competence commensurate with the nature of the offence of which their client stands accused. The practice in the ICTY is that accused are presented with the entire list of defence counsel from which they choose their own counsel and Amnesty International recommends that a similar practice prevails at the Tribunal.

*The accused should be given the widest possible choice of defence counsel.*

## **12. PUBLIC INFORMATION: CONFUSED AND UNINFORMED**

The Tribunal will only attract the political and financial support of states if it is able to publicize its activities effectively. The obligation to provide a public hearing should also extend to ensuring the public is able to understand and scrutinise the work of the Tribunal by full access to all public documents. A UN-created body has a duty to be open and transparent. While regular press releases and the newsletter of the Tribunal provide useful information, the lack of a strategy for the dissemination of information prevents the wider distribution of information about the Tribunal and the proceedings before it. The lack of adequate facilities for the media discourages some journalists from attending trials in Arusha.

A press release may contain brief information and may satisfy the needs of most journalists. However, there is a whole constituency consisting of non-governmental organizations, governments, institutes, lawyers and academics who would wish to follow the trials before the Tribunal more closely, analyze the proceedings and write commentaries and articles for journals.

In Arusha the Amnesty International delegates sought public documents pertaining to proceedings before the two Chambers of the Tribunal, but despite repeated promises, they received only a few documents which proved inadequate to understand the proceedings. Amnesty International was also told that there is no system for systematically and regularly sending public court documents to NGOs, academics and journalists who request these documents. There was also no system in operation at the Tribunal whereby a journalist or a member of the public could readily obtain copies of public documents, except for a few public documents which could be picked up here and there. Even staff at the OTP in Kigali complained that they did not receive documents regularly from Arusha.

At the very least public information should be accurate. In the case of Hassan Ngeze the Judge had refused to confirm the first count of the indictment relating to genocide, yet the indictment which was being publicly distributed in November 1997 as the confirmed indictment was wrong as it included the genocide charge. The impression created was that this was the confirmed indictment, when in fact it was the draft presented by the OTP to the judge for confirmation.

Amnesty International is very concerned at the inadequate protection of confidential information. Amnesty International delegates were handed by a member of

the Tribunal staff a copy of the urgent motion requesting a teleconference deposition in the Rutaganda case which included the names of the 16 witnesses. This was in direct contravention of the order of the Trial Chamber “that the names or other identifying information on the sixteen witnesses contained in the Extremely Urgent Request made by the Defence for a Teleconference Deposition be sealed immediately and that their disclosure to the public, to the media or to anyone else be prohibited”.<sup>42</sup>

The second OIOS report found that “copies of indictments and other public documents are not easily available to the press” and criticized the lack of a press room and other basic facilities for ensuring regular media coverage. The report recommended that the post of Chief of Press and Public Affairs be filled and recommended that “the Registry request the press officers at both Headquarters and the Tribunal for the former Yugoslavia to assist in defining the necessary press experience and skills and in the selection of qualified staff.”<sup>43</sup>

**The Tribunal should urgently fill the vacant position of Chief of Information with a competent and qualified person and develop a strategy for external dissemination of information. Procedures should be urgently implemented to ensure security and confidentiality and accuracy of information released.**

### **13. STATE COOPERATION**

Cooperation by states is essential to the effective functioning of the Tribunal. Despite the failure of most states, especially African states, to adopt legislation, the cooperation between the Tribunal and states, especially African states where suspects have taken refuge, increased during 1997. Suspects sought by the Tribunal have been transferred to the Tribunal’s jurisdiction by Cameroon, Kenya, Zambia, Switzerland and Belgium. Further offers of cooperation in handing over suspects have been received from Namibia and some West African states. However, despite this cooperation, there remain two issues which Amnesty believes requires discussions with states, especially African states, at the highest level by judges and other officials in the Tribunal and UN officials.

#### **13.1 Relocation of witnesses**

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<sup>42</sup>The Prosecutor v. George Rutaganda, Case No. ICTR-96-3-T, Decision on the defence motion for orders to expunge the names of certain defence witnesses, 30 September 1997.

<sup>43</sup>See OIOS report, *supra* note 9, at 15 & 18.

To date, not a single state is known to have offered to allow witnesses who testify before the Tribunal to be relocated to their countries. While most of the prosecution witnesses from Rwanda have so far chosen to return to Rwanda, there may be witnesses in the future who would be at risk if they returned to Rwanda. Given the current political climate in Rwanda with increasing insecurity, armed conflict and daily killings of unarmed civilians by government troops and armed opposition groups, the safety and security of witnesses from Rwanda, especially defence witnesses, may require that they be relocated outside Rwanda.<sup>44</sup>

Urgent negotiations are required to encourage African states to agree to host witnesses who fear being killed or otherwise harmed if they return to Rwanda. Such negotiations may require not only the President of the Tribunal and the President of the Appeals Chamber to be involved, but may also require the assistance of the UN and OAU Secretaries-General.

A separate but related issue concerns the ability of defence witnesses to travel unhindered to testify at the Tribunal and to return to the country where they are resident. Most defence witnesses are currently resident illegally in mainly African countries. Their status and continued residence in these countries is uncertain as has been demonstrated by the arrest and detention in September 1997 and on several previous occasions of large numbers of Rwandese nationals in Nairobi. Furthermore, the travel documents of many Rwandese outside Rwanda who have chosen not to return have become invalid. There have also been mass expulsions back to Rwanda of Rwandese living in African countries, including Gabon and Democratic Republic of Congo.

Unless urgent arrangements are made by the Tribunal to ensure that witnesses identified by the defence are provided with travel documents and their status is clarified allowing them to return to the country in which they are currently resident or to another country where they can be safe, the defence in the current trials before the Tribunal may not be able to present witnesses to testify on behalf of the accused. In that event the trials may not be able to fulfil the right of the accused set out in Article 14(3)(e) of the ICCPR "to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

**The Tribunal, the UN and the OAU should encourage African states to allow witnesses who are at risk if they return to Rwanda to be the relocated to their territories.**

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<sup>44</sup>In a report published on 19 December 1997, *Rwanda - Civilians trapped in armed conflict* (AI Index: AFR 47/37/97), Amnesty International documented the killings of large numbers of unarmed civilians by soldiers of the Rwandese Patriotic Army and by armed opposition groups.

**The Tribunal should make urgent arrangements to clarify the status of defence witnesses resident outside Rwanda and provide them with travel documents to enable them to testify.**

### **13.2 Prison facilities**

The Statute of the Tribunal states in Article 26 that:

*“Imprisonment shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons, ....”*

At present six countries have indicated their willingness to provide prison facilities for persons convicted by the Tribunal: Austria, Belgium, Denmark, Norway, Sweden and Switzerland. No African state has yet put its name forward. The prisons in Rwanda are currently filled beyond capacity with more than 130,000 detainees who are suspected of having participated in the genocide. The conditions in these prisons amount to cruel, inhuman and degrading treatment and have led to the deaths of many detainees. In its September 1997 report, *Rwanda: Ending the silence* (AI Index: 47/32/97), Amnesty International stated that: “Despite many promises on the part of the government, little effective action has been taken to improve these life-threatening conditions...”.

The Tribunal should not contemplate sending convicted persons to Rwanda to serve their term of imprisonment under current circumstances. Furthermore, in the current political climate with little sign of reconciliation and strong feelings against those accused of participating in the genocide and other crimes against humanity committed in Rwanda in 1994, the safety and security of persons convicted by the Tribunal cannot be assured in Rwanda.

Amnesty International would urge the President of the Tribunal and the President of the Appeal Chamber to enter into direct discussions with governments, especially African governments, who are able to provide facilities which conform with international standards for imprisonment, to encourage them to agree to accept persons convicted by the Tribunal. The assistance of the Secretaries-General of the UN and OAU and other officials of these bodies should also be sought.

**The Tribunal should encourage states to accept into their prisons persons convicted by the Tribunal.**

## **14. SUMMARY OF RECOMMENDATIONS**

**Delay in Trials** (see section 3)

The accused indicted by the Tribunal should be assured a trial within a reasonable time without avoidable delays.

**Prosecuting RPF Abuses** (see section 4.2)

Amnesty International urges the OTP not to delay initiating cases concerning RPF abuses.

**Witness Protection** (see section 5)

The Tribunal should recruit persons with experience and expertise in witness protection and urgently develop an effective witness protection program.

The Tribunal should enter into negotiations with the Rwandese Government to change the procedures to better protect witnesses who travel to Arusha.

The Tribunal should be able to relocate to other countries witnesses who are at risk if they return to Rwanda.

Measures should be taken to improve the security of witnesses in Arusha.

Voice and image scrambling equipment should be installed in the court rooms as soon as possible.

The Tribunal should arrange an international workshop on witness protection to help it deal with the challenges facing it.

**Delays in Bringing Detainees Before a Judge** (see section 6)

All detainees should be brought before a judge without delay (in the first few days) after transfer to Arusha and a system of duty counsel should be created so that the rights of detainees are protected pending the assignment of defence counsel.

**Delays in Indicting Suspects** (see section 7)

The prosecution should confirm indictments against suspects detained under provisional detention orders without undue delay.

**Delays in Hearing Motions** (see section 8)

Amnesty International recommends that clear time periods for the hearing of motions should be set out, with an accelerated procedure for urgent motions.

**Detention of Jean Kambanda Outside the Detention Unit of the Tribunal** (see section 9)

The Tribunal should hold detainees only in officially recognized places of detention.

The Tribunal should consider appointing legal counsel as “friend of the Tribunal” for detainees who waive their right to counsel.

**Unlawful Detention of Esdras Twagirimana** (see section 10)

The Rules of Procedure should be amended to allow persons who are unlawfully detained to file claims for compensation with the Tribunal.



**Assignment of Defence Counsel** (see section 11)

The accused should be given the widest possible choice of defence counsel.

**Lack of Public Information: Confused and Uninformed** (see section 12)

The Tribunal should urgently fill the position of Chief of Information with a competent and qualified person and develop a strategy for external dissemination of information. Procedures should be urgently implemented to ensure security and confidentiality and accuracy of information released.

**State Cooperation** (see section 13)

The Tribunal the UN and the OAU should encourage African states to allow witnesses who are at risk if they return to Rwanda to be relocated to their territories.

The Tribunal should make urgent arrangements to clarify the status of defence witnesses resident outside Rwanda and provide them with travel documents to enable them to testify.

The Tribunal should encourage states to accept into their prisons persons convicted by the Tribunal.

## **14.1 Shared responsibility**

Amnesty International urges:

**the Tribunal and UN to:**

Remedy the shortcomings highlighted in this report.

**States, especially African states to:**

- adopt legislation on cooperation with the Tribunal;
- ensure the Tribunal has the necessary political and financial support;
- offer to accept witnesses who may be in need of relocation;
- offer prison facilities for those convicted by the Tribunal.

**The Organization of African Unity to:**

- express political support for the Tribunal through the Assembly of Heads of States and Governments and urge its member states to provide cooperation;
- urge its member states to offer to receive witnesses who require relocation and provide prison facilities for those convicted by the Tribunal.

**The Rwandese Government to:**

- cooperate with the OTP in the investigation and prosecution of human rights abuses committed by members of the RPF;
- change the procedures to better protect witnesses who travel to Arusha, in consultation with the Tribunal;
- allow the relocation to other countries of witnesses who are at risk if they return to Rwanda.