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RE-ESTABLISHING THE RULE OF LAW AND ENCOURAGING GOOD
GOVERNANCE

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I. Introduction

The expression *re-establishing the rule of law* is actually a bit of a misnomer as far as Rwanda and perhaps some other countries are concerned. There cannot be re-establishment of the rule of law where none ever existed. Rwanda became independent in 1962 after a particularly brutal period of Belgian colonization. The rule of law did not feature as a priority of any of its post independence governments. Tyranny and repression were the norm. Rwanda was one of the very first countries in Africa to declare itself a one party state. Opposition parties were banned and all opposition legislators murdered. Hundreds of thousands of citizens were driven to exile. Massive violations of human rights became endemic. The system of administration of justice of Rwanda left a lot to be desired even before the genocide. It was a system largely manned by unqualified people. Judges were appointed on the basis of political patronage. Corruption in the judiciary was rife. In spite of the country's long history of gross human rights abuses, courts had never come to the defence of the victims¹. The courts were neither free nor fair but were rather part and parcel of the dictatorship that reigned over the country during the period from independence in 1962 up to 1994. Impunity had become institutionalised. These massive violations of human rights culminated in the genocide of 1994.

The 1994 genocide was a systematic campaign of mass murder orchestrated by the government of the day. In the course of only 100 days, more than a million innocent men, women and children perished. Tens of thousands more were raped, tortured and maimed for life. Hundreds of thousands, may be more, ordinary people had participated in committing atrocities. At the end of the war and genocide, virtually every single Rwandan had become displaced. Well over three million citizens fled Rwanda and went to exile. All institutions of the state ceased to exist. There was extensive damage to infrastructure as well, as the

¹ For an exhaustive evaluation of the judicial system of Rwanda prior to the genocide, see study **La Place de La Justice et Le Role du Magistrat Dans L' Edification D' Un Etat Democratique** by Odette-Luce Bouvier, Ephrem Gasasira, Emmanuel Hakizimfura, Landrada Mukayiranga, Alphonse Marie Nkubito and Charles Ntagozera. Published by Ministry of justice, Rwanda, 1992.

departing government, military and militia took the trouble to destroy much of what they could not carry with them to exile.

The challenges which faced the government which took over following the war and genocide were immense: These included: stopping atrocities in areas of the country which were still occupied by the genocidal forces; restoring law and order throughout the country; ensuring that there were no revenge killings for the genocide; rebuilding institutions of the state which had ceased to exist with the collapse of the genocidal regime; providing humanitarian assistance to large numbers of internally displaced people; repatriating and resettling millions of refugees, to name but a few.

II. The importance of the rule of law in post-conflict nation building.

The 1994 genocide of Rwanda was made possible, we believe, in part by the culture of impunity for gross violations that gone unpunished and were in fact openly rewarded by the governments of the day since the so-called '1959 Revolution'. Perpetrators of atrocities got to inherit properties of their victims or were rewarded with promotions in public service. Impunity breeds violence. That is why the topic we are discussing at this conference is of crucial importance.

The Government which took over after the genocide decided to make the rule of law the cornerstone of its administration. Only the rule of law offered prospects for peace, national reconciliation, democracy and sustainable development. By dealing with the issue of impunity and facilitating national reconciliation possible, the rule of law makes other efforts at national building in post conflict societies possible. It can be said that the rule of law is the real foundation on which post-conflict reconstruction efforts rest.

Eradicating impunity

Large scale violations of human rights do not just happen. They occur because a conducive environment for their occurrence has been nurtured and cultivated for long periods. Genocide, as well as other grave violations of international humanitarian law, occur in circumstances where there is utter disregard for the law. Such gross violations of human rights are often preceded by institutionalized discrimination and gross abuses of the human rights of the victims. The perpetrators of these crimes are oblivious of the rights of their victims and the legal consequences of their criminal actions. Unfortunately, even the victims in such situations will themselves have come to accept the discrimination and suffering as inevitable. A prime concern of a society

emerging from a situation of genocide or other violations of human rights is how to secure itself and future generations from a recurrence of such catastrophe. In such situations, accountability for genocide is considered a necessary prerequisite for the eradication of the impunity that makes such tragedies possible.

National reconciliation.

Massive violations of human rights, particularly those which are part of a genocide, leave a legacy of deep and lasting scars. The process of healing these scars is particularly difficult where, as in Rwanda, those who mastermind the mass murder of the victims of genocide often find ways to entice or coerce large numbers of ordinary men, women and sometimes even children to participate in committing atrocities. When the conflict is over, victims and perpetrators of genocide are expected to live peacefully side by side and to work together to build a common future, the legacy of bitter divisions notwithstanding. The success of nation building in the aftermath of conflict depends in large measure on the extent to which efforts of national reconciliation have worked. On the other hand, there can be no reconciliation unless and until such a society comes to terms with the past. Justice is a prerequisite for reconciliation.

III. Domestic Prosecutions.

The starting point in addressing the problem of impunity that makes widespread violations of human rights possible is to bring the perpetrators to justice. The Rwanda genocide is unique at least in the sense of the remarkable degree to which extremely large numbers of ordinary people in our society participated in committing atrocities. As a result of this widespread social participation in committing genocide, the issue of accountability for genocide presents particularly difficult questions. As of today, there are approximately 110,000 genocide suspects in detention awaiting trial and this number represents only a fraction of all the people who participated in committing genocide.

The manner in which the prosecution of genocide in Rwanda has been undertaken has been dictated by a variety of considerations: *the demand of the surviving victims of genocide for justice; the necessity for accountability as tool for eradicating the culture of impunity that made the genocide possible; the desire to make the rule of law the corner stone of a new society being built in Rwanda in the aftermath of the genocide and the necessity to fashion a response to the genocide that would consolidate peace, promote reconciliation and facilitate the reconstruction and development of the country.*

In the context of the climate that existed in Rwanda in the aftermath of the genocide, the question of an amnesty for any category of the perpetrators was not politically feasible. It would have been vehemently opposed by survivors and others, and would in any event have been inconsistent with the goals of eradicating impunity and promoting the rule of law and could have led to widespread revenge killings that might have drawn the country into bloodshed again. By the same token, the strict application of the law as it existed in 1994 was out of question. In a situation where hundreds of thousands, perhaps even millions, had participated in mass murder, an attempt to strictly apply the provisions of the Rwanda Penal Code under which the offence of murder carries the death penalty would have rendered the tasks of consolidating peace and facilitating national reconstruction and development impossible and doomed efforts to promote national unity reconciliation

The law² which Rwanda passed in 1996 to pave the way for the prosecution of genocide attempted to address the above considerations by *creating specialized chambers within existing courts to deal exclusively with genocide and related cases, retaining the concept of personal accountability for crimes committed, categorization of suspects according to the degree of responsibility, providing incentives to join a confession and guilty plea program in order to expedite the processing of the caseload awaiting trial and abolition of capital punishment for the majority of the perpetrators of the genocide.*

At the end of the genocide in 1994, Rwanda's system of administration of justice had practically ceased to exist. Most judges, prosecutors and policemen had either died during the genocide or fled the country in its aftermath. Most infrastructure was in ruins. All equipment had either been damaged or looted. The country had to recruit new personnel, train them, rehabilitate infrastructure, provide equipment and pass all legislation necessary before the genocide trials could begin. All this took the better part of two years and the country was able to begin the first trials at the end of 1996.

IV. Gacaca Tribunals.

Since 1994, well over 150 000 thousand people have arrested on charges of genocide and crimes against humanity. Approximately 102 000 of these people remain in custody on these charges. Many of these suspects have been in prison for more than five years.

² Organic Law No. 8/96 of 30 August 1996 on the Organisation of Prosecutions for Offences Constituting the crime of genocide or crimes Against Humanity Committed Since 1 October 1990.

Rwanda has grappled with the problem of justice for genocide for close to seven years now. The Government of Rwanda started out on the premises that justice for genocide should be done in the general context of building a society based on the rule of law and that the existing judicial structures and mechanisms handle the genocide cases. The courts in charge of hearing genocide cases have now been in operation for more than six years. All institutions involved in the processing of genocide cases, notably courts, prosecutors offices and the judicial police, have worked tirelessly over this period. Their productivity has improved over time³. In 1997, they were only able to judge 346 persons. In 1999, the number had risen to around 1500. The number for the year of 2001 is more than 2500. Between 1996 and 2001, existing courts were only able to process the cases of only around 6000 suspects.

In any other situation, the successful conduct of 2500 murder trials in a single year would be an extraordinary achievement. In Rwanda, this is far from satisfactory in light of the very large number of persons awaiting trial. The court system is overwhelmed. Supporting institutions such as the prosecutors offices and police cannot cope. Prisons are overcrowded. The conditions of detention are far from satisfactory for many detainees. Defendants and complainants alike are equally frustrated by the slow pace of justice. The cost of maintaining these prisons takes a disproportionate portion of the national budget. Part of this budget could be put to better use financing social programs.

A good part of the money for supporting prisons comes from the international community, through the International Committee of the Red Cross. This external support will not always be forthcoming. Clearly, the current state of affairs is unsustainable. The classical system of justice has failed to deliver justice.

The problem is not the classical system of justice per se. The problem is that the system was never designed or intended to deal with accountability for crimes of such mass violence. The classical system of courts has been unable to deal with genocide cases because of a number of reasons: there are far too few courts dealing with the cases to have a significant impact; the classical courts are burdened by cumbersome procedures and cannot deal with the large caseload of genocide expeditiously; the speed at which classical courts operate is too slow bearing in mind the very large number of detainees awaiting trial; the wider society does not have an opportunity to participate in judicial processes.

³ Source - LIPRODHOR.

Having considered the current state of affairs over the last three years, Rwanda has now decided to transfer most of the genocide cases to Gacaca tribunals⁴, tribunals inspired by a traditional mechanisms for local dispute resolution .

Gacaca Tribunals are courts composed of persons of integrity from the community who will judge the bulk of the genocide caseload. It t is a system of justice inspired by comparable traditional forms of resolving conflicts whose purpose was not just retribution but reconciliation of members of the community as well.

Gacaca tribunals will henceforth judge all genocide cases except category 1 offences⁵. The judges in these tribunals will be elected by the community. The tribunals will be established at each of the four administrative levels along which the country is divided, namely the cell, secteur, district and province. *The Cell Gacaca tribunal* will deal with property offences. The system will encourage confessions by offering incentives to defendants who cooperate.

The law groups persons who participated in committing genocide and other violations of human rights into four categories:

Category 1: persons whose criminal acts or participation place them among the organizers, incitors, supervisors of genocide or crimes against humanity, murders who became reknowned because zeal or cruelty in carrying out atrocities and persons who committed rape or sexual torture. Category 1 suspects will be judged by ordinary courts;

Category 2: persons whose criminal acts or participation place them among the authors of or accomplices in murder or grave offences against the person resulting in death. Category 2 suspects will be judged by the District gacaca court.

Category 3 : persons whose criminal acts or participation render them liable for other grave offences against the person in which there was no intention to cause the death of the victim; This group is judged by category Secteur Gacaca Court.

⁴ See Organic Law No 40/2000

⁵ Category 1 suspects are defined as:

- (a) the persons whose criminal acts place them among planners, organizers, incitors, supervisors of the crime of genocide or crimes against humanity
- (b) The person who, acting in apposition of authority at the national, provincial or district level, within political parties, army, religious denominations or militia, has committed these offences or encouraged others to commit them;
- (c) The well-known murderer who distinguished himself in the location where he lived or wherever he passed, because of his zeal which has characterized him in the killings or excessive wickedness with which they were carried out
- (d) The person who has committed rape or acts of torture against person's sexual organs.

Category 4: persons who committed only property offences such as looting, theft, arson, malicious damage to property and the like. This group is not liable to criminal prosecution but is required to compensate victims.

Gacaca tribunals will make it easier to establish the truth by introducing the participation of the community in the justice process. Gacaca courts will help communities reckon with the past. This will lead to establishment of the truth about what happened in each place. The establishment of the truth will in turn lay a foundation for unity and reconciliation. The process of reconciliation made possible by gacaca will in turn enhance prospects for peace and stability in Rwanda. The more 10,000 tribunals spread across the country will expedite resolution of the genocide caseload. The number of detainees in the overcrowded prisons will be reduced by substitution of part of the sentence of a prisoner with a requirement to perform community service. This will reduce government expenditure on prisons and the savings made can help finance desirable social services. Conditions for detainees who will remain in prison will improve dramatically as the number of inmates goes down. The new system will facilitate the re-integration of perpetrators of grave abuses in society. Through community service, persons convicted of criminal offences will help make it up to society for part of the damage they caused and be prepared for re-integration in society.

A separate law will outline modalities for compensation of the victims.

Implementation of the gacaca court system started in twelve sectors across Rwanda two months ago. There will shortly be a review of the experience of this pilot phase and the lessons learnt from it will be used in the gradual implementation of the system across the country, hopefully before the end of the year. It is anticipated that the gacaca system will deal with the existing case load in 3 – 5 years.

V. Promoting good governance.

Justice alone is not enough to ensure and sustain good governance in post conflict situations. Justice is only one of many initiatives required for the successful reconstruction in the aftermath of conflict.

The period since 1994 has been a period of intense change in Rwanda. The Government was soon able to restore law and order across the country. Institutions of the state which had ceased to exist were recreated. Central and local government organs were re-established. The civil service and entire machinery of administration of justice, including courts and prosecution service, had to be rebuilt from scratch. Damaged or destroyed infrastructure such as

schools and health services were rebuilt or repaired and returned to use. Social services to the population were resumed. Hundreds of thousands of internally displaced people were returned to their homes. Millions of refugees were repatriated and resettled in their communities. We set a National Unity and Reconciliation Commission to promote national reconciliation. We started a gradual process of democratization and all political organs are now elected up to district level. We established an independent National Human Rights Commission to promote and protect human rights. We have established institutions such the Auditor General to ensure transparency and accountability in the use of public funds. To promote good governance, we have instituted a system of decentralized government to empower communities at grassroots level and give them a say in how they are governed. We have drawn up and are implementing a national poverty reduction program and other policies to promote economic development in general.

Rwanda today continues to be a country in post-conflict transition in every sense of the word. We are today simultaneously involved in several ambitious processes which will very fundamentally transform the social and political landscape of our country in the coming days. By measures such as establishing a new civilian National Police, we continue to work hard to ensure that peace and security are a right every resident of our country, citizen and foreigner alike, can take for granted, this in spite of the threats against posed against our survival by perpetrators of genocide, particularly those who have taken sanctuary in the sister state of the Democratic Republic of Congo. We are continuing diverse programs to promote and consolidate national unity and reconciliation in the aftermath of the genocide. We are beginning our efforts at trying to ensure accountability for the genocide through the system of Gacaca tribunals as opposed to classical courts. We are in the midst of a constitution making process which will culminate in the promulgation of a new constitution and presidential and parliamentary elections before the end of the year 2003. We are currently in the midst of a massive exercise to reform and modernize our court and prosecution services in order to make our judicial system more independent, impartial and effective.

VI. The Role of the international community promoting the rule of law and encouraging good governance.

The international community has traditionally responded to post conflict situations by simply providing humanitarian assistance to alleviate the suffering of the victims of conflict. In recent times, however, the international community has endeavoured to go further. There have been United Nations peace keeping missions. The UN human rights mechanisms have been invoked. In Rwanda for

example, the response of the UN human rights system to the genocide was to send a field operation of monitors. The continuing existence of endemic human rights abuses world wide is testament to the fact that these UN mechanisms have not been effective at all. The record of regional human rights mechanisms, such as the mechanisms provided for under The Africa Charter of Human and Peoples Rights, has been even more disastrous. During the last decade, the international community finally came up with the concept of international tribunals, the ad hoc Tribunals for the former Yugoslavia and Rwanda and now the permanent International Criminal Court.

International criminal justice has today become the international community's ultimate response to the challenges facing post-conflict societies: but just how satisfactory has it been, we need to ask ourselves.

The ad hoc international tribunals are based in far away countries and the societies they are supposed to serve know little about them. They have been prone to gross mismanagement, even by the United Nations own reports. They are very slow. They consume disproportionately enormous resources at the expense of national judicial systems. In cases such as Rwanda where large numbers of the most culpable of the perpetrators of graves abuses are scattered all over the world and stand little chance of ever being brought to justice, the credibility of the international criminal justice per se itself is at stake. The failure of the ad hoc tribunals to address victims's rights has undermined their relevance. Whereas victims of gross abuses are expected to draw healing from empowerment, the fact that states of the societies which have victims of such gross abuses have are excluded from any role in the ad hoc tribunals perpetuates an unhealthy sense of powerlessness and exclusion. It is argued models along the lines of the tribunal for Sierra Leone where national authorities and the international community work together would be less offensive and find greater acceptance in societies emerging from conflict. international judge. In Rwanda today, the relevance of the ICTR is regularly called into question and its success can not be taken for granted. While our government by and large supports the ICTR in principle and practice, the growing perception of many in our country is, if any thing, that it is a kind of judicial imperialism.

I do not intend to argue that UN and regional human rights mechanisms and international criminal justice are unimportant. Clearly, it is undeniable that all do have an important role to play. My argument simply is that international criminal justice is neither the only nor necessary the most important response to grave abuses and that disproportionate attention and resources are expended on international mechanisms and tribunals at the expense of national programs that hold out better potential for promoting prospects for the rule of law, respect for human rights and good governance. Consider the following examples.

After the 1994 genocide, the United Nations response was to send a peace keeping mission (**UNAMIR**) to Rwanda whose budget exceeded our country's budget. Rwanda eventually decided not to agree to the continuation of the peace keeping mission and did not experience the chaos and upheaval the peace keeping mission was there to prevent. There was also a human rights field monitors operation (**HRFOR**) which cost more than the budget available to the entire judicial system of Rwanda. We decided not to renew the field operation's mandate and the situation of human rights in Rwanda has nevertheless improved tremendously since. We now have the international Criminal Tribunal for Rwanda (**ICTR**) which has already cost the international community more than 600 million US dollars. It has an annual budget of around 100 million dollars and with the recent approval of the tribunal's request for ad litem judges, the amount is set to increase. This is money which the international community purportedly avails to promote national reconciliation, respect for human rights and the rule of law in Rwanda. During its eight year existence, the ICTR has concluded 5 full trials and accepted guilty pleas of three suspects. It now has slightly more than 50 suspects, 17 of whom are now on trial. Rwanda on the other hand has more than 100 000 genocide suspects in detention awaiting trial. Rwanda's ordinary court will deal with up to ten thousand of these cases in which the defendants were among the leaders. More than 10 000 gacaca tribunals, with 250 000 – 300 000 judges, are set to deal with cases of the rank and file among the genocide suspects. Rwanda does not receive from the international community even one tenth of the budget of the ICTR budget to support its overwhelmed judicial system. Yet, it can not be disputed that it is national systems that are really critical to the establishment of the rule of law and protection and promotion of human rights. The manifest bias of the international community towards international mechanisms at the expense of national systems is difficult to comprehend or justify.

The international community can and should respond better to the challenges of promoting the rule of law and good governance in post conflict situations by directing much of the attention and more of the resources currently focused on international mechanisms generally and international tribunals in particular, towards national programs for the promotion of stability, the rule of law and good governance in general: These programs include programs to consolidate peace and stability; programs addressing and seeking to resolve the causes of conflicts in the context of which grave abuses take place; support of initiatives to promote tolerance, unity and reconciliation and peace building; investing in promoting the rule of law, by especially support the development of an independent, impartial and effective judicial system; human rights education and promotion; supporting the growth of stable democratic institutions; facilitating the growth of a strong civil society.

The responses of the international community to post-conflict challenges can some times be contradictory and self defeating. Consider the irony. The United Nations Security Council did not do anything to prevent the Rwanda genocide. The perpetrators of the genocide went to Zaire, now the Democratic Republic of Congo, with all their weapons and the international community did nothing to disarm or disband them. The Security Council set up the ICTR to bring to justice the leaders among these perpetrators of the genocide. Nevertheless, more than 50 000 of them still threaten Rwanda from their safe havens in the DRC and the international community does nothing to deal with this menace. The ICTR has indicted 13 of these genocide suspects, the DRC does not hand them and the Security Council has not done anything concrete about the matter. Meanwhile, the Security Council continues to profess its unwavering support for the work of the ICTR.

The promotion of the rule of law and good governance are at the heart of all the reforms I have outlined above which are now underway in Rwanda. I have no doubt that the international community would get a better return of its investment if the bulk of the 100 million dollar annual budget the ICTR were spent to support the indispensable work of some of these programs, such as Rwanda's Unity and Reconciliation Commission, gacaca courts, ordinary courts, prosecution service, police, prisons, National Human Rights commission, Constitutional and Legal, Commission and civil society to name but the institutions busy at work to make the aspirations of real people for the rule of law and good governance a reality.

VII. CONCLUSION

I can sum up the lessons we have learnt from our experience in Rwanda as follows:

1. Justice is a pre-requisite for national reconciliation and reconstruction of post- conflict societies. Justice in this context does not merely denote mechanisms for accountability for past abuses but encompasses all other efforts to build institutions to guarantee the rule of law and respect for human rights in future.
2. In post conflict societies, accountability for past abuses will not necessarily the strict application of the letter of the law. In some states, particularly those where violations of international human rights and humanitarian law have been massive or members of the former regime maintain a degree of political power as a result of a peaceful settlement, the strict and indiscriminate application of the letter of the law may be impractical, ill-

- advised or even undesirable. What is crucial is some form of accountability, preferably in a judicial setting, that is able to send home the message that impunity shall henceforth not be tolerated.
3. Justice in post conflict societies is not an end in itself. It is but only one of many building blocks required to craft a new democratic society based on the rule of law.
 4. The form and scope of the mechanisms of accountability chosen to help eradicate the culture of impunity and institutionalize the rule of law will depend of the particularly circumstances of each country. It may take the form of a truth commission. Some countries opt to deal with the past through the courts. Rwanda is taking recourse to a system influenced by traditional forms of resolving conflicts. International criminal justice may be an option and is set to play an increasingly influential role. There may be combinations of any of these forms operating concurrently. The choice will be ultimately be dictated by local circumstances and in particular, the policies which the successor government deems consistent with the desire to ensure continued stability and development.
 5. The process of determining the appropriate mechanism for accountability for past abuses and promoting good governance should be based on national consensus. It should be a result of the broadest national consultation possible. This consultation may be long and arduous but is nevertheless essential. The outcome of that consultation must be a process that helps to heal wounds and to unite, not to divide society even more. It ought to be a process grounded in the ideal and imperative of national reconciliation.
 6. It is paramount that particular attention be paid to the problems, concerns and views of the victims when dealing with justice in particular and post conflict reconstruction in general.
 7. The international community needs to re-asses a wide range of issues relating to its response to the aftermath of grave abuses. Its response of the to the challenges of nation building in post conflict situations ought to be more and more informed and guided by the concerns and policies of the countries concerns. The disproportionate emphasis of the international community on international justice as the principal response to gross abuses is untenable. The international community needs to focus more attention and provide more resources to domestic programs to promote democracy, the rule of law and respect for human rights. The response of the international community to the challenges of establishing the rule of law in the aftermath of conflict should not focus exclusively or principally on accountability for grave abuses. It is absolutely essentially that more of the resources now devoted to supporting mechanisms for accountability for violations of international human rights and humanitarian law be

channeled to national programs devoted the establishment of the rule of law and good governance.