TABLE OF CONTENTS

BURUNDI
Justice on Trial

I INTRODUCTION

Amnesty International has long argued that one of the main causes of the continuing human rights crisis in Burundi, characterized by violence and widespread killings, is the fact that the perpetrators of these crimes have rarely been brought to justice. Decades of human rights violations have been accompanied by decades of almost total impunity, particularly for members of the security forces and supporters of the government in power. The difficulties of tackling a problem of such enormity are immense but there can be no long term peaceful political solution or guarantee of respect for human rights in Burundi unless impunity is ended.

Since February 1996, hundreds of people charged with politically-motivated violence have been tried in Burundi. Over 8,000 people, mainly Hutu, are awaiting trial. The majority of trials have been of civilian members of the Hutu ethnic group accused of participating in the massacres of primarily civilian members of the Tutsi ethnic group which followed the assassination of President Melchior Ndadaye in October 1993. Other political trials - of opponents of the government, of people accused often arbitrarily of collaboration with or belonging to Hutu-dominated armed opposition groups, and of those accused of the assassination of President Ndadaye - are continuing.

Amnesty International welcomes moves by the Government of Burundi to bring to justice those responsible for these crimes. However, it is crucial that if the Government of Burundi is to fight impunity effectively, trials should conform to internationally recognized human rights standards, including the right to a fair trial. Justice must be done and must be seen to be done, if impunity is to be addressed and confidence to be restored in the judicial process and rule of law.

Amnesty International is concerned at the failure of virtually all the trials and detention proceedings to comply with these international fair trial standards. In expressing concern at the unfairness of trials, Amnesty International is not saying that all those who have been tried, or who await trial are innocent. It is however, seeking to uphold everyone's right to a fair trial, whatever the crime of which they may be accused. Ultimately it is only by improving the quality of trials that the Government can be sure that the guilty have been brought to justice. Moreover, whereas members of both the Hutu and Tutsi ethnic groups have been involved in killings over the years, virtually all those detained or tried in connection with political violence are Hutu or supporters of political opposition groups. Ending impunity for crimes of political violence means prosecuting all those responsible, not just members of particular opposition groups or one ethnic group.

This report sets out Amnesty International's concerns and recommendations in relation to the judicial system and to on-going trials in Burundi. The cases which are included are illustrative of hundreds of others. The report provides recommendations which are both implementable and which conform to international standards for fair trial and respect for human rights. The report is based in part on the findings of an Amnesty International research mission to Burundi in April and May 1998. During its visit, Amnesty International delegates met representatives of the Government, judiciary and law enforcement agencies and discussed Amnesty International concerns and recommendations. The delegates also met lawyers, detainees and human rights groups.

This document does not address or document all of Amnesty International's concerns in Burundi. Other human rights concerns, including extrajudicial executions by the security forces and abuses, including indiscriminate killings, hostage taking and mutilation, by armed opposition groups will be the subject of a report to be published later in 1998.

II BACKGROUND

Since independence in 1962, members of the minority Tutsi ethnic group [1] have traditionally controlled the country and its armed forces. The judiciary, the educational system, business and news media are also dominated by Tutsi. The decades-long struggle for power between Tutsi and Hutu elites in Burundi has led to the deaths of hundreds of thousands of people, most of them civilians. Repeated Hutu challenges to Tutsi domination have each time been followed by reprisals against Hutu civilians by the security forces. Waves of killings occurred in Burundi in 1965, 1969, 1972, 1988 and 1991. In 1972, more than 80,000 people, most of them Hutu, were massacred by the security forces.

In the early 1990s a process of democratization began and multi-party elections were held in June 1993. Contrary to the expectations of many observers, the Hutu-dominated opposition *Front pour la démocratie au Burundi* (FRODEBU), Front for Democracy in Burundi, won a landslide victory over the government of Major Pierre Buyoya who had taken power in a military coup in 1987. Less than four months later, on 21 October 1993, President Melchior Ndadaye, a Hutu, and other key members of the government, including his constitutional successor, were assassinated by army officers in a coup attempt. Initial military statements said that the coup attempt had the support of all the armed forces. After worldwide condemnation of the coup and the suspension of foreign aid, military leaders claimed that only a small group of soldiers had carried out the coup attempt. This claim was difficult to believe when there had been no evidence of

[1] Of Burundi's population, Hutu form approximately 80 to 85 percent of the population, Tutsi approximately 15 to 20 percent, and Twa approximately one percent.

any sections of the armed forces taking measures to prevent the coup. Military leaders announced the return of power to the elected civilian FRODEBU government.

But as news of the assassination of President Ndadaye spread, thousands of Tutsi civilians as well as Hutu supporters of the *Union pour le progrès national* (UPRONA), Union for National Progress, the former ruling party, were killed in reprisal by Hutu civilians. Within four days of the coup, mass and indiscriminate reprisals for these killings were being carried out by the Tutsi-dominated security forces and Tutsi civilians against the Hutu population. Hundreds of thousands of Hutu, as well as some Tutsi, fled the violence, mainly to Tanzania and Zaire (now the Democratic Republic of Congo) and hundreds of thousands of others, mainly Tutsi, were internally displaced. The majority of refugees and internally displaced have yet to return to their homes.

There has not been to date any full investigation to establish how many civilians were killed in the massacres which followed the assassination of President Ndadaye, although it is estimated that as many as 50,000 were killed by the end of 1993. Since then hundreds of thousands of Hutu civilians have been killed by the security forces. There has been a lot of debate, much of it politically motivated, about whether the killings were a spontaneous violent reaction to the assassination of President Ndadaye, whether and to what extent the killings were orchestrated by local officials, or whether, as a UN Commission of Inquiry into the killing of President Ndadaye and the subsequent mass killings found, acts of genocide had been committed against the Tutsi ethnic community. However, the Commission of Inquiry itself admitted, that it had inadequate resources to fully carry out its task, that it was unable to visit most parts of the country, that access to Hutu witnesses was difficult, and that independent access to witnesses was impossible. Nor did the Commission indicate why it concluded that killings of Tutsi were genocidal and that killings of Hutu were not. Amnesty International believes further investigations are necessary to establish whether the killings constituted acts of genocide.

In the aftermath of the 1993 coup attempt, leaders and allies of the mainly Tutsi UPRONA organized themselves to resist the return of power to FRODEBU control. The Tutsi political opposition, backed by the Tutsi-dominated army, was reluctant to relinquish the power it had enjoyed since independence, and continued to force political concessions from the weakened FRODEBU government. Tutsi youths formed armed groups, with the knowledge and even assistance of Tutsi soldiers. Many government supporters, particularly Hutu, were killed during such action. To counter this violence and what they considered as the inability of the FRODEBU-led government to protect its members and supporters, armed Hutu groups sprang up in and around Bujumbura[2].

[2]See previous Amnesty International reports **Burundi: Time for international action to end a cycle of mass murder** (AFR 16/08/94, 17 May 1994), **Burundi: Struggle for Survival. Immediate action vital to stop killings** (AFR 16/07/95, June 1995), **Burundi; Targeting students,**

Since late 1994, the *Forces pour la défense de la démocratie* (FDD), Forces for the Defence of Democracy, the armed wing of the Hutu-dominated *Conseil National pour la défense de la démocratie* (CNDD) National Council for the Defence of Democracy, has been fighting government forces in open war. The armed wings of other Hutu opposition parties, the *Parti pour la libération du peuple hutu* (PALIPEHUTU), Party for the Liberation of the Hutu People, and the *Front pour la libération nationale* (FROLINA), Front for National Liberation, are also engaged in conflict with government forces. All these armed groups have been responsible for serious human rights abuses, including the killings of unarmed civilians. Attacks were carried out against camps of internally displaced people, the majority of whom were Tutsi. The human rights and political crisis continued to spiral out of control and large parts of the country became inaccessible through conflict and insecurity. In this bitterly divided and unstable context the trials of those accused of participating in the 1993 massacres of Tutsi began in February 1996.

The violent political crisis continued. By early 1996 the government of President Sylvestre Ntibantunganya had effectively lost the little control of the country it had. Many civilian governors were assassinated and replaced by military officials. From February 1996, the rural Hutu population in areas of conflict were forcibly rounded up and relocated into camps, ostensibly for their protection. Those who failed to leave their homes risked being killed as suspected members of armed groups and hundreds of men, women and children were killed in the round-up operations [3]. Although the "regroupment" was ostensibly for reasons of protection, it was clear that it was a military strategy aimed at keeping tighter control over the Hutu population and removing potential support from the armed groups. Anyone left in the area was considered to be linked to Hutu-dominated armed groups and therefore legitimate military targets during counter-insurgency operations or combat.

UPRONA and other Tutsi opposition parties continued to undermine the government with support of the army and in July 1996 Major Pierre Buyoya returned to power in a coup, temporarily suspending the national assembly and banning political activity. This time, the coup received some international support, although, it was strongly condemned by many African leaders. Regional states closed their borders in protest and imposed economic sanctions, which remain largely in force, although they

teachers and clerics in the fight for supremacy (AFR 16/14/95, September 1995) **Burundi: Armed groups kill without mercy** (AFR 16/08/96, 12 June 1996) for further information.

[3]See **Burundi: Forcible relocation, New patterns of human rights abuses** (AFR 16/19/97, 15 July 1997).

have been relaxed to allow for humanitarian aid. The Government of Burundi has repeatedly appealed for the sanctions to be lifted and has been supported in its calls by other foreign governments and others including the UN Special Rapporteur on Burundi. In February 1998 at a regional meeting in Kampala, President Buyoya apparently agreed to a number of political concessions, in return for the promise of the regionally-imposed sanctions being lifted. These are reported to have included the release of former president Jean-Baptiste Bagaza who was placed under house arrest in early 1997 after criticising President Buyoya. The sanctions have not been lifted.

On retaking power, President Buyoya promised to end human rights violations. However, since his return to power, Amnesty International has documented hundreds of cases of extrajudicial execution, "disappearance", arbitrary arrest and torture. Critics and opponents of the government have also been harassed, arrested and tortured in a pattern of attacks on political opponents, apparently aiming to eliminate effective political opposition.

Despite negotiations between the government and opposition, including the CNDD, with the mediation of former president Julius Nyerere of Tanzania, aimed at finding a solution to the conflict, the conflict has continued. Serious and large scale human rights abuses continue to be reported particularly from areas of conflict. In a well established pattern of abuse, the security forces carry out large scale reprisal killings of the local Hutu population following military activity by the armed groups or reports of their presence. Killings by Hutu-dominated armed groups have also continued and increasingly, Hutu civilians have also been targeted. Since President Buyoya's return to power there has been a significant increase in militarization of the country. Not only has the army greatly expanded in number, including by conscripting many former members of Tutsi armed groups but the armed forces have provided military training to Tutsi civilians in a civil self defence program. Further negotiations under the chairmanship of Julius Nyerere in Arusha between all parties resulted in late June 1998 in a cease-fire, to come into force in mid-July. However, its chances of being implemented appear small; immediately after the agreement, the government declared it did not consider itself to be bound by the agreement. Both the CNDD and PALIPEHUTU have also expressed serious reservations. In the meantime, fighting is continuing.

In early June 1998, as the mandate of the National Assembly drew to a close, negotiations at a national level between the Government and the National Assembly produced a new power-sharing agreement and new Transitional Constitution. President Buyoya was sworn in as president on 11 June 1998 and a new government formed. The new government includes two posts of vice-president, one of which is occupied by Frédéric Bamvuginyumvira of FRODEBU and a number of smaller ministerial portfolios were also allocated to FRODEBU. Although commitment has now been expressed to

issues such as the reform of the judiciary, it appears they have not been discussed substantively.

III CURRENT TRIALS

i) The trial of those accused of assassinating President Melchior Ndadaye and of participation in the attempted coup of 21 October 1993

The trial by the Supreme Court of 79 people accused of assassinating President Ndadaye has moved very slowly. Key defendants remain at liberty. They and others reported to have been implicated in assassination of President Ndadaye and the attempted coup have been appointed to senior positions within the army and government or in business in which they may be able to hinder investigations, intimidate witnesses or carry out further human rights violations. They include the then Minister of Defence, **Lieutenant Colonel Charles Ntakije**, the then army chief of staff, **Lieutenant Colonel Jean Bikomagu**, **Lieutenant Colonel Isaie Nibizi**, who was the commander of the military barracks responsible for President Ndadaye's security and is currently spokesperson for the armed forces and **François Ngeze**, a Hutu member of UPRONA and member of parliament who was named as the head of the *Conseil national de salut public*, National Council of Public Salvation appointed by the coup plotters to head the country.

For those who have been detained, their detention has been marked by pre-trial irregularities. The investigation itself has been flawed. The national commission of inquiry, which was responsible for investigating the attempted coup of 21 October 1993 and the assassination of President Ndadaye, included as one of its members, the former *Auditeur général* (military prosecutor) who had been nominated as head of the *Documentation nationale*, national intelligence service, during the short lived coup. It cannot therefore be considered to be impartial. In December 1995, three soldiers accused of involvement in the coup attempt and detained at Mpimba central prison were shot and killed apparently as they tried to escape. The exact circumstances are not clear. They included **Dominique Domero** who had been returned from the Democratic Republic of Congo where he and two others had been held without charge or trial since 1993.

Furthermore, during the investigation and trial there seems to have been little attempt to establish the identity of the instigators of the coup and the assassination of President Ndadaye and other key government officials. In the first hearings sessions, questions were limited to events of the night of 20 - 21 October 1993 despite the protests of both the defence and plaintiff. Key witnesses have not appeared in court. On 20 March 1998, two witnesses, the Prime Minister at the time, **Madame Sylvie Kinigi**, and **Monseigneur Bernard Bududira**, who acted as intermediary between the temporary

leaders and the deposed government, who had been called on behalf of the *partie civile* (plaintiff)[4], did not turn up in court. The lawyer for the plaintiff was repeatedly denied the opportunity to speak. Witnesses requested by the plaintiff's lawyer, including **Lt-Colonel Jean Bosco Daradangwe**, the then Director General of Communication at the Ministry of Defence, were not called. Although an adjournment was requested to allow for more witnesses to be heard, the proceedings were closed by the President of the Supreme Court. Many sources in Bujumbura claim that senior members of the government exerted pressure on members of the judiciary, including the President of the Supreme Court, to close the hearing.

Concern has been expressed that while the few soldiers, only one of whom is an officer, detained in Mpimba central prison - who may indeed have participated in or witnessed the events of 21 October 1993 - are to be brought to justice, others who were really behind the attempted coup remain free.

ii) Trials of people accused of participating in the massacres of Tutsi civilians in October and November 1993

Trials started in February 1996 and at least 89 people were sentenced to death by the end of 1996 after grossly unfair trials. During 1997 and 1998 the conduct of the trials themselves improved to some extent but their fairness continues to be undermined in many cases by the absence of witnesses, lack of legal representation, the undermining of the presumption of innocence, admission of evidence allegedly obtained through torture and the summary nature of many trials. In early 1997, as part of the United Nations Centre for Human Rights program in Burundi[5], a program of judicial assistance was established to ensure that those defendants in the trials who requested legal assistance would be able to have it. At least 250 people have now been sentenced to death in connection with these cases. Six people were executed on 31 July 1997, all of whom had been convicted after grossly unfair trials.

[4]The plaintiff is the party who seeks monetary or other compensation for damages resulting from the commission of the criminal acts before the court. The plaintiff in this trial includes Madame Laurence Ndadaye, the widow of President Melchior Ndadaye and former president Sylvestre Ntibantunganya, then Minister of Foreign Affairs and Cooperation, whose wife was assassinated when soldiers failed to find him.

[5]An operation of the United Nations High Commissioner for Human Rights.

The majority of trials have taken place before the *chambres criminelles* of the *cour d'appel* (criminal chambers of the Appeal Court) which try people accused of offences punishable by the death penalty or life imprisonment. There is no right to a full appeal: people convicted by the criminal chambers may only appeal on the basis of procedural irregularities or errors to the cassation chamber at the Supreme Court[6]. In a minority of cases, defendants benefiting from a *privilège de juridiction* (privileged status) have been tried by the Supreme Court. Again there is no right to a full appeal and prisoners may only submit a cassation appeal which is considered by all chambers of the Supreme Court.

Trials are conducted in sessions lasting one month in which cases are heard every day. In practice trials are frequently and repeatedly deferred, usually until the next session and there may be long delays between hearings. Sessions are usually held every two months. The number of cases which actually reach a verdict is relatively small in each session.

iii) Arrests and trials of alleged members of armed groups

Hundreds of civilians, mainly Hutu, have been arrested and accused of participating in or collaborating with Hutu-dominated armed opposition groups. In many cases there is no substantiating evidence to support the accusation and many of the arrests appear to be arbitrary. The majority are held without charge or trial. Many were tortured and ill-treated to extract statements or information. Many religious figures, including the **Reverend Elizer Ntunzwenimana**, who was arrested in March 1997 and detained for nearly two months at the BSR during which time he was severely beaten, or community workers have been accused of collaborating with armed groups apparently solely because of the humanitarian aid they have provided to the community. There are numerous reports of "disappearances" of detainees, particularly in military camps. Children as young as 12 years old have been arbitrarily accused of collaboration with armed groups and unlawfully detained. Although Tutsi-dominated armed groups have also carried out human rights abuses and criminal activities, often in collaboration with members of the armed forces, few if any members have been arrested.

In February 1998, seven men, accused of links with the CNDD, were sentenced to death by the criminal chamber of Bujumbura Appeal Court after being found guilty in an unfair trial of participation in a series of mine explosions in which 11 people were killed in Bujumbura in early 1997. Five other defendants received prison sentences and two defendants, **Pasteur Jean-Pierre Mandende**, who was reportedly beaten in

[6]See Section VII(vi) - The Right to Appeal for further details.

detention, and a journalist, **Agnès Ndayikeza**, were acquitted. Another 12 defendants, including the president of the CNDD **Léonard Nyangoma**, its spokesperson, **Jérôme Ndiho**, and other members of the CNDD, all of whom are in exile, were charged *in absentia* with involvement in the mine explosions. The prosecution called for the death penalty to be imposed *in absentia*, if they were found guilty of the offences of which they were charged. The court referred their cases to the Supreme Court for further investigation. The status of the investigation was still not clear in July 1998.

iv) Trials of political opponents

Since Major Buyoya returned to power in July 1996 political opponents from all parties have been harassed, arrested and detained, placed under house arrest or forbidden to travel abroad, after being accused of participation or involvement in criminal offences. The pattern of abuses against them suggests a strategy to remove or limit the activities of political opponents. Many of the arrests took place in early 1997 as President Buyoya attempted to consolidate his position.

Charges of participating in the massacres of 1993 or other criminal activities have been used against a number of political opponents of the current government including **Augustin Nzojibwami**, the Secretary General of FRODEBU, and **Léonce Ngendakumana**, the President of the National Assembly, also of FRODEBU. Augustin Nzojibwami was arrested and briefly detained in February 1997, accused of having distributed arms to the population in 1994 as Governor of Bururi and to have ordered an attack on a military camp in 1995. The charges have not been dropped although the status of the case against him is unclear. Charges of involvement in the massacres of 1993 against Léonce Ngendakumana were dropped on 16 March 1998, following investigation into the allegations which found that the charges were based on false testimony.

On 8 and 9 March 1997, senior members of *Parti pour le redressement national* (PARENA), National Recovery Party and other supporters of former president Jean-Baptiste Bagaza, were arrested and accused of involvement in a plot to assassinate President Buyoya. The men were also initially accused of being behind the series of mine explosions in Bujumbura, including explosions on 12 and 13 March, later attributed to the CNDD. The arrests appear to have been related to their membership or association with

PARENA and its opposition to the current government. Its president, former President **Jean-Baptiste Bagaza**, who was placed under house arrest in January 1997, had been outspoken in his criticism of both the July 1996 coup, stating that it would not resolve Burundi's problems, and the military's choice of Major Buyoya as leader. Two of the detainees, **Lt-Col Pascal Ntako** and **Isidore Rufyikiri**, an executive member of an extremist Tutsi opposition party, *Solidarité jeunesse pour la défense des droits des minorités* (SOJEDEM), Youth Solidarity for the Defence of Minorities, had earlier been arrested and briefly detained in January 1997 after several Tutsi opposition leaders spoke out against President Buyoya.

Under Burundian law, cases involving both civilian and military defendants are tried by military jurisdictions[7], and the case was submitted to the court martial in Bujumbura in November 1997. The competency of the court to try the defendants was questioned by defence lawyers. The lawyer for Jean-Baptiste Bagaza argued that as a former President he was entitled because of his status to be tried by the Supreme Court. Lawyers for Isidore Rufyikiri, a retired higher magistrate, also argued he should benefit from this privilege. The arguments were upheld by the court, which ruled that it was not competent to try the cases and released Jean-Baptiste Bagaza, from house arrest.

The ruling was partially upheld on appeal, but in June 1998 the *Procureur Général de la République* (State Public Prosecutor) appealed to the Supreme Court to return the case to the court martial, arguing that the appeal had focussed on the case of Isidore Rufyikiri and as he was a retired and not a practising superior magistrate, he had no right to benefit from a privileged status. The Supreme Court has yet to rule on the case.

v) Other trials by military courts

Although government officials have stated that the arrests of soldiers, hundreds of whom are now reported to be in detention, show their determination to tackle impunity, only a small number of soldiers have recently been arrested, tried and convicted for their alleged part in human rights violations. The majority of soldiers have been arrested for other offences, such as desertion, theft or the loss of weapons.

While Amnesty International welcomes moves to address the almost total impunity enjoyed by the security forces, it is concerned that trials within the military

[7] Article 15 of the *Décret-Loi no. 1/5 du 27 février 1980, portant code de l'organisation et de la compétence des juridictions militaires*, Decree no. 1/5 of 27 February 1980 dictating the organization and competence of military jurisdictions.

jurisdiction fall short of internationally recognized standards for fair trial, and that the independence and impartiality of the courts cannot be guaranteed. Not all the members of military courts have received appropriate or adequate legal training and not all defendants have received legal counsel. Amnesty International is also concerned that a number of soldiers have been sentenced to death after unfair trials by court martial.

The organization is also concerned that the provision of "mitigating circumstances" appears to be used to play down grave human rights violations carried out by members of the armed forces. The few soldiers who have been tried and convicted of involvement in grave human rights violations, such as killings of civilians, have received significantly lighter sentences than those imposed by civilian courts. If found guilty, the defendant's sentences should be in proportion with the gravity of the crime committed, without recourse to the death penalty. The argument that it is a time of war can never be used to justify killings of unarmed civilians or of prisoners of war.

On 10 January 1997, 126 Burundian refugees were forcibly returned from Tanzania and handed over to the Burundian security forces at Kobero, Muyinga Province. One hundred and twenty-two of the refugees were killed by the Burundian security forces shortly afterwards. The refugees were allegedly supporters of PALIPEHUTU, and had been forcibly returned to Burundi after fighting in the camp between supporters of PALIPEHUTU and those of the CNDD. There are conflicting reports of the circumstances of the extrajudicial execution of the refugees. According to the Burundi authorities, members of the security forces, overwhelmed by the large number of refugees, were "understandably nervous" as the 126 were known to be members of PALIPEHUTU and panicked, fatally shooting 122 of the 126 refugees. According to other sources, the refugees were executed in small groups accounting for the lack of wounded.

Of the 12 soldiers tried for the killings, two were acquitted. The remaining 10 soldiers were convicted and received sentences of between five months and 10 years, the court accepting in mitigation the argument that the soldiers had acted in self-defence.

In 1994, 27 members of the armed opposition group the FDD, were taken prisoner at Ruziba, Rural Bujumbura Province and were left in the care of two soldiers while their commanding officer returned to Bujumbura to collect a vehicle to transport the prisoners to the BSR. Twenty- six of them were subsequently summarily executed by the soldiers. The soldiers were arrested and charged with murder. After a trial by court martial in Bujumbura, the two soldiers were found guilty of murder and sentenced them to life imprisonment. The sentence was reduced on appeal to 12 years' imprisonment. At the appeal hearing their lawyer argued in mitigation that it was a time of war and those killed were the enemy, reportedly stating in court that the soldiers had

merely anticipated the death penalty that would have been imposed had the prisoners been brought to trial.

IV INTERNATIONAL STANDARDS

Amnesty International takes as its standard the provisions of international human rights treaties to which Burundi is party. Burundi has made a commitment under international law to respect international standards of fair trial, including protection from arbitrary arrest and detention by ratifying the International Covenant on Civil and Political Rights (ICCPR)[8], the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture)[9] and the African Charter on Human and Peoples' Rights (African Charter)[10]. In addition, there are numerous international standards which spell out the right to fair trial, including the United Nations (UN) Standard Minimum Rules for the Treatment of Prisoners, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the UN Basic Principles on the Independence of the Judiciary, the UN Guidelines on the Role of Prosecutors and the UN Basic Principles on the Role of Lawyers. These international obligations recognize that every person shall have the right to:

- be protected from arbitrary arrest and detention;
- be presumed innocent until proven guilty;
- be informed promptly of the nature and cause of the charge;
- examine, or have examined, witnesses against him or her and to call witnesses to testify on his or her behalf;
- have adequate time and facilities for the preparation of his or her defence;
- a fair and public hearing by a competent, independent and impartial tribunal;
- be tried in his or her presence, to defend himself or herself in person or through a lawyer of his or her choice;
- be provided with state-funded legal assistance where the defendant is unable to afford a lawyer;
- not be compelled to testify against himself or herself or to confess to guilt;

[8] See in particular Articles 9 and 14 of the ICCPR.

[9] See in particular Articles 13, 14 and 15 of the Convention against Torture which enshrine the obligation of the state to investigate allegations of torture, forbid the use of testimony extracted under torture and provide for the right of the victim to compensation.

[10] See in particular Article 7 of the African Charter as defined by the resolution of the African Commission on Human and Peoples' Rights on Right to Recourse Procedure and Fair Trial adopted at its 11th Session in March 1992.

- have the free assistance of an interpreter if he or she cannot understand the language used in court;
- appeal to a higher tribunal;
- compensation if a final conviction is reversed or there is pardon by reason of a miscarriage of justice;
- not be tried or punished again for an offence for which he or she has already been finally convicted or acquitted.

Little attention has been paid to these international standards by most members of the Burundian judiciary and government. Furthermore some of the provisions of the Burundian Code of Criminal Procedure are contrary to these principles.

V INDEPENDENCE OF THE JUDICIARY

The independence of the judiciary is a key element in the protection of human rights and in ensuring the principles of equality before the law, presumption of innocence and fair trial. The judiciary has frequently shown itself to be weak and partial.

Article 26 of the ICCPR states that:

> "*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*."

Principles of impartiality of the judiciary are compromised, or perceived to be compromised, by the composition of the judiciary, which is overwhelmingly dominated by judicial officials from the Tutsi ethnic group, particularly at the higher levels. The services responsible for arrests and investigating cases are also heavily dominated by Tutsi. Although many Tutsi civilians and members of the security forces are known to have perpetrated numerous human rights abuses, mostly against Hutu, few of them have been arrested or brought to justice. In a society with entrenched mutual suspicion, all necessary steps must be taken to ensure that all have confidence in the judicial system's competence, independence and impartiality and that all ethnic communities are equal before the law.

The judiciary has frequently failed to abide by Article 6 of the Basic Principles on the Independence of the Judiciary and to ensure "*that judicial proceedings are conducted fairly and that the rights of the parties are respected*". Judges have admitted statements made under torture or duress. In some trials, the plaintiff has been the sole

prosecution witness and defence witnesses have not been heard. Courts have failed to take effective action against hostile behaviour towards defendants by members of the public present in the courtroom.

The independence of the judiciary has also been compromised by government interference. For example, in the trial of those accused of assassinating former President Ndadaye, immediately prior to the hearing of one of the defendants, François Ngeze, who was rumoured to be about to implicate members of the current government in his testimony in court, senior members of the government including the presidency are reported to have exerted pressure on the President of the Supreme Court and others to ensure that the investigative part of the trial (*instruction*) was terminated, although not all the key witnesses had been heard and despite the protests of lawyers for the defence and plaintiff.

Article 26 of the African Charter imposes an obligation on the Government of Burundi to "*guarantee the independence of the Courts*". Under Burundian law, the *Conseil supérieur de la magistrature*, Supreme Judicial Council, is, charged with guaranteeing the independence of the judiciary. However, its own independence is undermined by its domination by members of the government, including the President, who additionally appoints six other members from the judiciary, and the Minister of Justice.

Crucially, the judiciary itself at all levels is also severely under-resourced, both in human and financial terms, with serious implications for the conduct of investigations and trials. The majority of prosecutors have no means of transport, greatly hampering them in carrying out investigations. With regard to the possibility of obtaining legal representation, there are currently less than 40 practising lawyers in Burundi, only two of whom are Hutu, all of whom are based in Bujumbura and only a minority of whom are involved in criminal trials. There are essentially six lawyers involved, for both defence and prosecution, in the trials of the thousands of people accused of participation in the massacres of 1993. Sufficient financial resources to assist the travel of witnesses are not provided.

Amnesty International is also concerned that military courts cannot guarantee impartiality. There are five court martials which correspond to the five military regions of Burundi. Each court martial has three judges, all of them commissioned military officers with additional functions as judges, who cannot therefore be considered to be independent of military hierarchy.

VI PRE-TRIAL DETENTION IRREGULARITIES

i) Irregularities in arrest procedures

Currently, many individuals are arrested on the basis of unsubstantiated denunciations. Vague accusations of participation in the massacres of October and November 1993, or of links with armed groups, are sometimes used as a pretext for arresting people for other motives, including the removal of political opponents or critics, or to settle accounts with personal enemies. While many of those detained may be guilty, many may be innocent. The majority have not been informed of the specific accusations against them. Detainees are very rarely given the opportunity to challenge the basis for their pre-trial detention due to the lack of judicial controls.

In a typical case, **Ferdinand Niyongabo** was arrested in March 1997 in Gitega and accused of collaboration with armed groups. The sole accusor has since retracted his statement. However, Ferdinand Niyongabo and the four other people who are accused in the same case remain in detention in extremely harsh conditions in Gitega prison. Ferdinand Niyongabo had obtained a grant for study in Burkina Faso, and was arrested shortly before he was due to leave Burundi. The case was due to be heard by Gitega High Court in July 1998.

The Burundi Code of Criminal Procedure prohibits arbitrary arrests and sets out safeguards to prevent illegal detentions. The detainee must appear immediately before the public prosecutor and after five days before a judge. The detention should be reviewed and confirmed after 5 days, reviewed and extended after 15 days and thereafter reviewed and extended on a monthly basis by the *chambre de conseil* (council chamber). These judicial reviews to prevent illegal and arbitrary detentions rarely take place and are moreover inadequate. In practice, many detainees spend weeks or months in police custody before being taken before the public prosecutor. Others are transferred directly from police custody to prison without the detention being reviewed and confirmed. Neither the detainee nor their legal counsel (should they have one), have the right to submit their case to the council chamber and challenge the legality of the detention. The arresting authorities rarely take the initiative to do so.

Furthermore, some defendants are initially held incommunicado. **Captain Protais Nzeyimana**, **Laurent Bimenyumurenyi** and other detainees who were arrested in connection with an alleged plot against President Buyoya were held incommunicado at the *Documentation nationale* in Bujumbura for several weeks after their arrest in March 1997. They were tortured during this period of detention. Laurent Bimenyumurenyi was arrested on 9 March 1997 in Gitega and held incommunicado in a military camp for five days. Another detainee, Captain Protais Nzeyimana was held incommunicado for one month at the *Documentation nationale* before being transferred to the northern prison of Ngozi.

Some of these irregularities appear to be a direct result of the desire of the police to maintain control of proceedings coupled with the lack of control of the public prosecutor over the police. In some cases, records have apparently been falsified to cover up irregularities. Lack of training means that some police commanders or investigating officers appear to be genuinely unaware of the correct procedures and rights of the detainees. The fact that there are many police units responsible to different ministries also creates the potential for police units to act outside the control of the judiciary. For example, the *Police de la sécurité publique* (PSP), Public Security Police, is responsible to the Ministry of Interior while the *Brigade spéciale de recherche* (BSR), Special Investigation Brigade, is responsible to the Ministry of Defence. The *Police judiciaire des parquets*, judicial police service, is responsible to the Ministry of Justice, and the *Documentation nationale*, security service, is responsible to the Presidency. Local administration authorities also appear to be acting outside their powers and carrying out arrests which relate to criminal offences rather than administrative issues.

These abuses also reflect the general lack of awareness in arresting authorities and others within the judiciary, of the principle that detention should be the exception, strictly defined and regulated by law, rather than the rule. In meetings with Amnesty International representatives, the State Public Prosecutor, Jean Bosco Butasi, stated that, "We are all on bail", reflecting the extent to which detention is the norm.

ii) "Disappearances" in custody

There are numerous reports of the "disappearance" of detainees shortly after their arrest, often when the arrests are carried out by soldiers. The lack of control over arrest and detention procedures and the climate of impunity facilitate these "disappearances". Many of these reports are impossible to confirm due to lack of access by relatives to detainees, the refusal of the authorities to disclose places of detention and lack of access to areas through insecurity. However, Amnesty International is concerned at the frequency with which it receives such reports. It believes that people regularly

"disappear" and their bodies hidden at military positions, particularly in zones of conflict. Many recent reports have come from the province of Rural Bujumbura. They include women and children who have been arrested as they return from the fields and accused of collaborating with armed groups - on the grounds that they have food on them and must therefore be feeding combatants. A number of "disappearances" from prison have also been reported.

Etienne Mvuyekure, former Secretary General of the political opposition party, the *Rassemblement du Peuple Burundais* (RPB), Rally for Burundi People, "disappeared" soon after his arrest on 2 November 1997. It appears he was killed days afterwards. Etienne Mvuyekure was arrested in the Rweza district of Kavumu *colline* (administrative unit), in Bujumbura by a commander of the Muyira Zone military position and taken to a nearby military barracks known as the *bataillon para*. He was reportedly severely beaten before being taken to the barracks. Although the authorities have denied that he was transferred to Mpimba central prison, he was seen there for one day and reportedly returned to the camp. When relatives and others went to the barracks and asked to see him, they were told that he had been released. He has not been seen since and Amnesty International fears he may have been killed in custody. Amnesty International has raised the case with the government, who have responded that as he is no longer at the barracks he must have been released. No real investigation appears to have taken place to establish his whereabouts.

The UN Declaration on the Protection of all Persons from Enforced Disappearance[11] sets out a government's obligation to investigate cases of enforced disappearance, "*whenever there are reasonable grounds to believe that an enforced disappearance has been committed...even if there has been no formal complaint*". The Government of Burundi has failed in its responsibility to investigate cases of "disappearance" and to bring to justice those responsible for such practices.

Often, the arresting authorities do not tell detainees or their relatives where they are being taken to. Relatives may be told without further explanation that the detainee is no longer held, creating fear that the detainee has been killed. In some cases, this fear is well-founded. In others, the detainee may have been transferred to a different place of detention and may subsequently "reappear". As detainees often depend on their families to supplement their meals such isolation can have severe consequences. Detainees held incommunicado or without their families knowing where they are, are also more vulnerable to torture and ill-treatment.

[11]General Assembly resolution 47/133 of 18 December 1992.

iii) Torture

> "*Ils m'ont dit qu'il me tueraient si je n'acceptais pas [l'accusation]. Je les ai crus. J'ai tout accepté mais c'était faux*"[12]
>
> "They told me they'd kill me if I didn't agree [to the accusation]. I believed them. I agreed to everything, but it wasn't true."

Despite assurances from members of the Government of Burundi, law enforcement officials and members of the judiciary that the practice of torture has been largely eradicated, Amnesty International remains concerned at what it believes to be the widespread and routine practice of torture and ill-treatment of detainees, primarily in police custody and in many cases to force "confessions". The failure of courts to investigate torture allegations and their willingness to accept confessions obtained under torture encourages the practice of torture. An allegation of torture should be investigated at whatever stage of the judicial process it is made. General comment 20 of the Human Rights Commission regarding Article 7 of the ICCPR, paragraph 12 states:

> "*It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment*."

In May 1998, Amnesty International representatives met the commanders of the BSR and PSP in Bujumbura. Both claimed that torture was no longer practised in their places of detention, although they admitted that it had been in the past. At the BSR Amnesty International delegates were able to meet some detainees, although only in the presence of the commander of the BSR. Some stated they had been beaten "but not very much". Amnesty International representatives did not gain access to the adjoining military camp where some detainees held at the BSR are reported to be taken and tortured. **Pasteur Mandende**, who was arrested in March 1997, was reportedly beaten while at the BSR.

The organization also obtained reliable testimony of torture at the PSP in Kigobe, Bujumbura, including recent cases of beatings while tied in excruciating positions. One detainee recently transferred to Mpimba central prison was reportedly beaten and humiliated; she was told to kneel and was spat at in her face. While on her knees she was hit on the head with a key. She was made to undress during an interrogation, during which she was also hit with a wooden stick, and threatened that if she did not accept the accusation against her she would be killed.

[12]Statement by torture victim in Mpimba central prison to Amnesty International delegates.

Many defendants in political trials claim to have been tortured in detention centres belonging to the Gendarmerie (*brigades*), military camps, the *Documentation nationale* and others. Both **Captain Protais Nzeyimana** and **Laurent Bimenyumrenyi** were reportedly tortured while at the *Documentation nationale* in Bujumbura. Captain Nzeyimana was arrested without a warrant on 8 March 1997 at Ijenda, Rural Bujumbura Province, by the police commander of Ijenda brigade where he was held for five days. He was interrogated once when he was reportedly beaten and threatened that if he did not accept the accusation he would be killed. After five days he was transferred without warning to the *Documentation nationale*. He was not told where he was he was being taken and assumed he was being taken away to be killed. He was held in solitary confinement at the *Documentation nationale* and questioned on several occasions by a military commission. The interrogations reportedly followed more or less the same pattern. He would be beaten with a variety of instruments - standard police batons and whatever was to hand. He would then be questioned and "asked" to sign statements. He was usually handcuffed. Laurent Bimenyumurenyi was reportedly threatened and beaten during interrogation sessions at the *Documentation nationale*. According to his testimony he was hit on his head and legs, kicked in his stomach and beaten on the soles of his feet, and threatened with electric shocks or being stabbed with needles. Under torture he agreed to accept the accusations against him, although he has since denied the accusations.

In none of these cases are their claims of torture known to have been investigated even when defendants have shown signs of injury. Statements extracted through torture or as a result of intimidation - sometimes from a fear of further torture - have been accepted in court as evidence. Members of the government and judiciary in Burundi have stated that confessions allegedly extracted under torture are disregarded if the subsequent statement to the Prosecutor is different. In practice this is not always the case and moreover some detainees stated to Amnesty International that they had felt unable to change their statement at the first occasion they appeared before the Prosecutor through fear of further torture.

Djamali Nsabimana, who was sentenced to death on 12 February 1998 after being found guilty of involvement in the series of mine explosions in Bujumbura in

March 1997, claims to have been severely tortured during interrogation on several occasions on the first three days of his detention in Buyenzi military barracks in Bujumbura. He was interrogated by judicial police officers of the PSP, and by the commanders of the BSR and Buyenzi military barracks. Djamali Nsabimana told Amnesty International that during interrogation, he was made to undress and his hands were tied behind his back. He was heavily beaten on his head, back, legs and the soles of his feet with sticks, machetes and bayonets. He was cut above both knees and threatened that if he "didn't tell the truth" and confess to involvement in planting the mines, his legs would be cut off. He was also given electric shocks to his fingers and genitals. Two brothers, **Roger Baramburiye** and **Charles Ndabadugitse**, lodgers of Djamali Nsabimana, who were arrested at the same time, have "disappeared". On the second day of their detention they were taken from the cell in which they had been held with Djamali Nsabimana and did not return. In the subsequent interrogation Djamali Nsabimana was told to confess or to receive the same fate as his two co-detainees. He assumed this to be a death threat. Djamali Nsabimana agreed to "confess" to involvement in laying the mines after three days of torture. He claims he did not retract his confession at the first occasion he saw a magistrate outside the barracks because he had been threatened and advised not to change his statement. The second time he saw the magistrate, he retracted his statement.

While on trial at Bujumbura Appeal Court, Djamali Nsabimana, showed some of the torture scars and his lawyer asked for investigation into the allegation. The President of the court refused the investigation. The fact that Djamali Nsabimina had not retracted his confession at the first occasion was seen to authenticate the version he had given under torture.

Members of the government, judiciary and police units dismissed Amnesty International's concern that detainees were routinely tortured, saying that such allegations were the standard, and by implication, false claim of all defendants. None of these claims had apparently merited investigation, despite the long and well-documented use of torture in Burundi. They also claimed that all torture leaves scars, and that if no scars were visible, the person could not have been tortured. Clearly not all torture techniques leave permanent visible scars. In some cases the defendant may go to trial three years after their arrest and torture and the scars may no longer be visible. Even when scars have been shown, there have been no investigations into the claims. Members of police units also claimed that improved training and human rights education had reduced torture. They were unable to provide examples of law enforcement officers who have been prosecuted for carrying out torture.

Torture methods most frequently reported include severe and sustained beatings using electric cables, sticks, and other heavy implements, beatings on the joints, the soles of the feet and the genitals, kneeling on bottle tops, stabbings, electric shocks, tying in

excruciating positions, humiliation, intimidation and threats including death threats or other psychological abuse. Other techniques documented by Amnesty International include burning by boiling water, breaking of bones and simulated executions. These torture methods have been documented by Amnesty International for many years.

Jean Minani, who is accused of killing Lieutenant Colonel Lucien Sakubu, a former mayor of Bujumbura, in March 1995, is currently awaiting trial by the criminal chamber of the Appeal Court in Bujumbura. In March 1995, Amnesty International representatives, met and interviewed Jean Minani at the BSR shortly after his arrest. He had been severely beaten and told the Amnesty International representatives that he had confessed to killing Lieutenant Colonel Sakubu under torture although he denied that this was true. In August 1995, when Jean Minani appeared before the Prosecutor General he reportedly denied the killing and stated that he had only "confessed" because he had been tortured. After Amnesty International members took action on the case, an investigation into the torture allegations was promised. However, it appears that no investigation took place.

Jean Minani was one of 12 people detained after being accused of involvement in the murder of Lieutenant-Colonel Sakubu. Following the discovery of the body, about 80 people from the suburb in which the body had been found, were arrested and transferred

to the BSR for interrogation. Women and children amongst those arrested were asked to reveal the identities of those thought to be involved in the killings. All but 12, including Jean Minani and **Tharcisse Nzimpora**, who was also severely beaten, were subsequently released. Jean Minani is the only one of the 12 who, under torture, made a statement admitting to the killing and is the only one to be tried in connection with the murder by the criminal chamber of the Appeal Court. He appears to be being tried mainly on the basis of evidence extracted under torture. Six other detainees including Tharcisse Nzimpora will reportedly be tried before a different court, of a lower jurisdiction, in Bujumbura; they will have the right to a full appeal if convicted and will not face the death penalty. Four other detainees have since been released without charge, and one detainee has died.

Humanitarian and human rights organizations, including UN human rights monitors do not have immediate access to all places of detention, nor access to all military camps. Their access could prevent further cases of torture. The International Committee of the Red Cross (ICRC) has not been present in Burundi since the killing of three of its representatives in Burundi in 1996, which the Government has so far failed to investigate.

iv) Long term detention without trial

International law requires that a trial 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 should benefit from the presumption of innocence, do not suffer unduly prolonged uncertainty. Approximately 80% of detainees in Burundi are untried. Many have been held in detention without trial for years. The failure to provide a judicial review of the legality of detention results in people who should never have been detained, spending years in pre-trial custody. In many cases, the court appearance is the first opportunity to challenge the legality of their detention. The denial of the right to challenge the legality of their detention is in contravention of Article 9(4) of the ICCPR.

Although courts basically were not functioning from 1993 to 1996, mainly due to political instability and insecurity, arrests continued, creating an overwhelming backlog. Of the approximately 2,500 detainees in Mpimba central prison, only approximately 550 have been sentenced. In Ngozi prison for men, of the over 2,300 detainees only approximately 180 have been sentenced. Of the over 2,300 who are held without trial, approximately 2,000 are accused of participating in the massacres of October and November 1993. Many have been held for three years or more. One detainee, **Vianney Sikuwabo**, who was arrested in August 1994 in Mutimbuzi, Rural Bujumbura Province and accused of belonging to an armed group, appeared for the first time in court in October 1997 more than three years after his arrest.

Detainees who are subsequently acquitted after years of detention are not awarded compensation for their illegal detention in violation of Article 9(5) of the ICCPR. Providing compensation would increase accountability and create an incentive to ending the problem of long term detention without trial. Long term detention without trial is so institutionalised that it facilitates score-settling in the knowledge that once arrested, it is likely to be years before the person may challenge their detention.

v) Conditions of detention

Prison conditions in Burundi are harsh and aggravated by severe overcrowding. Conditions, which are sometimes life-threatening, often amount to cruel, inhuman or degrading treatment.

Overcrowding occurs in all prisons, most of which house several times their capacity. Conditions in Ngozi prison, northern Burundi, are particularly bad. Over 200 people died in detention in Ngozi prison between January and April 1998, averaging around 50 detainees per month. The prison, which has a capacity of 400, holds over 2,408. In 1997 over 400 inmates died in detention in the same prison. Gitega prison which has a capacity of 400, holds over 1,700, and Mpimba central prison which has a capacity of 800, holds over 2,500.

The majority of people in Ngozi prison are held without trial and are accused of participating in the massacres of Tutsi civilians in October and November 1993. The majority of deaths are as a result of the combined effects of malnutrition, poor conditions, and the spread of infectious diseases such as tuberculosis, malaria, dysentery and typhoid. Concern has been expressed that the death rate is higher than in other prisons because the incidence of torture in the communal cells and police stations in the area is more extreme and the prisoners who arrive are physically debilitated or injured and therefore more vulnerable.

Prisoners under sentence of death in Mpimba central prison, Bujumbura, are held in what are referred to as "isolation cells". They are held in communal cells separate from other prisoners. At least 150 prisoners are held in two cells isolated from the rest of the prisoners and detainees. The cells are extremely overcrowded; for instance, one cell, in which over 40 prisoners are held, measures approximately only six by four metres. The prisoners are obliged to take turns in lying down and sleeping. They are allowed outside for only half an hour per day. Unlike other prisoners and detainees, who receive regular family visits, prisoners who have been condemned to death receive only one family visit per week.

Conditions are aggravated by the wholly insufficient budget which is allocated by the Government of Burundi to the penitentiary system. In March 1998 financial constraints meant there was effectively no food provided for prisons. Many detainees depend on their families to bring food to supplement inadequate provisions. Some prison governors have apparently adopted more flexible routines which allow prisoners to work outside the prison and earn money for food. However, this appears only to affect condemned prisoners and the majority of detainees therefore do not benefit. In some cases, humanitarian aid from non-governmental organizations which could have helped alleviate conditions and severe malnutrition was reportedly rejected by the authorities.

Detainees who are held far away from their homes and families are particularly vulnerable to the poor conditions. The majority of the detainees arrested in March 1997 in connection with an alleged plot against President Buyoya were transferred after interrogation to prisons away from their home areas making access by and support from their families more difficult. One of the detainees, **Lieutenant-Colonel (Retd) Pascal Ntako** died in detention in Muyinga prison apparently as a result of being denied essential medical care on or around 11 May 1997. Another detainee, **Isidore Rufyikiri**, required hospitalization as a result of the poor conditions of detention he experienced in Rumonge prison, Bururi Province.

In discussions in May 1998 with Amnesty International representatives, the Minister of Justice, recognized the problems of overcrowding and poor conditions and stated that more prisons would be built to alleviate severe overcrowding. Amnesty International fears that should this be the case, it might simply increase capacity to hold more untried detainees, and urges that as first priority greater resources should be given to provide for the immediate care of those who are already detained and to ending illegal detentions.

VII TRIAL IRREGULARITIES

i) Delays

Trials are repeatedly deferred before or after hearings have begun. Some cases have been deferred over five times before being heard. Amnesty International welcomes deferrals which contribute to the fairness of the trial, for example to allow for lawyers and witnesses to be present, and for a lawyer to be fully acquainted with the case. However, in some cases concern has been expressed that deferrals have allowed for prosecution witnesses to amend their statements, or for the intimidation of defence witnesses. Furthermore, numerous repeated deferrals are creating additional pressures on the judicial

system and adding to the problems of long-term detention without trial. Several factors, many of which are avoidable, appear to be contributing to delays in trial proceedings.

In the first place, the investigation of the case is often poor. Most detentions take place before the police investigate to establish the legal basis for arrests. The judiciary frequently fails to check on detention centres in order to release detainees against whom there is insufficient evidence to justify their detention. If the inadequacies or irregularities of the police investigation have not been addressed by the public prosecutor, the investigation of the facts takes place, through the examination of witnesses, in court. Court time is also wasted on cases which should have been thrown out at earlier stages.

The organization of the courts also plays a part. For example, as the majority of those in detention are accused of crimes which fall under the jurisdiction of the criminal chambers of the appeal courts, they may only be tried by three courts, in Bujumbura, Ngozi or Gitega. Lawyers and witnesses must also travel to these courts, and their absence, for whatever reason, results in deferrals. In early 1998 a ministerial directive was issued allowing for the appeal courts to sit in other locations within their territorial jurisdiction. Another potential solution would be to modify relevant legal texts to allow for courts of a lower jurisdiction, such as High Courts to try cases. There is one High Court per province. While this reform would also have the advantage of allowing for full appeal at the Appeal Court, it could only facilitate the trying of more defendants if there were more lawyers available to work in the trials and to work for long periods outside Bujumbura.

The pace of trials is further hampered by the small number of lawyers who are overburdened. This results in lawyers requesting deferrals because they have not had time to prepare the defence. The UN Program of Judicial Assistance provides six national lawyers to represent the defence and prosecution in ongoing trials at the criminal chambers of the Appeal Courts. Foreign lawyers who have been involved in the trials work alongside national lawyers rather than independently and have therefore not added to the capacity of the judiciary to try cases. The lack of lawyers is compounded by the insufficient time between the publication of cases due for trial and the actual hearings.

Many cases are deferred illegally after trials have begun. Article 22 of the Decree-Law of 19 August 1980 providing for the creation and organization of the criminal chambers, which states that “proceedings may not be interrupted and must continue until there is a ruling on the case. Proceedings may only be suspended to allow for judges and defendants to rest”.This article is designed to prevent witnesses influencing each other.

Trials such as the trial of those accused of being behind mine explosions in Bujumbura in early 1997 proceeded without interruptions over consecutive days,

showing that if the political will is there, such irregularities can be avoided. However, the trial of those accused of participating in 21 October 1993 coup attempt has continued at the pace of one hearing every one or two months indicating a serious lack of will to complete the trial. In March 1997 the first hearing was postponed when only 20 of the 79 accused turned up in court. Only four of those who appeared in court were at liberty. Soldiers who were arrested after the failed 21 October 1993 coup attempt have now been held for four years in preventive detention.

Members of the judiciary in Burundi made it clear in discussions with Amnesty International delegates that one of their primary concerns was that trials should be dealt with speedily. Amnesty International is concerned that such speed should not be to the detriment of the fairness of the trial and that trials should not continue when the lawyer is absent or inadequately prepared.

ii) The right to legal counsel

During 1996 virtually all defendants tried for their alleged participation in the 1993 massacres did not have a lawyer. Requests in court by defendants for their trials to be deferred until a lawyer was present were ignored. Some lawyers who were prepared to defend prisoners were intimidated to prevent or discourage them taking up cases. Given the seriousness of the offences and punishments it is crucial that every attempt be made to ensure the best defence of the defendant.

Article 14(3)(d) of the ICCPR imposes a binding legal obligation on the Government of Burundi to provide legal assistance to a defendant:

> *"... in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it".*

In its interpretation of Article 7 of the African Charter, the African Commission on Human and Peoples' Rights has affirmed the right of an indigent defendant to legal assistance provided by the state[13]. Where an indigent defendant is unable to pay for a defence lawyer, the state must provide legal counsel, especially in cases where the death penalty may be imposed on conviction.

Without access to a lawyer of one's choice, there is little chance of a fair trial. However, the presence of a lawyer in court is not enough to guarantee fair trial. Defendants should also have the right of access to legal counsel immediately after their

[13]Resolution on the Right to Recourse and Fair Trial, Fifth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annexure VI ACHPR/XII AN.RPT/5 Rev.2

arrest and during interrogation. The presence of a lawyer during interrogation will not only ensure the detainee's rights are respected but will also prevent torture during interrogation. The Code of Penal Procedure does not guarantee the right of a detainee to have a lawyer until the second judicial review of the detention. Many detainees do not benefit from this review. Article 30 of the Code of Criminal Procedure provides for the possibility of legal counsel after the first judicial review but does not guarantee the right.

Lawyers must have the opportunity to consult adequately defendants, building trust and confidence and fully acquainting themselves with the facts of the case. Lawyers should also be able to challenge the admissibility of confessions likely or known to have been obtained under duress or torture before the trial begins.

In practice, the majority of defendants only receive a lawyer at best when they are notified of their court date, or even later. The first time a defendant sees a lawyer can therefore be after years of detention. In the majority of cases in relation to the 1993 massacres there is no contact between defendant and lawyer prior to the trial. The volume of cases means that in the majority of cases lawyers do not have time to visit the defendant prior to the trial, should they be sufficiently motivated. International lawyers defending clients as part of the UN Program of Judicial Assistance may arrive just days before the court hearings start, or even after they have begun.

It is widely acknowledged that most case files are virtually empty. Given the inadequacy of the files, if a real defence of the client is to be provided it is crucial that the lawyers have the time and access to be able to build the defence of their client. Furthermore, although not prohibited by law, lawyers do not have free access to case files and have to study them in the court buildings. International lawyers working with the UN program have been prohibited from taking photocopies of translations of case files away from court buildings.

In court, the role of defence lawyer is also limited and somewhat passive. The right to ask questions through the bench may be permitted by the judge but is not guaranteed. In the majority of cases lawyers are able to cross examine witnesses. However, in the hearing of those accused of assassinating President Ndadaye, the lawyer for the plaintiff was repeatedly denied the right to cross examine witnesses. Furthermore, interventions by a lawyer can only be effective in ensuring a fair trial if the court officials themselves are aware of and abide by national and international law.

iii) Witnesses

Many people, particularly those accused of participation in the massacres of 1993, have been convicted in the absence of defence witnesses.

The cross-examination of prosecution and defence witnesses is crucial to ensuring fair trial[14]. It is particularly important to hear witnesses, when the process of the establishment of cases files cannot be assumed to be thorough and impartial, and when the defendants and their lawyers have not had access to the case file throughout the investigation period.

The hearing and cross examination of witnesses, both for the prosecution and defence, can be crucial in ensuring a just verdict and it is therefore all the more important that efforts are made to ensure their presence. There are clearly genuine difficulties in ensuring the attendance of witnesses in court in Burundi. As the alleged crimes were often committed over four years ago and the intervening years have been marked by violence and civil war, it is often not possible to find the witnesses as they have since moved, fled into exile or died. Furthermore, there are practical impediments as witnesses have to pay for their own transport and lodging. Many witnesses are not able or willing to do this, particularly when cases are often deferred. In some of the cases researched by Amnesty International, witnesses for the defence, even when present, were not heard. In some cases the prosecution's case rested entirely on the testimony of the alleged victim who, as the plaintiff, was seeking compensation at the same time.

Certain measures have been taken to try to increase the presence of witnesses and many trials deferred on several occasions because of the lack of, primarily, defence witnesses. Courts may ask the local authorities for assistance in locating witnesses but do not have the resources to monitor the search by the local authorities to find witnesses, or whether in fact the witnesses ever received notification. It therefore presupposes good will and sufficient resources at local level - neither of which are guaranteed.

Witnesses for the defence have also been intimidated, beaten and arrested. **Abbé Patrice Vyiyngoma** was arrested in early 1996 and detained in Muyinga prison, Muyinga province. He is accused of providing food and clothes to Hutu armed groups. Abbé Vyiyngoma claimed to have been distributing aid to internally displaced people. Defence witnesses who supported his statement were arrested and accused of giving false statements. They were sentenced to two months imprisonment. Abbé Vyiyngoma is still awaiting for his trial to conclude.

Radio announcements summoning named witnesses to trials are also made. The public announcement of witnesses, particularly in sensitive cases, clearly leaves the

[14]Article 14(3)(e) of the ICCPR states that everyone is entitled "*To examine, or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him*".

witness potentially vulnerable to intimidation or reprisal, from which there is no protection. Some local organizations and press have been instrumental in generating intimidatory feelings.

In January 1998 Joseph Mirenzo was acquitted by Gitega Appeal Court of participating in the massacres of 1993, after the Prosecutor had visited the area to seek out defence witnesses. After his release he was handed over to a group of *déplacés* (internally displaced people) in Muriza, Ruyigi province by the administrator of Butaganzwa commune, and killed. The administrator and five *déplacés* were subsequently arrested. NETPRESS, a news agency, reported the killing of Joseph Mirenzo saying:

> "*Emmanuel [Joseph] Mirenzo, a suspected génocidaire, had reportedly made himself noticed in the killings of October 1993. He was accused of killing a lot of people in Kinyinya. He set up special gibbets on the bridge which separates Butaganzwa and Ruyigi communes to hang men, logs to burn children, he coordinated the rape of Tutsi young girls and women before killing them...the same sources indicate that* [after his release] *he wasted no time in restarting the same genocidal teachings. This is reportedly why he was killed the next day*."

The news article then named the defence witnesses who had been interviewed by the prosecutor and reported that his action had not been appreciated by certain members of the community. This clearly posed a threat to the security of the witnesses and prosecutor.

During her trial by the criminal chamber of Gitega Appeal Court, **Marie Rose Umahoro**, who was accused of participation in the massacres, was asked in court to name defence witnesses. According to her testimony, when she tried to name her witnesses, she was shouted down by spectators in the court room, accusing her and the witnesses of having taking part in the genocide. She was convicted and sentenced to death in Gitega in July 1997 in the absence of defence witnesses.

One lawyer stated to Amnesty International that defendants sometimes deliberately name witnesses who are dead, have never existed or who are in exile to delay their court appearance. While it may well be true that some defendants deliberately name witnesses who are impossible to find to delay their court appearance, in many other cases this assumption may not be justified. Defendants who have spent a long time in custody may not be aware of the whereabouts of their witnesses with whom they may have had no communication for long periods.

iv) Summary trials

The majority of trials in connection with the massacres of 1993 are summary. Many have lasted under 30 minutes. Few people plead guilty. Some people were sentenced to death in trials that lasted 15 minutes. For example, **Corneille Karikurubu** was sentenced to death on 24 June 1996 after a trial that lasted around 30 minutes. He had no lawyer. No defence witnesses were heard. He was convicted of participating in the massacre of Tutsi civilians in 1993. He was detained for three months in a PSP cell in Karuzi where he was reportedly severely tortured. He was held handcuffed, and regularly beaten on the head and his joints. Another defendant, **Placide Wimana** was sentenced to death in a trial by the Criminal chambers of Gitega Appeal Court that lasted under 30 minutes. No defence witnesses were heard. He had not been informed that he was to appear in court and in court, he requested an adjournment to allow for a lawyer to be present. The request was denied. Placide Wimana was reportedly tortured and ill-treated over a six month period in the Brigade de Karusi, Karusi province, following his arrest in August 1994, after being accused of participation in the massacres of October 1993. He was repeatedly beaten and his fingers broken.

Even in the UN Program of Judicial Assistance there seems to be some resistance to the application of international standards. One lawyer interviewed by Amnesty International stated that one of the reasons for the backlog of cases in Burundi are that trials are "*too long*" lasting "*one or two hours*".

v) Atmosphere in court

Particularly during 1996 and 1997, the atmosphere in many of the trials was reportedly hostile to defendants and their lawyers, undermining the presumption of innocence and fairness of the trial. Court officials do not appear to have taken sufficient steps to ensure that the atmosphere in court was not intimidatory or hostile, by, for example, excluding people who may be hampering the conduct of the trial. Spectators in court rooms jeered and shouted out, and court officials have made it clear they consider the defendant to be guilty. The failure to maintain decorum and silence hecklers affects the appearance of impartiality of the judiciary.

During the trial of **Firmat Niyonkengurukura**, the former director of Kibimba school, who was convicted of burning alive 70 Tutsi students in October 1993, the atmosphere in court was particularly bad. Foreign lawyers who attempted to represent him in 1996 on the initiative of Burundian human rights groups, were forced to withdraw

after threats and he was sentenced to death without legal representation. At his appeal hearing at the cassation chamber of the Supreme Court, both the national and foreign lawyer who were to represent him withdrew for reasons of personal security. The hearing was not postponed to allow for other legal representation to be provided. His appeal was not upheld and he was executed on 31 July 1997.

According to most people interviewed by Amnesty International, the atmosphere during recent trials has significantly improved and in the majority of cases now, the atmosphere is relaxed and open and more conducive to fair trial and impartial judgement. This was the case in hearings attended by Amnesty International representatives. However the potentially negative impact of a hostile atmosphere should be one of the factors taken into consideration when cases are reviewed.

vi) The right to appeal

One of the fundamental guarantees for a fair trial is the right to appeal against the conviction and sentence to a higher court. The requirement of international law is that national laws must guarantee a procedure in which both the factual and legal aspects of a case may be reviewed by a higher court. The right to appeal is particularly important in cases involving capital offences, as has been recognized by the UN Safeguards guaranteeing protection of the rights of those facing the death penalty. Safeguard 6 states:

> "*Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory*"

In most trials covered in this document, defendants may only petition the cassation chamber of the Supreme Court for a review of the case (cassation) on the basis of procedural irregularities or errors[15]. The cassation procedure does not look at the facts of the case. It can overturn any conviction resulting from an unfair trial where there were breaches of procedures and return the case for retrial, It does not therefore amount to a full appeal and is in contravention of Article 14(5) of the ICCPR[16].

[15]Under Burundian law, the more serious the offence, the more the right to appeal is denied. Offences incurring a penalty of 20 years or more including the death penalty are tried by the criminal chambers of the Appeal Courts and the right to appeal is limited to the cassation procedure, and thus only on questions of law. Lesser offences are tried by the High Courts which guarantees a full appeal hearing at the Appeal Court, then a review of the case through the cassation procedure at the Supreme Court.

[16] Article 14(5) guarantees that "*Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to the law*"

The cassation procedure is a technical procedure and requires knowledge of the law to be able to submit an acceptable appeal. The majority of prisoners who submitted appeals to the cassation chamber in 1996 were forced to do so in the absence of a lawyer. The majority of these appeals will be considered inadmissible because of the technical nature of the appeal.

Furthermore, appeals to the cassation chamber must be submitted within eight days of the judgment being passed. In the majority of cases, neither defendant nor lawyer, where there is one, received copies of the judgment on which to base the cassation. The cassation chamber has also been inflexible with regard to accepting late submissions of appeals from defendants or their lawyers who had not received the correct documents, or in cases where lawyers have been asked to represent defendants who submitted cassation appeals without the help of a lawyer. In such a context the value of the intervention of a lawyer is nominal. Furthermore defendants and lawyers have been asked to pay for copies of the judgement. Many defendants are unable to afford the copies. In early 1998, the Minister of Justice issued a directive which ordered the immediate production of a copy of the judgment. Even if this is implemented, a move which Amnesty International would welcome, it does not address previous appeal submissions.

Although Burundi is bound by the obligations of the ICCPR, the denial of the right to have a lawyer in capital cases has not been accepted as grounds for cassation. The UN Safeguards guaranteeing protection of the rights of those facing the death penalty also stresses the need for those facing the death penalty to receive legal assistance at all stages of the progress. Very few cassation appeals have been accepted.

Soldiers tried by court martial have the right to appeal to the *Cour militaire* (military court of appeal) and then to the Cassation chamber of the Supreme Court. Soldiers of ranks of major and above are tried by the military court of appeal and may only appeal to the Cassation chamber of the Supreme Court. They do not therefore have full rights to appeal, in contravention of international standards governing fair trial.

Placide Wimana, who was denied legal representation at his trial submitted an appeal to the cassation chamber of the Supreme Court without the assistance of a lawyer and without the written judgment. Although he was represented at the cassation hearing by a lawyer when the appeal was heard, and the procedural irregularities of the case raised, the cassation was not upheld. He has appealed for clemency.

vii) Other violations of prisoners' rights

Violations are not limited to pre-trial detention and trial proceedings. Some defendants remain in detention despite acquittal, or beyond the expiry of their sentence. In some cases this is because prisoners have not been informed of the length of their sentences. Other detainees - who have never been to court - have been in detention for longer than the maximum sentence they could have received if convicted of the crime they are accused of. The work of the *Association burundaise pour la défense des droits des prisonniers* (ABDP), Burundian Association for the Defence of Prisoners' Rights, has highlighted some of these cases, and on their intervention there have been scores of releases.

VIII THE DEATH PENALTY

> "*Punishment must to some extent be commensurate with the offence, but there is no requirement that it be equivalent or identical to it. The state does not put out the eyes of a person who has blinded another in a vicious assault, nor does it punish a rapist by castrating him and submitting to the utmost humiliation in gaol. The state does not need to engage in the cold and calculated killing of murderers in order to express moral outrage at their conduct*."[17]

On 31 July 1997, **Stanislas Machini**, **Firmat Niyonkenguruka**, **Ephraim Banka**, **Edouard Sahokwsawama**, **Pontien Bizumukama** and **Damien Nsabimana** were executed in the first executions in Burundi since 1981. The men had all been convicted after unfair trials of participation in massacres or other killings since 1993. None had legal representation. One of the detainees, Stanislas Machini, wrote to the State Prosecutor in 1995 alleging that he had confessed to participation in the massacres after torture. The allegation of torture is not known to have been investigated by the authorities.

Amnesty International is unconditionally opposed to the death penalty, in all countries and in all circumstances. This position is based on its firm conviction that the punishment is a state-sanctioned violation of the right to life. Whatever the crime committed by an individual, even for the worst cases of violence and murder, it should not be punished by a human rights violation. The death penalty is also the most extreme form of cruel, inhuman and degrading punishment.

Opposition to the death penalty is not, as some critics of Amnesty International argue, synonymous with calling for impunity for the guilty. On the contrary, Amnesty

[17]The South African Constitutional Court declaring the death penalty unconstitutional, (The State v T Makwanyane and M Mchunu, Case No. CCT/3/94, paragraph 129).

International continually calls for those responsible for human rights violations to be brought to justice and welcomes their prosecution in conditions of fair trial.

Amnesty International firmly believes that the use of the death penalty can only perpetuate the cycle of bitterness and revenge, instead of bringing reconciliation and respect for human rights to Burundi. Rather than being a deterrent, violent punishment can further entrench violence in society. Amnesty International is urging the Government of Burundi to refrain from using the death penalty and instead apply prison sentences, as appropriate to the gravity of the crimes. It should take this opportunity to demonstrate its commitment to respecting human rights and putting an end to political violence in Burundi.

Amnesty International is particularly concerned when it is clear that death sentences result from manifestly unfair trials without a possibility of a full appeal against the conviction and sentence. Executions carried out after unfair trials amount to arbitrary executions in violation of the right to life guaranteed in Article 6 of the ICCPR and Article 4 of the African Charter.

At least 260 people are now under sentence of death in Burundi. The majority have been sentenced to death for their alleged part in the massacres of October and November 1993. A number of soldiers who have been convicted of killing other members of the armed forces have also been sentenced to death. Many of those who have been sentenced to death in Burundi have been sentenced after unfair trials. Six men were executed on 31 July 1997 in the first executions in Burundi since the early 1980s. All had been sentenced to death after unfair trials.

Gaëtan Bwampaye was sentenced to death on 27 September 1997 after a grossly unfair trial. Gaëtan Bwampaye was arrested in August 1994 and accused of involvement in the massacres of Tutsi civilians in Ruhororo commune, Ngozi province in October 1993. A statement (*procès verbal*) was drawn up which he was forced to sign without reading. He was not informed of the specific charges against him. He was subsequently charged with inciting violence, participating in massacres which took place in Ruhororo commune and in erecting roadblocks. During his trial his family was harassed and his house burnt down. His defence witnesses were arrested and beaten after giving evidence in December 1996 in court. At the hearing of 20 August 1997, the defence lawyer was due to make his speech for the defence (*plaidoirie*). He was reportedly told to summarise his arguments as there was not enough time to hear all the arguments. The lawyer refused and the hearing was deferred until 27 September 1997. On 27 September an adjournment was requested as the defence lawyer was unable to attend. The request was denied and the hearing proceeded without the lawyer. Gaëtan

Bwampaye is currently held in Mpimba central prison. He has appealed to the Cassation Chamber of the Supreme Court to have the sentence reviewed.

IX JUDICIAL ASSISTANCE

Amnesty International believes that the international community has a crucial role to play in assisting and encouraging the Government of Burundi to tackle impunity and to reform, where necessary, the national judicial system. Such assistance should be carefully considered and evaluated to ensure that it has a real and positive impact.

i) Comment on the United Nations Program of Judicial Assistance

The introductory description of the UN Program of Judicial Assistance (the UN Program) signed between the UN and the Government of Burundi in October 1996 states that the project's objective is "*to assist the Burundian judicial system in its fight against the state of impunity in Burundi following the crisis of 1993... Within the project, national and international lawyers will undertake the defence to ensure that trials are fair. This project of judicial assistance aims therefore to guarantee the impartial nature of justice in Burundi and by so doing facilitate the conditions for a return to peace, national reconciliation and the rule of law*".

Amnesty International welcomes the efforts of the United Nations and others to support and strengthen the Burundi judicial system and to improve the quality of trials. The program, which has been in place since early 1997, has had some positive results. According to the majority of members of the judiciary met by Amnesty International delegates, an important achievement which must be recognized is the UN Program's work in breaking down some of the mutual mistrust between the defendants and the Tutsi-dominated judiciary, and an increased acceptance of the right to defence. Largely as a result of the UN Program, many defendants now receive legal representation at trials and more defence witnesses are heard. The UN Program has also been involved in training and human rights education initiatives for the judiciary and law enforcement agencies.

However, while these are undoubtedly positive developments, Amnesty International is concerned that unless other persistent abuses are addressed their immediate impact is undermined. Amnesty International has not made a detailed study of the UN Program and its work. However, it appears much more needs to be done to ensure that the UN Program attains the ultimate goal of guaranteeing fair trials which conform to international standards. Some of the practices of the UN Program amount to condoning unfair trial.

- Although some national lawyers working with the UN Program make reference to the obligations of international treaties relating to fair trial, the courts are not adhering to these obligations. There seems to be a level of resignation within the UN Program which makes it ineffective in tackling these issues. In meetings with Amnesty International delegates it was clear that not all the national lawyers with the UN Program and court officials were familiar with these treaties.

- The judicial assistance by the UN Program concentrates on a visible part of the judicial process - the trial proceedings. It has been ineffective in tackling irregularities at this stage of the process and has had only a limited impact on pre-trial irregularities.

- Although the UN Program concentrates on trial proceedings, it has accepted to work in conditions where the right to the best defence possible cannot be guaranteed. Lawyers do not have unrestricted access to case files nor are they able to spend sufficient time with their clients before trials to build a proper defence. In particular, foreign lawyers may arrive just days before the start of a session. In one trial, foreign lawyers who objected to the restricted access to files and refused to represent the defendants in conditions where they felt they could not guarantee the best defence of their clients, were replaced by other foreign lawyers working for the UN Program.

Amnesty International believes that unless the UN Program intervenes earlier, it will not be effective in obtaining its goals.

- The UN Program has been unable to prevent abuses such as admission by the courts of confessions extracted through torture, or, in some cases, trials continuing in the absence of legal representation, even when it has been assigned. No steps have been taken to encourage victims of torture to file complaints, or for defendants who have been acquitted after illegal detention, to seek compensation.

- The agreement between the UN and the Government of Burundi specifies that there will be a provision within the budget for travel of witnesses for the defence and prosecution, and the victims. This appears to have been inadequate or not implemented.

- There appears to be a lack of information sharing between different UN programs in Burundi, even when they are part of the same operation, so that there is no information transfer for example, where a UN human rights monitor can provide information substantiating an allegation of torture to a lawyer defending the case. Nor is there the necessary information sharing between the UN Program and the

UN human rights monitoring operation which would allow the monitoring of witnesses who are potentially at risk;

- The UN Program, like the government and judiciary, faces real practical difficulties. One of the problems faced is that the terms of the agreement between the UN and the Ministry of Justice are often not respected by courts. For example, the agreement makes explicit reference to the rights guaranteed by the 1992 Constitution such as the right to be presumed innocent until proven guilty and the right to legal counsel. Both these rights are guaranteed by the new Transitional Constitution of June 1998. In continuing to allow practices which undermine these principles, and in particular by executing six people who had been denied these rights, the government and judiciary have not respected these obligations.

  However, Amnesty International is concerned at the failure of the UN to ensure compliance with the terms of the agreement, and to speak out publicly against such violations.

ii) An international tribunal for Burundi?

Both the Government of Burundi and political opposition parties have called repeatedly for the establishment of an international tribunal for Burundi to try those accused of crimes of genocide and crimes against humanity. The need for an international jurisdiction for Burundi was recommended in 1996 by the UN Commission of Inquiry into the assassination of President Ndadaye and the mass killings which followed. In its report the Commission found that acts of genocide had been committed against the Tutsi ethnic group and recommended that:

> *"If it is decided to assert international jurisdiction regarding acts of genocide in Burundi once a reasonable level of order and security and ethnic harmony are reestablished, the investigation should not be limited to acts committed in October 1993 but should also extend to other acts committed in the past, in order to determine whether they also constituted acts of genocide and, if such is found to be the case to identify those responsible and bring them to justice. Particular attention should be given to the events that took place in 1972 when, according to all reports, a systematic effort was made to exterminate all educated Hutus. No one was ever prosecuted for these acts."*

In calling for an international tribunal for Burundi, the government of President Buyoya has repeatedly sought to limit the mandate of such a court to the events of 1993, and to the genocide of Tutsi which it alleges took place in the days which followed the

assassination of President Ndadaye. Amnesty International has two fundamental concerns with this position. Firstly, the UN Commission which found that acts of genocide against the Tutsi ethnic group had taken place was restricted in its activities, and flawed in methodology. It is not clear how its conclusions were reached, and whether therefore acts of genocide had in fact taken place, or why the killings of Tutsi were considered to be acts of genocide and not those of Hutu. Further independent and impartial investigations are required to establish whether indeed acts of genocide took place in 1993. Secondly, it is crucial that the decades of impunity and mass killings in Burundi be impartially and independently investigated. Limiting the time frame would further entrench impunity and divisions within Burundi leading to further human rights violations. On this particular issue, Amnesty International welcomes the commitment expressed in the June 1998 transition agreement which calls for investigation into other past abuses.

Amnesty International has consistently argued that UN member states must give international tribunals such as the International Criminal Tribunals for Rwanda and the former Yugoslavia sufficient financial and political support to enable them to carry out their work[18]. The experience of both tribunals demonstrates that an international court must receive stable and adequate financial, human and technical resources to ensure its effective functioning. There has been little, if any, political support by the international community for a tribunal for Burundi. The existing UN programs within the country are themselves under resourced. There is nothing to suggest that this is likely to change.

Calling for the creation of an international tribunal should not be a way of abdicating responsibility. Primary responsibility for justice is with the national authorities and the national courts. Even in the unlikely eventuality of a fully resourced and impartially mandated international tribunal being created for Burundi, it would only ever be able to deal with a handful of cases. This would not be sufficient to address impunity and improve justice and human rights in Burundi.

Amnesty International firmly believes that it is more important to reform and strengthen the national judicial system of Burundi to ensure a fully functioning impartial judicial system. This in itself is a substantial task requiring commitment from both the government of Burundi and the international community. Commitment and resources should be to provided to support this key element of the steps towards resolving the human rights crisis in Burundi.

[18]See **International Criminal Tribunal for Rwanda: Trials and tribulations** (IOR 40/03/98, April 1998) for Amnesty International's concerns and recommendations in relation to the International Criminal Tribunal for Rwanda.

iii) Reform of the Code of Criminal Procedure

Over the last 10 years there have been a number of draft revisions of the Code of Criminal Procedure, none of which have come into force. Amnesty International discussed some of the proposed changes with members of the judiciary and government during its visit to Burundi. Amnesty International would like to appeal to those considering the draft to take this opportunity to ensure that the Code of Criminal Procedure is amended to incorporate the provisions of the international human rights treaties which Burundi has ratified, including allowing for the right of detainees to challenge the legality of their detention and the right to legal counsel at all stages of the judicial procedure.

One of the proposed amendments is to lengthen the period (police custody) between arrest by a judicial police officer and first appearance before the public prosecutor to seven days and to extend the period before a judicial review of the detention from five days to 15 (starting from the production of the arrest warrant). The initial confirmation of the detention would be valid for one month, rather than 15 days at present.

While welcoming discussion on and moves towards legalising detentions, Amnesty International is concerned that such a long period is excessive and would leave detainees vulnerable to torture and ill-treatment. More positively, it is proposed that detainees would have the right to challenge the legality of their detention at the first judicial review. At present this is not allowed.

However, as this change would allow all currently detainees who so far have not had the right to challenge their detention, to do so, and as no measures have been discussed on how the potentially thousands of requests would be dealt with, there is a serious risk that the improvement would be on paper only. Given the current complete disregard for the concept of legal detention, it is unclear how the changes would be enforced.

iv) National assistance

National non-governmental human rights organizations including the *Association burundaise pour la défense des droits des prisonniers* (ABDP), the Association for the defence of prisoners' rights, and the Burundian Human Rights League, ITEKA, have initiated valuable programs to help improve the fairness of trials. In particular, the ABDP has provided lawyers, informed detainees and prisoners of their rights and about developments in their cases and has provided medical care. Their actions have resulted in the release of scores of prisoners who had been detained illegally for several years. They have also documented scores of cases of torture.

Organizations including the ABDP, ITEKA and the *Fondation Melchior Ndadaye pour les droits de l'Homme, la démocratie et le développement*, Melchior Ndadaye Foundation for Human Rights, Democracy and Development, tried to get foreign lawyers to represent defendants in the first trials of people, including Firmat Niyonkenguruka, accused of participating in the massacres. In the latter case, lawyers subsequently were forced to withdraw after threats against their safety.

X PROPOSED NEW LEGISLATION

i) Prosecuting those accused of genocide or crimes against humanity

Burundi is required under the Convention on the Prevention and Punishment of the Crime of Genocide, which it ratified in July 1996, to *"enact legislation to give effect to the provisions of the genocide*". A draft law to this effect was produced in late 1997. In March 1998 Amnesty International addressed a memorandum to the Government of Burundi containing its concerns and recommendations in relation to a draft law for "the prosecution of people guilty of crimes of genocide or crimes against humanity"[19]. The draft law breaches certain internationally recognized standards for fair trial including the right to a full appeal in capital cases. The proposed time frame of the draft law, which prevents investigation of crimes committed before 21 October 1993, would be in contravention of Burundi's obligations under the Genocide Convention and the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity[20].

The draft will be discussed by the Cabinet before promulgation. Amnesty International has been assured by some members of the Government that some of the irregularities including the limitation on the time frame of the law will be addressed before the draft law is finalised.

[19]*Loi portant procédures de poursuites et de mise en jugement des personnes coupables de crimes de génocide ou de crimes contre l'humanité, Note sur l'opportunité de légiférer sur le génocide en général ou de le circonscrire aux événements d'octobre 1993.* Law on the prosecution of those responsible for acts of genocide or crimes against humanity, Explanatory note on whether to restrict the law to the events of October 1993.

[20]**Memorandum to the Government of Burundi on the draft law on genocide and crimes against humanity** can be obtained from the International Secretariat of Amnesty International, 1 Easton Street, London, WC1X 8DJ, United Kingdom.

ii) Reform of other legal texts

Some of the recommendations proposed by Amnesty International would require modification of legal texts governing the composition of courts and legal jurisdictions in order to attain consistency with international standards of fair trial. For changes to be effective, a comprehensive package of reforms should be introduced. It is also essential that new laws provide sanctions for those who violate the law and ways for the victims to gain redress including compensation.

XI CONCLUSION

It is crucial that people responsible for human rights violations and other crimes are brought to justice. Without justice, there will be no end to the political or human rights crisis. However, Amnesty International believes that the judicial system in Burundi is so flawed that most trials have failed to conform to internationally recognized standards for fairness. Although the UN Program of Judicial Assistance has had a positive impact, it has not addressed fundamental failings in the system. The majority of convictions must therefore be regarded as unsafe.

In concluding that the majority of convictions cannot be regarded as safe, Amnesty International is not stating that those tried and convicted are all innocent. What it is saying is that people accused - of even horrendous crimes - have the right to a fair trial. Some of those tried and convicted may be innocent but may have been denied the opportunity to prove their innocence. At the same time, many civilians and members of the security forces responsible for politically motivated violence and serious human rights abuses remain at liberty. The judiciary needs urgent reform to ensure independence, and resources and assistance to enable it to function more efficiently and to cope with its enormous burden and ensure that those accused of human rights abuses and other crimes are properly arrested, tried and brought to justice in accordance with international standards of fairness and without recourse to the death penalty.

The reforms necessary to address these issues are not necessarily complex but inevitably will take time to implement, even if there is the political will to do so. In the short term, reforms should take place to allow for the assistance of foreign legal experts at all stages of the judicial process and for the full right to appeal, which should apply to cases already tried.

If these resource issues are to be addressed in the long term, it is crucial that more human and financial resources are given to the judiciary to enable it to function more competently. In the interim, the capacity of the judiciary could be increased by a wider

program of judicial assistance in which foreign lawyers, magistrates and judges, would be employed at all levels in the courts.

Priority should be given to investigating the cases of the thousands of detainees awaiting trial and releasing those against whom there is no or insufficient evidence to justify their continued detention and to reviewing through a full appeal procedure deciding on the merits of the case, all cases which have been tried since 1996. If necessary a special chamber at the Court of Appeal should be created specifically to review all cases tried since 1996. Priority should also be given to ensuring that future arrests conform to procedures.

XII RECOMMENDATIONS

i) Recommendations to the Government of Burundi

Amnesty International is appealing to the Government of Burundi to implement the following recommendations:

Strengthening the Judiciary

- the laws regulating the appointment of judges and judicial officials such as the President of the Supreme Court, and members of the procuracy (*parquet*) should be modified to ensure greater independence of the judiciary. Changes in the law should be based on the UN Basic Principles on the Independence of the Judiciary and the Procedures for the effective implementation of the Basic Principles on the Independence of the Judiciary;

- the composition of the Supreme Judicial Council should be reformed to ensure independence from the executive branch of government;

- some of the powers concentrated in the prosecutor should be devolved. Lawyers and detainees should be empowered to challenge the legality of their continued detention by submitting their case directly to the council chamber;

- the assistance of foreign lawyers should be broadened to include assistance at all levels of the judiciary including judges, magistrates and prosecutors. It should extend to the procuracy and to the council chamber. Amongst other things such assistance would enhance the independence, impartiality and competence of the courts.

Preventing and investigating arbitrary arrest and illegal detentions

- the roles and responsibilities of different police units and arresting authorities should be urgently clarified;

- arrest, investigation and detention procedures by all police units should be closely monitored by independent judicial officials;

- measures should be taken to ensure that arresting and investigating officers are fully aware of and understand the principle of the presumption of innocence;

- the government should take steps to prevent arbitrary arrests, ensuring that specific charges and detailed evidence form the basis for any arrest. Each individual case must be throughly investigated;

- detainees must be promptly informed of the specific charges against them and allowed to challenge before an independent magistrate the legal basis for their detention in accordance with Article 9(3) of the ICCPR and Article 7(1)(a) of the African Charter. Legal reforms should take place to enshrine this right in law but should not prevent a change in practice now;

- urgent attention and resources should be put into regularizing the detentions of all detainees, ensuring that those against whom there is insufficient evidence are provisionally released pending further investigations or charges dropped. Full investigations should be carried out into each charge against each individual to ascertain that the charge is based on evidence that can be corroborated;

- the council chambers should be given extra resources to help regularize detentions. This could be in the form of foreign lawyers. Further capacity could be given by decentralizing the council chambers to the level of the High Court;

- the possibility of introducing the equivalent of trained para-legals, who would represent detainees following their arrest and ensure that the defendant had the chance to challenge their detention should also be actively considered;

- more attention should be paid to monitoring acquittals and cases where sentence has been served to ensure that people are not held longer than necessary in detention;

- detainees found to have been detained unlawfully should be entitled to compensation. Not only is this the right of the detainee under international law

but will ensure that greater attention is paid to preventing further illegal detentions.

Preventing and investigating torture

- allegations of torture should be systematically investigated. If the practice is to be eradicated it is essential that those responsible are brought to justice. Administrative or disciplinary sanctions are not a sufficient deterrent;

- detainees should be given a medical examination promptly after their arrest and when they are released or transferred to prison to await trial. Examinations should be conducted by an independent doctor who has the confidence of the detainee;

- statements allegedly extracted under torture should not be admitted as evidence until an independent and impartial investigation has certified that torture did not take place. Cases where defendants claim to have been tortured should be reviewed and their convictions and sentences quashed in cases where court decisions were based wholly or partially on confessions extracted under torture or duress;

- independent and impartial investigations should be conducted into all allegations of torture, with a view to prosecuting the perpetrators. Officials, whether government, military, judicial or otherwise, who have ordered or condoned torture should be removed from their positions of authority and brought to justice;

- detainees and prisoners who have been the victims of torture or ill-treatment should be encouraged and assisted to institute proceedings against the law enforcement officers responsible. Compensation must be provided to the victims;

- instant, independent and total access to all places of detention including military barracks must be given to human rights groups, the UN human rights monitors and humanitarian organizations.

Preventing and investigating "disappearances"

- make clear that "disappearances" constitute a grave violation of human rights and that those responsible for "disappearances" will be brought to justice;

- undertake prompt and thorough investigations into cases of reported "disappearances" and keep the families of the "disappeared" informed of the progress and outcome of these investigations;

- allow international and national human rights and humanitarian organizations full access to all civilian and military detention centres to facilitate attempts to trace the "disappeared" and verify whether they are in detention. The authorities should keep systematic and accurate records of the whereabouts of detainees, including their transfer from one detention centre to another, and make these records publicly available;

- ensure that no detainees are held in secret or unofficial detention centres and end the practice of detaining civilians in military detention centres.

Addressing delays in trials

- in cases that have not yet gone to trial, the prosecutor should ensure that full investigations have taken place, including the interviewing of defence witnesses;

- the conduct of trials should be reviewed to avoid deferrals in the middle of court proceedings, allowing for the intimidation of witnesses or for witnesses to confer. Allowing trials to run on consecutive days would also facilitate the presence of witnesses and thus reduce deferrals;

- the possibility of trying defendants in courts nearer to home should be investigated;

- all possible steps should be taken to safeguard complainants, witnesses and investigators against violence, threats of violence or any other form of intimidation;

- the timing of trials should be announced well in advance to ensure that lawyers have sufficient time to fully acquaint themselves with the facts of the case and to prepare the defence, and to allow for witnesses to be present;
- greater resources should be put in place to ensuring that witnesses testify and are cross examined before the courts;

- jurisdiction for offences punishable by prison sentences of 20 years and above, and the death penalty should be transferred to the High Court which should be given appropriate material and human resources. This measure would ensure that more defendants will appear before the courts within a short period and would ensure the right to a full appeal was guaranteed at the Appeal Court.

Ensuring the right to legal counsel

- defendants should have access to legal counsel from the moment of their arrest to the end of their trial, including during interrogation. In particular lawyers should be present when defendants sign statements. Lawyers must have the opportunity to spend time with defendants, building trust and confidence and fully acquainting themselves with the facts of the case. Lawyers and the defendants should be given the opportunity to read statements they are expected to sign;

- lawyers should also be able to challenge the admissibility in court of confessions known or suspected to have been obtained under duress or torture prior to hearings;

- the right to legal counsel must be respected in all cases. The government should recognize its obligation to provide legal assistance to all defendants, particularly those accused of offences punishable by death or long prison sentences;

- access to case files should be improved, and copies should be allowed to be studied away from the court house;

- legal reform should take place to allow for the defence lawyer to be involved in all stages of the case including during police custody, to allow for a more active role in court and to guarantee the right of lawyer to intervene in court

Granting the right to appeal

- legal reform should urgently take place to ensure that the right to a full appeal is guaranteed in all cases;

- the cassation chamber of the Supreme Court should acknowledge the disadvantages faced by defendants who have been forced to submit appeals to the court without the assistance of a lawyer and without seeing the final verdict and allow for late submissions;
- the cassation chamber should also adhere to international standards for fair trial when considering the merits of an appeal for cassation, and include the violation of the right to legal counsel as sufficient grounds for quashing convictions or ordering a retrial.

In relation to military courts

- in the light of the failure of military courts to adequately investigate and bring to justice military personnel accused of involvement in human rights abuses, including torture and extrajudicial executions, the jurisdiction for common crimes committed by military personnel on active duty should be transferred to ordinary civilian courts;

- military courts should try only offences of a purely military nature. It should be made explicit that the execution of prisoners of war or unarmed civilians in conflict zones for example are criminal offences to be handled by civilian courts;

- civilians should not be tried by military courts;

- steps should be taken to ensure that military courts conform to international standards of fairness, including having rights to a full appeal;

- defendants' sentences should be in proportion with the gravity of the crime committed, without recourse to the death penalty. The provision of extenuating circumstances should not be used to minimize grave human rights violations.

Improving conditions of detention

- urgent steps should be taken to address life threatening prison conditions in Burundi. By imprisoning people, the Government has taken responsibility for their care. Further material resources and trained prison personnel must be allocated and practical measures implemented, affecting all categories of detainees, to improve conditions of detention. This should include, where necessary, accepting humanitarian and medical aid for prisoners;

- all prisoners should be treated humanely and not subjected to cruel, inhuman or degrading treatment regardless of their judicial status or the nature of their convictions and sentences. Prisoners under sentence of death should not be subjected to harsher conditions than those of other prisoners.

The death penalty

- a moratorium on executions should be implemented immediately pending a full study and discussion on the question of the abolition of the death penalty;

- the President of the Republic should commute all death sentences passed so far;

- particular attention should be paid to ensuring that defendants charged with capital offences are provided with legal counsel at all stages of their trial, sufficient time and facilities for preparation of their defence, and to prepare appeals and petitions for clemency if sentenced to death;

- the Penal Code should be reformed to make the imposition of the death penalty optional not mandatory in offences currently punishable only by the death penalty.

ii) Recommendations to the Bar on strengthening the judiciary

- members of the Burundian Bar Association should scrupulously seek to uphold the principles of the UN Basic Principles on the Role of Lawyers, the UN Basic Principles on the Independence of the Judiciary and the Procedures for the effective implementation of the Basic Principles on the Independence of the Judiciary. It should also seek to publicise the principles amongst its members.

iii) Recommendations to the international community

Amnesty International is appealing to the international community to:

- continue to assist the judiciary and by providing material and human resources, including legal experts at all levels. Foreign governments should facilitate the secondment of trained investigators and magistrates to Burundi to improve the competence, independence and impartiality of the country's judiciary;

- assist the prison system in improving conditions of detention and ensuring that detainees have access to medical care at all times;

- provide sufficient political and financial support to the evaluated and revised UN Program to help it address problems it may face in Burundi;

- support and facilitate the work of non-governmental human rights organizations providing valuable support to prisoners and detainees;

- exert whatever influence they can over the Burundian government and security forces to respect international human rights standards and humanitarian law, and to implement the recommendations listed above;

- maintain pressure to ensure that no further judicial and other executions take place and to help eradicate the practice of torture in Burundi.

iv) Recommendations to the Office of the United Nations High Commissioner for Human Rights

- a comprehensive evaluation of the current UN Program of Judicial Assistance should take place, and its recommendations made public. Much of the appraisal of the work of the program so far appears to be in the form of statistics, the usefulness of which, without, for example, an evaluation of the fairness of the trial, the quality of legal representation - of either the accused or victims - provided by the program's lawyers appears limited. The evaluation should also assess what percentage of detainees request assistance from the program;

- The program could play a more important part in ensuring the presence of witnesses, both defence and prosecution, which would both enhance the prospect for fair trial and ensure a greater rapidity in trials.

v) Recommendations to the Organisation of African Unity

Amnesty International is appealing to the Organisation of African Unity to in particular:

- include the situation of human rights, and in particular unfair trials and prison conditions, in the reports submitted to the Secretary General, to the Council of Ministers and to ensure that the issues receive serious consideration;

- ensure that the Special Envoy of the Secretary General to Burundi raises the concerns in this report with the Burundian authorities and urges them to implement the recommendations;

- ensure that Burundi remains on the agenda of the Council of Ministers, even if there is progress in the current negotiations aimed at ending the conflict, until there is significant improvement in the human rights situation.