BURUNDI

Memorandum to the Government of Burundi on Appellate Rights

I. Introduction

The Government of Burundi has said on a number of occasions that it wishes to break with a past characterised by serious violations of human rights that have gone unpunished. Amnesty International believes that, for this cycle of impunity to be broken, every effort must be made by the Government to ensure that any justice rendered is both fair and impartial.

In the spirit of contributing to the Government of Burundi's efforts to end impunity, on 30 July 1998 Amnesty International published its report *Burundi: Justice on Trial* (AFR 16/13/98) which followed its March 1998 *Memorandum to the Government on the draft law on genocide and crimes against humanity* (TG AFR 16/98.01).

The recommendations contained in this new Memorandum flow from one of the issues raised in *Burundi: Justice on Trial* which also appeared in the Government of Burundi's reply of 30 July 1998 to that report – the right to have the factual and legal basis for conviction and sentence reviewed. These recommendations are intended to draw attention to a key guarantor of a fair trial, and a crucial component of the fair trial guarantees set out in Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and Article 7 of the African Charter on Human and Peoples' Rights (African Charter)[1], to which Burundi is bound. Amnesty International believes that strengthening appellate rights will positively impact on human rights protection in Burundi, and will contribute to the creation of a strong and credible justice system – both of which are necessary for ending impunity.

[1]. The provisions of this Article were interpreted and amplified by the African Commission on Human and Peoples' Rights in its Resolution on the Right to Recourse Procedure and Fair Trial, Fifth Annual Acitivity Report of the African Commission on Human and Peoples' Rights 1991-1992, ACHPR/XI/AN.RPT/5 Rev.2

Amnesty International is appealing to the Government of Burundi to take these concerns and recommendations into consideration, and to urgently amend the *Code de procédure pénale* (Code of Criminal Procedure) and *Code de l'organisation et de la compétence judiciaires* (Code of Organization and Judicial Competencies) to ensure that they conform with Burundi's obligations.

II. The Right to a Review of Conviction and Sentence

Amnesty International remains concerned by the failure of Burundian law to adequately ensure that "everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law," as required by article 14(5) of the ICCPR. Although the African Charter does not expressly set out the right to appeal, decisions of the African Commission on Human and Peoples' Rights (African Commission) and its resolution on fair trial recognize the right to appeal as an inherent part of the right to fair trial under Article 7.

While Burundian law allows for a full appeal of conviction and sentence from judgments rendered by the *Tribunaux de Grande Instance*,[2] persons who qualify for a *privilège de juridiction* (privileged status) by reason of their position (magistrates, communal administrators or high functionaries), as well as those who are accused of crimes which are punishable by life imprisonment or death, are tried at first and last resort by the criminal chambers of the Court of Appeal.[3] In exceptional circumstances, persons who qualify for the highest privileged status are tried at first and last resort by the Supreme Court[4].

Judgments rendered by the criminal chambers of the Court of Appeal, as with all courts which operate as courts of first and last resort, are not subject to appeal. Defendants can only apply for review through the cassation procedure at the *Chambre de cassation* (Cassation Chamber) at the Supreme Court, which allows only for a limited review on questions of law and substantial violations of form (*contraventions à la loi et des violations des formes substancielles ou prescrites à la peine de nullité*). There is therefore

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[2]. Defendants tried under the jurisdiction of the *Tribunal de Grande Instance* may challenge their sentence and conviction at the Court of Appeal, and then appeal on an error of law or substantial violation of form to the *Chambre de cassation* (Cassation Chamber) of the Supreme Court.

[3]. *Code de l'Organisation et de la Compétence Judiciaires* (Code of Organization and Judicial Competencies) and the *Decrét-loi 1/55 du 19 Août 1980 portant création et organisation d'une chambre criminelle à la Cour d'Appel* (Decree establishing a criminal chamber at the Court of Appeal).

[4]. Article 58 of the Code of Organization and Judicial Competencies. For example, the trial of 79 people accused of assassinating President Melchior Ndadaye is currently before the Supreme Court, acting as a court of first and last resort. The trial of Aloys Hakizimana, former governor of Bujumbura-rural, also proceeded at first and last resort before the Supreme Court.

no ability for those judged by the criminal chambers of the Court of Appeal to have the factual basis on which they were convicted and sentenced reviewed. This is also the case for military jurisdictions, where officers of a grade equal to or exceeding that of major are tried at first and last resort by the Military Court (as opposed to the *Conseil de Guerre*), and therefore do not benefit from a full appeal. The extremely limited relief provided by the Cassation Chamber is, in addition, often beyond the reach of the unrepresented applicant, whose limited knowledge of the law impedes him or her from formulating the type of technical arguments required by that court.

The ability to have the factual basis for conviction and sentence reviewed is an important guarantor of a fair trial, and is a crucial component of the fair trial guarantees set out in article 14 of the ICCPR, to which Burundi is bound. The Human Rights Committee, in its General Comment 13, has stated that "the guarantee is not confined to only the most serious offences". In Salgar de Montejo v. Colombia (64/1979), the Human Rights Committee held that a charge which involved a one-year sentence was serious enough to warrant a review by a higher criminal tribunal regardless of whether domestic law classified the offence as "criminal".

The African Commission in its *Resolution on the Right to Recourse Procedure and Fair Trial* has stated: "Persons convicted of an offence shall have a right of appeal to a higher tribunal." Subsequently, in The Constitutional Rights Project (in respect of Zamani Lakwot and 6 others) v. Nigeria (87/93) and Constiutional Rights Project v. Nigeria (in respect of Wahab Akamu, G. Adega and others) (60/91), the African Commission considered a decree which specifically prohibited appeals against the decisions of special tribunals created by the decree and stated: "... to foreclose any avenue of appeal to "competent national organs" in criminal cases bearing such penalties clearly violates Article 7.1(a) of the African Charter, and increases the risk that even severe violations may go unredressed".[5]

[5]. 8th Annual Activity Report of the African Commission on Human and Peoples' Rights 1994-1995ACHPR/RPT/8th/Rev.1, Annex VI.

The review of a conviction must take place before a higher tribunal and must be a genuine review of the issues in the case. Reviews limited only to questions of law (as opposed to examination of the law and facts) may not satisfy the requirements of the guarantees in Article 14 of the ICCPR and Article 7 of the African Charter. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has expressed concern about appeal procedures which review only legal aspects and not facts. In raising concerns in connection with the cassation procedure before the Supreme Court of Algeria and about proceedings before the State Security Court in Kuwait, he stated: "defendants do not fully benefit from the right to appeal as set forth in the pertinent international instruments, since they are deprived of a stage of appeal which fully reviews the case, both with regard to the facts and legal aspects".[6]

This right to appeal is especially important in the case of Burundi, where serious concerns about the fairness of trial proceedings persist. Without an adequate appeal process, the injustices which resulted from unfair trials[7] have no chance of being adequately resolved by legal means. Amnesty International urges the Government of Burundi to begin discussions as to how these deficiencies can be most effectively addressed. One possible option of how to begin to address some of the current deficiencies would be to amend the relevant legislation so as to enable defendants who, because of the nature of the offense, would be judged at first and last resort by the criminal chambers of the Court of Appeal, to instead be judged at first instance by the *Tribunaux de grandes instances*, with a full appeal to the Court of Appeal, followed by the right to apply for cassation review. Similarly, defendants who, because of their privileged status (*privilège de juridiction*) are tried by the criminal chambers of the Court of Appeal, the Military Court or the Supreme Court, could be tried at first instance by these jurisdictions, and could be afforded the right to a full appeal to these same jurisdictions, to a differently constituted bench consisting of a panel larger than the panel which tried them at first instance, followed by the right to apply for cassation review.

III. The Criminal Chambers of the Court of Appeal

[6]. Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, 7 December 1993, UN Doc. E/CN.4/1994/7, at paras. 113 and 404.

[7]. These injustices are documented in Amnesty International's 31 July 1998 report, *Burundi: Justice on Trial* (AFR 16/13/98).

The majority of cases currently heard by the criminal chambers of the Court of Appeal relate to the massacres which followed the 1993 assassination of President Melchior Ndadaye. These trials, which are taking place in the courts in Bujumbura, Ngozi and Gitega towns, commenced in February 1996, and at least 260 people have now been sentenced to death. Six people were executed on 31 July 1997. Not only do international standards require that the death penalty be an exceptional measure, they further stipulate that this sentence can only be imposed after strict observance of prescribed procedural guarantees.[8] Paragraph 6 of the UN Safeguards guaranteeing protection of the rights of those facing the death penalty provides that "*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*."

During 1996, virtually no defendants benefitted from legal representation at their trial before the Court of Appeal, and many of those who were convicted were forced to submit their applications for cassation without the benefit of legal advice, and consequently, most failed to raise receivable arguments. Though more accused are now appearing with lawyers thanks to the UN Program of Judicial Assistance, in practise, the majority of defendants only receive a lawyer after they have been notified of their court date, which is usually just a few days prior to the trial. Virtually no lawyers assist accused persons at the pre-trial phase of proceedings. Because of these failings, Amnesty International remains concerned that legal representation has been ineffective.

In Price v. Jamaica (572/1994), the Human Rights Committee held that a lack of effective representation violated Article 14 of the ICCPR. The African Commission decided in a complaint against Malawi[9] that the denial of legal representation during a criminal trial violated Article 7.1(d) of the African Charter which guarantees the right to be defended by counsel of choice.

Article 5 of the UN Safeguards guaranteeing protection of the rights of those facing the death penalty provides that "Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial ... including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings."

[8]. Article 6(2) ICCPR; Human Rights Committee General Comment 6 (16th session, 1982) at par. 7.

[9]. Krishna Achutan (on behalf of Aleke Banda) (64/92), Amnesty International on behalf of Orton and Vera Chirwa (68/92), Amnesty International on behalf of Orton and Vera Chirwa (78/92) Malawi, 8th Annual Acitivity Report of the African Commission.

In the absence of legal assistance, the cassation procedure, which is technical and requires knowledge of the law, offers little hope of an effective review of conviction and sentence. Appeals to the Cassation Chamber must also be submitted within eight days of the judgment being passed, which gives a lay appellant little time to prepare a technical argument. In many cases, neither defendant nor lawyer, where there is one, received copies of the judgment on which to base the cassation within the eight day period. Some defendants were required to pay for copies of their judgments, which some could not afford. The cassation chamber has been inflexible with regard to accepting late submissions of appeals from defendants or their lawyers who had not received the correct documents.[10]

The right to a fair and public trial must be observed during appeal proceedings. Such right includes the right to adequate time and facilities to prepare the appeal as guaranteed in Article 14(3)(b) of the ICCPR and Article 7 of the African Charter. Affording an appellant only eight days to file a review by cassation, especially where the individual may not have the assistance of a lawyer and where the judgment of the trial court may not be available, falls short of Burundi's obligations under the ICCPR and African Charter. The failure of the Court of Appeal to make available to the convicted persons or their legal representatives the judgment and reasons for judgment within the eight day period is in violation of the right to appeal and the right to adequate facilities to prepare a defence guaranteed in Article 14(5) and 14(3)(d) respectively of the ICCPR.

Jackson Hatungimana was tried by the criminal chambers of the Bujumbura Court of Appeal on 20 March 96. Though he requested legal assistance, he remained unrepresented at his trial, and was sentenced to death. Though he requested the appearance of several defense witnesses, none were called by the Court. He applied for cassation review without a lawyer, which made it virtually impossible for him to raise receivable arguments, and his application was ultimately rejected. **Placide Wimana** was denied legal representation at his trial before the criminal chambers of the Gitega Court of Appeal. He had no choice but to submit an appeal to the cassation chamber without a lawyer, without a written judgment, and therefore without fully understanding the nature of his conviction and sentence. His cassation application was rejected in November 1997.

Lazare Banciriminsi and **Gaspard Butoyi** were sentenced to death by the criminal chambers of the Gitega Court of Appeal on 7 June 1996. They had no legal representation. They were not provided with the documentation relating to their verdicts

[10]. In early 1998, the Ministry of Justice issued a directive which ordered the immediate production of a copy of the judgment, though this has not been universally implemented.

and were forced to submit their appeals without knowledge of the grounds on which they had been convicted. Their cassation application has been rejected.

Gaëtan Bwampaye was sentenced to death by the criminal chamber of the Ngozi Court of Appeal in September 1997. Though he did have legal representation for part of the trial, on 25 September, the date that counsel was to present the defense arguments, counsel was ill and failed to appear. The court continued in counsel's absence, forcing the accused, who was unprepared to do so, to present his own defense. Similarly, **Gaëtan Bwampaye** applied for cassation without having seen the written judgment on which he was convicted, because it had not been issued by the Court of Appeal. The Human Rights Committee has interpreted article 14(5) of the ICCPR to entitle a convicted person to, within reasonable time, access to written judgments, duly reasoned, for all instances of appeal in order to enjoy the effective exercise of the right to have conviction and sentence reviewed by a higher tribunal according to law.[11]

IV. Comparisons with Belgium and France

In the Government of Burundi's reply to Amnesty International's report *Burundi: Justice on Trial*, it maintained that its system of appeals exists in many countries. Amnesty International is fully aware that Burundian criminal law and procedure is principally derived from the laws of Belgium and France, but remains concerned that some of the safeguards provided for by these countries have not been adopted in Burundian procedures. Amnesty International further questions the ability of any court of first and last resort to comply with article 14(5) of the ICCPR, and notes that some countries, including France, are currently planning legal reforms which address these very inadequacies.

Similar to Burundi, the organization of the competence of trial courts in those countries is based on the nature of the offence, and/or on criteria relating to the accused. Offences in Belgium and France are categorised as *crimes*, *délits*, and *contraventions*. The most serious *crimes* are tried by the assize court, other *crimes* and *délits* are tried by the *tribunal correctionnel* (correctional court), whereas *contraventions* are tried by the police courts.

[11]. Anthonie Currie applied to the UN Human Rights Committee when he was forced to appeal his death sentence to the Judicial Committee without a written judgment from the lower court. The Committee found that the absence of a written judgment barred the author from making effective use of the remedy of the Judicial Committee, thereby constituting a violation by Jamaica of article 14(5) of the ICCPR. (Communication No. 377/1989)

The criminal chambers of the Burundian Court of Appeal resembles the French and Belgian assize courts, in that it operates as a court of first and last resort for the most serious offences, with only the possibility of cassation review. However, important differences remain. For example, for a case to reach the French assize court, two levels of pre-trial instruction are required - after the initial instruction of the case, the entire *dossier* (case file) must be reviewed by the *Chambre d'Accusation* which decides whether or not a committal to the assize court (*arrêt de mise en accusation*) is warranted. Similarly, committals to the Belgian assize court must be authorised by the Court of Indictment (*chambre des mises en accusation*) of the Court of Appeal. These special committal orders function as additional safeguards for defendants.

Assize courts in Belgium and France operate on the principle of *vox populi vox dei* - decisions from these jury courts represent the popular will of the people, which should not be overturned. *(Les inconvenients d'un seul degré de juridiction sont compensés par la composition de telles juridictions qui comprennent les représentants du peuple au nom duquel la justice est rendue*). In France, the assize court is comprised of three judges and nine lay jurors, whereas the Belgian equivalent is composed of three judges and 12 jurors.

In Burundi, an assize court attached to the Court of Appeal did function with a jury of six, and similar to the French and Belgian systems, did require a specific committal order from the Court of Appeal,[12] though this court ceased to function in 1976. Its replacement, the criminal chamber of the Court of Appeal, was instituted in 1980 though it contained none of the 'safeguards' associated with assize courts. This court, unlike its predecessor, is comprised of an advisor (*conseiller*) from the Court of Appeal and three judges from inferior jurisdictions. There are no lay jurors, and therefore the concept of *vox populi vox dei*, however tenuous in its own right, cannot apply.[13] Unlike procedures in place in the assize courts, there is no specific committal proceeding which confers jurisdiction to the criminal chamber of the court of appeal.

When Belgium and France ratified the ICCPR, they entered reservations to article 14(5), recognizing that their legal systems, even with the safeguards referred to above, did not comply with the right of everyone convicted of a crime to have his or her conviction and sentence reviewed by a higher tribunal according to law.[14] These reservations would not have been necessary if article 14(5) required less than a full appeal.

[12]. *Arrêté-loi du 10 mars 1966 déterminant la composition, la compétence et le fonctionnement de la Cour d'assises.*

[13]. Amnesty International does note, however, the positive development of *decrét-loi n. 1/004 du 16 avril 1998 portant modifications de l'article 132 du Code de l'organisation et de la compétence judiciaires*, which allows all jurisdictions to sit as itinerant courts in any locality.

[14]. Belgium entered the following reservation: "*Paragraph 5 of the article shall not apply to persons who, under Belgian law, are convicted and sentenced at second instance following an appeal*

Despite France's declaration, which serves to limit the extent to which it is bound by article 14(5) of the ICCPR, reforms of French criminal procedure are currently underway, which seek to bring France in compliance with the text of the ICCPR. Major modifications to the French assize court, including the introduction of an appellate jurisdiction, were contemplated as early as January 1996, and though these reforms are still in discussion, the current Minister of Justice has re-affirmed her commitment to them, and has stated that they could come into effect as early as 1999.

V. Recommendations

Article 14(5) of the ICCPR requires State parties to ensure that their domestic legislation provides an adequate appeal from conviction and sentence. The ability to apply for cassation review does not constitute an adequate appeal within the meaning of article 14(5), because it is limited to a review on technical points of law, and therefore legal reform is required if Burundi is to comply with the ICCPR. An effective appeal helps prevent miscarriages of justice, which tend to be most prevalent when there is inadequate access to legal representation, and is especially critical when defendants are facing the death penalty.

- **Amnesty International realizes that there may be several ways to bring Burundian law into compliance with its obligations under the ICCPR and the African Charter. It recommends that the Government of Burundi urgently consider the issues raised herein in forthcoming law reform sessions, and that it assure that every person convicted of a crime, regardless of their status or the nature of the crime, be afforded the right to have the conviction and sentence fully reviewed by a higher tribunal according to law.**

- **Amnesty International further recommends that new appeal procedures in the reformed legislation be made available to all those who were denied an**

against their acquittal of first instance or who, under Belgian law, are brought directly before a higher tribunal such as the Court of Cassation, the Appeals Court or the Assize Court." France has made the following declaration: "*the Government of the Republic interprets article 14, paragraph 5, as stating a general principle to which the law may make limited exceptions, for example, in the case of certain offences subject to the initial and final adjudication of a police court and of criminal offences. However, an appeal against a final decision may be made to the Court of Cassation which rules on the legality of the decision concerned.*"

adequate right to appeal to a higher tribunal as stipulated in Article 14(5) of the ICCPR, especially those who face the death penalty.

- **Amnesty International also recommends that the Government of Burundi consider and implement the recommendations put forward in its report *Burundi: Justice on Trial* .**