impunity watch

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Impunity Watch is a Netherlands-based, international non-profit organisation seeking to promote accountability for atrocities in countries emerging from a violent past. IW conducts periodic and sustained research into the root causes of impunity and obstacles to its reduction that includes the voices of affected communities to produce research-based policy advice on processes intended to encourage truth, justice, reparations and the non-recurrence of violence. We work closely with civil society organisations to increase their influence on the creation and implementation of related policies.

Policy Brief: Burundi's Draft Law on the Proposed TRC

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Summary

In October 2011, the technical committee established by the government of Burundi to advise on the establishment of a Truth and Reconciliation Commission (TRC) delivered its report to the President, including a draft law for the proposed TRC. More than a year later, the TRC has yet to be established. Nevertheless, a new draft of the law was informally circulated at the end of November 2012, with a final draft submitted to Parliament in December 2012. The new draft, revised by a committee composed of four Ministers, contains a number of revisions to the original version of the draft law, itself not free from criticism. In the following Policy Brief, Impunity Watch analyses the new draft according to three basic principles that the TRC should adhere to in Burundi in order for the truth-seeking process to meet the very basic requirements for a meaningful and legitimate process: (i) Independence; (ii) Participation; and (iii) the non-exclusion of Criminal Prosecution. Impunity Watch observes a clear regression in the protection of the rights of victims in Burundi between the three drafts of the law. The intentions of the government to use the process as a way to guarantee amnesty for crimes under international law have now seemingly crystallised, with the draft laws providing for an indefinite process of 'pardons' and the latest draft removing any reference to criminal prosecution. If promulgated and passed by Parliament, the law would institutionalise a TRC process that would infringe upon the rights of victims and disregard clear evidence that victims wish to keep open the possibility of criminal justice. Furthermore, a substantial risk exists that the TRC could be used as a political tool in the run up to elections in 2015.

Arusha Peace and Reconciliation Agreement 2000, Protocol II (Democracy and Good Governance), Chapter I (Constitutional Principles of the Post-Transitional Constitution), Article 18 (Combating impunity during the transition)
Article 18(2): *In accordance with Protocol I to the Agreement, a National Truth and Reconciliation Commission shall be established to investigate human rights abuses, promote reconciliation and deal with claims arising out of past practices relating to the conflict in Burundi.*

A *de facto* Amnesty for Serious Crimes Under International Law
In his comprehensive analysis, Stef Vandeginste demonstrates how Burundi's legal regime has managed to comply with and simultaneously circumvent the international prohibition of amnesty for international crimes. *See* Vandeginste, S. (2011) *Bypassing the Prohibition of Amnesty for Human Rights Crimes under International Law: Lessons Learned from the Burundi Peace Process*, Netherlands Quarterly of Human Rights 29(2): 189-211.

SELECTED REPORTS ON THE FIRST TRC DRAFT LAW:

Observations du Groupe de Réflexion sur la Justice Transitionnelle (GRJT) sur le Rapport du Comité Technique Chargé de la Préparation de la Mise en Place des Méchanismes de Justice Transitionnelle au Burundi, Bujumbura, le 7 décembre 2011.

Amnesty International, ***Burundi: A critical moment for justice***, AFR 16/011/2011, 19 December 2011.

Background

Since 2011, Burundi has been witnessing an important development in its protracted transitional justice process, manifested by the government's apparent will to establish the long-awaited and long-overdue Truth and Reconciliation Commission (TRC) as provided for under the Arusha Peace and Reconciliation Agreement of 2000. This step is considered a crucial one towards dealing with the past in Burundi and revealing the 'truth' in a country that has been shaken by cyclic violence and major conflicts between its two main ethnic groups, the Hutu and Tutsi, since independence in 1962.

A culture of impunity has emerged in Burundi as a result of the failure to provide redress for the waves of violence and serious crimes under international law committed over fifty years. The legacy of abuse affects the functioning of Burundi's contemporary institutions and remains at the very forefront of collective (ethnic) memories of the past. The culture of impunity underpins and has exacerbated many of the problems facing Burundi today.

Despite the framework laid down in the 2000 Arusha Agreement for 'combating impunity during the transition', little progress was made until recently towards the establishment of the proposed truth and reconciliation commission and the international judicial commission of inquiry stipulated at Arusha. After lengthy negotiations after 2000, the proposal to establish a truth commission of mixed composition and a special chamber within Burundi's judicial system emerged in 2005. Over time, the latter was replaced by the idea to establish a special tribunal. However during the years of protracted negotiations, a system of *de facto* amnesty has been put in place, manipulating temporary immunity provisions established at Arusha intended to assist the transition from violence and a 2003 law ratifying the Rome Statute. In effect, as a result of these two instruments, no judicial body is competent to try crimes of the past in Burundi.

Negotiations between the UN and the government of Burundi had reached an impasse until in 2007 an agreement was reached to organise National Consultations on transitional justice. Eventually held in 2009, the publication of the final report in 2010 was the first opportunity that the population had had to give its opinions on the process of transitional justice. Nonetheless, the report and its recommendations have been largely ignored since publication. And yet, noteworthy findings from the report include majority support for a TRC of mixed national and international composition, with a mandate to investigate crimes from 1962 to 2008, and the provision of reparations.

TRC Draft Laws

The government of Burundi's sudden announcement in May 2011 that a TRC would be established by 2012 was followed by the appointment of a technical committee in charge of advising the government on the set-up of the TRC. Nominated by the President of the Republic, the committee submitted its report in December 2011. The report became known as the 'Kavakure report' after the head of the committee, Minister Laurent Kavakure.

The report includes a draft law on the TRC which has been examined and critiqued on a number of important points by both national actors and their international partners. Whilst commending the renewed initiative and apparent will to establish mechanisms of transitional justice, various civil society organisations (CSOs) in Burundi and the international community, namely the United Nations, formally criticised the aforementioned draft law. Many of the criticisms are based on the fact that the law falls short of complying with international standards and best practices for truth commissions. Additionally, the draft law failed to fully comply with the major desires expressed by the population during the 2010 National Consultations.

As a result, numerous national and international lobbying and advocacy efforts were conducted before the Burundian government after the draft law's publication, aimed at amending the first draft law. These advocacy efforts ultimately proved ineffective when, on 14 November 2012, the Council of Ministers delivered a second draft of the law to a ministerial committee, including none of the recommendations and observations made by international and national actors. The ministerial committee subsequently delivered a final, third draft of the law to the National Assembly of Parliament in late December 2012.

Not only does the final draft of the law not contain any of the recommendations or address any of the observations made by national and international actors, but it also contains a number of

revisions to the original version of the draft law that mark a clear regression in the protection of the rights of victims in Burundi. The intentions of the government to use the process as a way to guarantee amnesty for crimes under international law and institutionalise a process of pardon has now apparently crystallised.

If passed by Parliament, the law would institutionalise a TRC process that would infringe the rights of victims and disregard clear evidence that victims wish to keep open the possibility of criminal prosecutions. Furthermore, a substantial risk exists that the TRC could be used as a political tool in the run up to elections in 2015.

Impunity Watch observes that in order for the TRC to meet the objectives of affording Burundians a meaningful and legitimate process of 'truth-telling', the TRC draft law must be examined with respect to the following points:

- ***(i) Independence of the Commission;***
- ***(ii) Inclusive Participation of victims / survivors; and***
- ***(iii) The non-exclusion of Criminal Prosecutions and the international prohibition of any form of amnesty for war crimes, crimes against humanity and genocide.***

The following observations and recommendations made by Impunity Watch are based on the population's will as expressed during the National Consultation of 2010, the reflections made by national CSOs and the opinions expressed to Impunity Watch during our research among affected communities since early 2011 as part of our *Victimes à la Une* project. Hereafter, unless otherwise stated, the 'draft law' refers to the final draft that has been delivered to the National Assembly.

Independence of the Commission

Impunity Watch Research Instrument, 2007
The Independence and Willingness, as well as the Resources and Capacities of institutions of the state responsible for truth-telling will be essential to the constitution and the conduct of these commissions in the combat of impunity.

Under the pretext of national sovereignty, the draft law rules out the inclusion of internationals as commissioners in the TRC and also excludes an international presence in the selection procedure of the commissioners through the previously agreed upon tripartite committee (Government-UN-CSOs). Furthermore, the Article that previously provided for the selection of commissioners after wide consultations between the government, political parties, religious groups, civil society and other professionals has been removed. Under the draft law, the commissioners will be appointed by the President after approval by the National Assembly. This casts doubt on the independence and transparency of the process of selection and appointment, leaving the government with exclusive, unchecked power in the composition of the Commission. Moreover, this will increase the risk of a TRC with a political balance slanted in favour of the ruling party, since it has a majority in Parliament and the bulk of political opposition remains in exile.

The proposed process for the nomination and selection of the commissioners would likely negatively affect the credibility and independence of the TRC, especially in a country like Burundi where the Executive power is little distinguishable from the Legislature. For the TRC to gain the trust of the population and secure their inclusive and active participation, the draft law must exclude political actors from the process of establishing the TRC and provide measures for securing the independence and credibility of the Commission's future work. The procedures for nomination and selection of the commissioners are key factors that must be subjected to the utmost transparency on the part of the government and should meet the population's expectations in order to secure its 'trust'.

UN Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, E/CN.4/2005/102/Add.1, 8 February 2005
Principle 10: Guarantees for Victims and Witnesses Testifying on Their Behalf
Effective measures shall be taken to ensure the security, physical and psychological well-being, and, where requested, the privacy of victims and witnesses who provide information to the commission.

Inclusive Participation of Victims and Survivors

For any TRC to reach its ultimate objective of 'truth-telling', its basic legal framework should include measures aimed at reassuring and engaging the wider population of victims and survivors in the process. These actors must be seen as the main beneficiaries of the process.

Impunity Watch nevertheless observes an identifiable pattern in the draft law that contributes to the exclusion of a vast majority of victims and survivors.

Protection measures for witnesses (presumed perpetrators and survivors) are yet to be elaborated in the draft law. Many of the victims and survivors interviewed by Impunity Watch – and those participating in the National Consultations – insisted on the presence of international actors in a witness protection unit given their longstanding distrust of the existing security forces within which many alleged perpetrators still hold high-ranking positions. In particular, the fear exists that after exposing presumed perpetrators before the TRC their life and those of their family could be in real danger, once again partly due to the prevailing insecurities in Burundi and

evidenced by the on-going extra-judicial killings. Weak witness protection measures would likely discourage many survivors from testifying before the Commission and would without doubt discredit the work of the TRC.

Establishing trust: Political interference in the process of establishing the Commission and in the final composition of the TRC, including a presumed lack of independence, will create a lack of trust among victims and survivors. Like the absence of witness protection measures, this will certainly affect their willingness to testify before the Commission. For now, it appears that according to the draft law the granting of pardon is a prerequisite for alleged perpetrators to confess their crimes. Should the draft law be passed by Parliament in its current form, a large majority of victims and survivors who seek justice through criminal prosecutions will neither have their rights to justice guaranteed, nor will they likely see the value in participating in the process if such participation is tied to the obligation to grant pardons.

UN Security Council Resolution 1325 (2000)
[…] Reaffirming the important role of women in the prevention and resolution of conflicts and in peace-building, and stressing the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision-making with regard to conflict prevention and resolution […]
1. Urges Member States to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict […]

Gender-sensitivity: The gender-sensitivity of the TRC is inadequately addressed in the draft law, which does not envisage the establishment of any special gender units or provisions for recording the testimonies of female victims and survivors who were subjected to gender-based and sexual violence. Many victims of sexual violence have already paid a severe price through the cultural stigmatisation that they are subjected to in Burundi and deserve the opportunity to reveal the truth about the crimes inflicted upon them.

The number of women represented in the Commission is also not defined in the draft law. For full compliance with its undertakings as part of UN Security Council Resolution 1325, the Burundian government must take specific measures to ensure that gender-sensitivity is explicitly provided for in the TRC's law.

Securing the necessary financial and logistical resources: Burundi is habitually ranked as one of the poorest countries in the world. In particular, the country's interior suffers disproportionately from socio-economic deprivation and marginalisation. The TRC must be given the necessary financial and logistical resources that can guarantee the participation of those marginalised individuals willing to testify before the TRC. This may include, among other provisions, a clear decentralisation strategy for the hearings and at the very least a clearly defined and implementable outreach plan.

Criminal Prosecutions and the International Prohibition of Amnesty

In a clear move towards amnesty for serious crimes under international law, including war crimes, crimes against humanity and possibly, genocide, the draft law removes a number of important provisions from the first draft delivered together with the Kavakure report. On various levels, amnesty for the aforementioned crimes is promoted.

Arusha Peace and Reconciliation Agreement 2000, Protocol II (Democracy and Good Governance), Chapter I (Constitutional Principles of the Post-Transitional Constitution), Article 22 (Interim Period)
Article 22(2)(c):
By its signature the National Assembly agrees, within four weeks,
to: […] Pending the installation of a transitional Government adopt such legislation as is necessary for the granting of temporary immunity against prosecution for politically motivated crimes committed prior to the signature of the Agreement.

In the first draft of the law, it was clearly stated under Article 5 that the work of the TRC will not prejudice or adversely affect the establishment and the competence of any future special tribunal charged with prosecuting these crimes. This, and every other reference to criminal prosecutions and judicial bodies, has been systematically removed from the current draft. For example, in the definition of key terms under Article 1 reference to 'Mechanisms of Transitional Justice' including the ending of impunity has been removed. Reference under Article 6(3), explaining the mandate and competences of the Commission, to the task of publishing a list of alleged perpetrators has also been removed in spite of support expressed by Burundians for prosecution and 79% consulted during the National Consultations stating that the TRC should publish such lists.

Tellingly, in addition to these omissions, the final article from the first draft (Article 78) referring to the long-standing temporary immunity provisions established at Arusha has also been removed. Temporary immunities were granted under the various peace agreements as a way to secure a peaceful transition and the participation of key actors in the peace process by guaranteeing immunity from prosecution for politically motivated crimes for the period of transition. It was previously stated that these immunities would cease upon publication of the TRC's final report.

Moreover, the first draft law proposed measures for combating impunity including the adoption of vetting measures to exclude from positions of power or from electoral process those persons accused of committing crimes (Article 6). This provision has also been removed.

All of the abovementioned measures and provisions were omitted from the current draft law in spite of the recommendations and observations made by the international community and local

UN Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, E/CN.4/2005/102/Add.1, 8 February 2005

Principle 19: Duties of States With Regard to the Administration of Justice

States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished

CSOs. Impunity Watch is therefore gravely concerned by these developments in Burundi and the tendencies that they reveal on the part of the authorities in Burundi. In the light of these developments, the risk exists that the process may be instrumentalised for granting pardon and thus amnesty for serious crimes that have already enjoyed decades of impunity. Equally, the TRC could be manipulated for political purposes or for the persecution of political opponents. In the event that either takes place, Burundi's modern history demonstrates that it will be ordinary Burundians that will most certainly suffer the most.

The International Community

The international community and the United Nations have formally expressed their disappointment with the first draft of the law, particularly that it fails to adhere to minimum acceptable standards for a TRC. As noted, the subsequent drafts have only worsened with respect to these same standards. International actors have often alluded to their possible withdrawal from the process, thus refraining from providing technical and financial support to the Commission in the event that the Burundian government continues to pursue its current approach to the Commission. Whilst respecting the importance of these basic standards and the position of the international community and the UN, Impunity Watch stresses that **complete withdrawal from the process would have a damaging effect on the process and would leave Burundi's many thousands of victims and survivors with little hope for a genuine and legitimate process**. Withdrawal would also go against the UN Security Council's professed support for the transitional justice process in Burundi and its acknowledgement that establishing the truth would contribute to national peace and reconciliation as well as the regional combat of impunity (Resolution 1606 (2005)). The international community must confirm its role as 'watchdogs' over the TRC process.

Impunity Watch strongly recommends that the international community, in particular the United Nations and the donor community, unequivocally reminds the government of its obligations towards its population with respect to their rights to truth, justice, reparations and guarantees of the non-recurrence of violence. The international community should (i) **pressure the government of Burundi to guarantee the independence and impartiality of any TRC process;** (ii) **ensure the inclusive participation of victims and survivors through the measures outlined above, including those for ensuring the full participation of women;** and (iii) **underscore the absolute prohibition on amnesty for war crimes, crimes against humanity and genocide in any form, urging the government to clarify the relationship between the TRC and the Special Tribunal or any other proposed judicial body competent to prosecute international crimes.**

The complete withdrawal of international actors from the process will provide the opportunity for greater political meddling in the TRC, particularly in light of the upcoming elections in Burundi in 2015. The Burundian government should be reminded **before the promulgation of the law by the National Assembly** that its actions during the entire course of the TRC will be monitored by the international community and any infringements of the rights of the victims and survivors will not be ignored.

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