

BURUNDI

RECOMMENDATIONS TO
THE TECHNICAL
COMMITTEE REGARDING
THE CREATION OF A
TRUTH AND
RECONCILIATION
COMMISSION

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1. INTRODUCTION

Prior to and during Burundi's armed conflict, all sides were responsible for serious violations of international humanitarian and human rights law. Thousands of Burundians were killed during the conflict.

Amnesty International welcomes the creation, by the government of Burundi, in June 2011 of a Technical Committee as an initial step to address the lack of accountability for those responsible for human rights violations and crimes under international law in Burundi.¹ The Technical Committee's mandate is to make recommendations to establish a Truth and Reconciliation Commission (TRC) in Burundi. The Technical Committee has been tasked with proposing amendments to Law No. 1/018 of 27 December 2004 on the mission, composition, organisation and functioning of the National Truth and Reconciliation Commission (the 2004 Law) by 13 September 2011.² The Technical Committee is also authorized to propose criteria for the appointment of members to the TRC, suggest working methods for the TRC and determine the TRC's budget.

Amnesty International encourages the Technical Committee to recommend significant revisions to the 2004 Law to ensure that the TRC will be able to fully support victims of human rights violations and crimes under international law during Burundi's years of violence and conflict to seek truth, justice and reparations.

Amnesty International hopes that the TRC will go a long way towards revealing the truth about past human rights violations and crimes under international law, but considers that the TRC cannot be a substitute for judicial accountability and determinations of individual criminal responsibility. Individual criminal responsibility can only be established by independent and impartial criminal courts in proceedings in accordance with the highest fair trial standards.

Amnesty International notes that the Technical Committee has a broad mandate to prepare for the establishment of transitional justice mechanisms.³ Decree No. 100/152 suggests that the Technical Committee could recommend the creation of a judicial mechanism, as well as a non-judicial mechanism, as provided for in several agreements between the government of Burundi and the United Nations (UN).⁴ During the national consultations on transitional justice Burundians shared their views on how a Special Tribunal, a judicial mechanism of a mixed character (composed of both national and international judges and prosecutors), should be created.⁵

Amnesty International urges the Burundian authorities to ensure that everyone responsible for crimes under international law is brought to justice through a Special Tribunal. This body should try individuals suspected of responsibility for crimes under international law committed in Burundi irrespective of the date of their commission.

The Burundian authorities should also develop a long-term, comprehensive plan to rebuild its judicial system. This would enhance the capacity of ordinary national courts to investigate and prosecute crimes under international law. The Special Tribunal should play a central role

in increasing the capacity of the national justice system to investigate and prosecute crimes under international law and it should be an integral part of the domestic judiciary.

The long-term, comprehensive strategy to rebuild the justice system should be drafted and implemented in close and transparent consultation with victims and civil society organizations representing them, as outlined in the UN Secretary-General's 2004 report on the rule of law.⁶ Effective training of judges and other appropriate measures to enable the courts to conduct effective trials with fair trial guarantees should be provided.

This submission, which should be read in conjunction with Amnesty International's paper, *Truth, Justice and Reparation: Establishing an Effective Truth Commission*⁷, makes suggestions for what should be included in the law creating a TRC.

2. SPECIFIC RECOMMENDATIONS

2.1. MANDATE OF THE TRC (ARTICLE 2 OF THE 2004 LAW)

The 2004 Law provides in paragraph 1 the following mandate of the TRC:

- a) To conduct investigations in order to :
- Establish the truth about acts of serious violence committed during the course of the cyclical conflicts that have cast a shadow over Burundi since 1 July 1962, date of the country's independence;
 - Classify crimes other than acts of genocide, crimes against humanity and war crimes;
 - Establish responsibilities and the identity of those guilty;
 - Give the identities of the victims.

Amnesty International encourages the Technical Committee to recommend that the TRC law has a more clearly defined mandate than that provided for in the 2004 Law.

The 2004 Law states that the TRC is to establish the truth on "the acts of violence" in Burundi since independence, 1 July 1962 and "qualify crimes *other than* acts of genocide, crimes against humanity and war crimes" (emphasis added). The "Update set of principles for the protection and promotion of human rights through action to combat impunity" (hereinafter the Set of Principles) recommends that "Commissions of inquiry may have jurisdiction to consider all forms of violations of human rights and humanitarian law. Their investigations should focus as a matter of priority on violations constituting serious crimes under international law, including in particular violations of the fundamental rights of women and of other vulnerable groups."⁸

In line with the Set of Principles, Amnesty International recommends that the mandate of the TRC should be broad enough to cover all crimes under international law, including genocide, crimes against humanity, and war crimes. The mandate should cover crimes and human rights violations committed by both governmental forces and non-state actors involved in the conflict.⁹

Amnesty International notes that TRC should be mandated to determine whether human rights violations amounted to crimes under international law in a manner that is fully consistent with international law and standards.¹⁰ The mandate should be formulated in a way which does not suggest a predetermined outcome or limit investigations. In particular, it should be flexible enough to enable the TRC to determine in greater detail the matters that come within the scope of its investigation, including other matters it considers relevant as investigations progress.¹¹

In addition to clarifying facts about past human rights violations, the TRC may draw a historical picture of factors which allowed human rights violations and crimes under international law to occur, such as shortcoming in institutions, including law enforcement and security forces discrimination and access to education, weaknesses of the justice system, policies and practices of the armed and security forces, and possible links of armed groups with foreign countries.¹² This requirement was reflected in general terms in Article 2 (c) of the 2004 Law, which stated that TRC's task, among others, is also to "clarify the whole history of Burundi, going back as far as possible in order to explain their past to the people."

The 2004 Law also mandates the TRC to "establish responsibilities and the identity of those guilty." Amnesty International notes that the TRC is a non-judicial fact-finding body and should not have the competence to determine individual criminal responsibility for crimes under international law and possibly for other human rights abuses. This task should be exclusively reserved for competent, independent and impartial courts – either national, international or mixed in nature.

In this context, Amnesty International recalls Principle 8 of the Set of Principles which states that, terms of reference of commissions of inquiry "must be clearly defined and must be consistent with the principle that commissions of inquiry are not intended to act as substitutes for the civil, administrative or criminal courts. In particular, criminal courts alone have jurisdiction to establish individual criminal responsibility, with a view as appropriate to passing judgement and imposing a sentence."

Therefore the TRC should not be considered a substitute for judicial processes to establish individual criminal responsibility. Accordingly, the new law should determine that only a competent court (a national, international or mixed court) will have powers to determine individual criminal responsibility for the crimes in fair, effective and impartial trials.

The law should clearly define the relationship between the mandates of the TRC and the competent judicial body. Article 41 of the 2004 Law providing that "should the conclusions of the Commission be in contradiction with the judicial decisions, the Commission shall propose measures likely to promote national reconciliation" is not specific enough. The relationship between the two bodies should be defined without prejudice to judgments of judicial bodies which should prevail over decisions which conflict with those of the TRC.

The TRC should investigate credible information suggesting individual criminal responsibility. If the information gathered by the TRC suggests that a certain individual might be responsible for crimes under international law, the TRC should forward the information to the relevant prosecution authorities for further criminal investigation, with a view, if there is sufficient admissible evidence, to prosecuting the accused without delay. The TRC should also locate information to forward to prosecuting authorities concerning those suspected of having planned or ordered the crimes, thereby establishing chain-of-command responsibility, as well as those who aided and abetted them. Criminal evidence gathered by the TRC should be safeguarded for later use in the administration of justice.¹³ In order to make sure that the evidence collected by the TRC is admissible in criminal and other proceedings, Amnesty International recalls Principle 16 of the Set of Principles, which states:

“Courts and non-judicial commissions of inquiry, as well as investigators reporting to them, must have access to relevant archives. This principle must be implemented in a manner that respects applicable privacy concerns, including in particular assurances of confidentiality provided to victims and other witnesses as a precondition of their testimony. Access may not be denied on grounds of national security unless, in exceptional circumstances, the restriction has been prescribed by law; the Government has demonstrated that the restriction is necessary in a democratic society to protect a legitimate national security interest; and the denial is subject to independent judicial review.”

2. 2. PERIOD OF OPERATION OF THE TRC (ARTICLE 3 OF THE 2004 LAW)

A TRC should be allowed sufficient time to carry out its mandate. The 2004 Law gives the TRC a two year mandate, with the possibility of a year's extension should the government consider it necessary for the completion of the mandate. Amnesty International suggests that the TRC is also able to request an extension of its mandate, if necessary to complete its work. The organization welcomes the amendment suggested by the Reflection Group on Transitional Justice composed of Burundian civil society organizations adding that the two-year mandate should run “*from its actual entry into operation*”

2. 3. AMNESTIES (ARTICLE 4 OF THE 2004 LAW)

Amnesty International recalls that Burundi is obliged under international law not to provide an amnesty or any similar measure for those responsible for genocide, crimes against humanity, war crimes, torture, enforced disappearances and extrajudicial executions.

2.4. COMPOSITION, ORGANIZATION AND FUNCTIONING OF THE TRC (ARTICLES 6-26 OF THE 2004 LAW)

Amnesty International urges the Technical Committee to ensure that members of the TRC are selected on the basis of competence in human rights, proven independence and recognized impartiality. Some members should have proven expertise, knowledge and experience not only in international human rights law but also international humanitarian law. Members should also be experienced in dealing with victims of serious crimes, including traumatized

victims, victims of sexual violence and child victims.¹⁴

Additionally, the Commissioners should not be closely associated - or perceived to be associated - with any individual, government, political party or other organization potentially implicated in the human rights violations under investigation or with an organization associated with victims. The inquiry must be independent from both the executive and the institutions or organizations under investigation and should be free from political pressure.¹⁵

Amnesty International encourages the Technical Committee to recommend the appointment of international, as well as national, commissioners. The 2004 Law only provides for Burundian members of the TRC. The choice of a national, international or mixed truth commission should be determined by the need to ensure independence, impartiality and competence.¹⁶ Given the circumstances of the conflict, the TRC's independence and impartiality could be strengthened through the inclusion of members from other African countries or elsewhere.

Commissioners should be selected through a transparent process in close consultation with civil society. This is in accordance with recognized standards stating that:

“If a truth commission is to be accepted as credible and capable of achieving its vital objectives, its members must be selected by a transparent process that inspire public confidence. NGOs, victims’ groups and other civil society organizations should fully and actively participate in the process of selection and appointment of the commissioners. The composition of a truth commission should reflect a balance of women and men and a pluralist representation of civil society.”¹⁷

The composition of the TRC should reflect a balance of women and men and members of all ethnic groups.¹⁸ In particular, the TRC should include representatives of non-governmental organizations involved in the promotion and protection of human rights, faith-based organizations and women’s groups.¹⁹ It should also be able to call in specific experts, as required.

In the event of a vacancy, new Commissioners should be appointed according to the same procedure.

2. 5. PROCEDURE OF THE TRC (ARTICLES 14-26 OF THE 2004 LAW)

Amnesty International recommends that all procedural stages before the TRC should be defined in clear terms in accordance with requirements of fair procedure.²⁰ In particular, the TRC should respect the right of suspected perpetrators to be presumed innocent until and unless they are proven guilty in separate criminal proceedings in a court meeting international fair trial standards. The law should also determine the quorum for the TRC.

As explained in Amnesty International’s paper, *Truth, Justice and Reparation: Establishing an Effective Truth Commission*, the statute of the TRC should ensure the protection of victims and witnesses who may be at risk as a result of their participation in the process. The TRC should establish a comprehensive, long-term and effective victim and witness program. Protection measures should be available for witnesses, victims and their families, staff and

others associated with the investigation. The TRC should be responsible for overseeing the implementation of protection measures and victims who are not satisfied with protection measures should have recourse to ask Commissioners to address the issue.²¹

The TRC should take special measures to assist victims and witnesses, especially those that are traumatized, children, elderly or victims of sexual violence, in presenting views and concerns, registering their case, participating and giving testimony. In procedure before the TRC, witnesses, alleged perpetrators, or others who may be implicated have right to legal counsel and a right to reply.²²

Victims and witnesses should have access to psychological advice and support throughout the process. Support persons are important to guide victims through what may be a complex and potentially traumatizing process and to identify whether they require any specific assistance or protection measures.²³

Amnesty International recommends that a special unit for protection and support of victims and witnesses should be established within the TRC. The unit should include staff with expertise in dealing with child victims and victims of sexual violence, together with mental health specialists and counsellors to respond to the needs of traumatized victims.²⁴

2. 6. REPARATION (ARTICLE 2(B) OF THE 2004 LAW)

Amnesty International encourages the Technical Committee to provide for reparations, as Article 2(b) of the 2004 Law only allows the TRC to recommend measures of restitution and compensation. Under international law, the government must ensure that all victims of crimes under international law have access to an effective remedy, including full and effective reparation to address their suffering and help them rebuild their lives. Full and effective reparation can require the provision of all recognized forms of reparation, including rehabilitation, satisfaction and guarantees of non-repetition not mentioned in the 2004 Law. These forms of reparation are set out in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (adopted by the United Nations General Assembly in 2005), which should inform the reparation mandate of the TRC. In particular, reparation should never be seen as a substitute for bringing to justice perpetrators of crimes under international law and reparation programs must not preclude victims from seeking compensation through the courts.²⁵

2. 7. PUBLIC INFORMATION, THE FINAL REPORT AND RECOMMENDATIONS (ARTICLE 2(B), ARTICLE 42 OF THE 2004 LAW)

Throughout its operation, the TRC should regularly disseminate information about its work, through a range of media to ensure the information is accessible to the public.²⁶

The results of the TRC's investigations and its recommendations should be officially proclaimed, published and widely disseminated without undue delay.

3. CONCLUSION

The TRC should be part of a broader, long term, and comprehensive government action plan, developed, implemented and monitored with support from civil society and victims groups, to uphold the right of victims to obtain truth, justice and reparation. Such an action plan should also include prosecutions, mechanisms to ensure reparation and legislative, institutional and other reforms. A TRC should not be considered as a substitute for judicial process to establish individual criminal responsibility.

The establishment and functioning of the TRC must respect, protect and promote human rights. In particular, the TRC should clarify, as far as possible, the facts about past crimes under international law and human rights violations; provide the information it gathers into investigations and criminal and civil judicial proceedings; and formulate effective recommendations for providing full reparation to victims and their relatives.

Amnesty International encourages the Technical Committee to follow the recommendations provided in Amnesty International's paper, *Truth, Justice and Reparation: Establishing an Effective Truth Commission*, and to take into account additional observations in this submission.

¹ Decree No. 100/152 of 13 June 2011 on creating and appointing members of the Technical Committee to prepare for the establishment of transitional justice mechanisms.

² Law No. 1/018 of 27 December 2004 on the mission, composition, organisation and functioning of the National Truth and Reconciliation Commission.

³ *Decree No. 100/152* states that the Technical Committee is "responsible for preparing for the establishment of transitional justice mechanisms".

⁴ Security Council Resolution 1719, Framework Agreement of 2 November 2007 between the Government of the Republic of Burundi and the UN on the establishment of a Tripartite Steering Committee for National Consultations on Transitional Justice Mechanisms in Burundi.

⁵ United Nations and the Government of Burundi, Report on the National Consultations on Transitional Justice Mechanisms in Burundi, 20 April 2010.

⁶ United Nations Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, , 23 August 2004, U.N. Doc. S/2004/616.

⁷ Amnesty International, *Truth, Justice and Reparation: Establishing an Effective Truth Commission*, AI Index: POL 30/009/2007, 11 June 2007, <http://www.amnesty.org/en/library/info/POL30/009/2007/e>.

⁸ United Nations Commission on Human Rights, "Updated set of principles to combat impunity", E/CN.4/2005/102/Add.1, 8 February 2005, principle 8 (d) (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>)

⁹ *Truth, Justice and Reparation: Establishing an Effective Truth Commission, supra*, n. 1, at p. 14; see also pp. 21-22.

¹⁰ *Ibid.*, p. 15.

¹¹ *Ibid.*, p. 15.

¹² *Ibid.*, p. 15.

¹³ *Truth, Justice and Reparation: Establishing an Effective Truth Commission, supra*, n. 1, at p. 18.

¹⁴ See further *Truth, Justice and Reparation: Establishing an Effective Truth Commission, supra* n. 1, at p. 23.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, p. 25.

¹⁷ *Ibid.*, p. 26.

¹⁸ *Ibid.* p. 27.

¹⁹ See further, *Truth, Justice and Reparation: Establishing an Effective Truth Commission, supra*, n. 1, at pp. 24-25.

²⁰ The requirements of a fair procedure are discussed in the Amnesty International's paper, *Truth, Justice and Reparation: Establishing an Effective Truth Commission, supra*, n. 1, at pp. 31-34.

²¹ See further *Truth, Justice and Reparation: Establishing an Effective Truth Commission, supra*, n. 1, at p. 29.

²² *Ibid.*, p. 30.

²³ *Truth, Justice and Reparation: Establishing an Effective Truth Commission, supra*, n. 1, at p. 30.

²⁴ *Ibid.*, p. 31.

²⁵ *Ibid.*, p. 38.

²⁶ *Ibid.*, p. 30.

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