APPENDIX I: Human Rights and the Peace Agreement: Comments on the Agreement for Peace and Reconciliation in Burundi of 28 August 2000

I MEASURES TO TACKLE IMPUNITY (Protocols I and II)

Genocide

A number of provisions relate to the prevention and prosecution of the crime of genocide, including the introduction of legislation prosecuting the crime of genocide (Protocol I, Article 6(9)). Protocol II, Article 18 empowers the transitional government to constitute a commission of judicial enquiry on genocide, crimes against humanity and war crimes and make a report on this subject to the UN Security Council. A national observatory for the prevention and elimination of genocide, war crimes and crimes against humanity will be established and the creation of a similar regional body promoted (Protocol I, Article 6(4)). As yet, it is not clear what powers this body will have, nor how it will function in practice, particularly in its relation to the National Truth and Reconciliation Commission (NTRC).

- Burundi has already ratified the UN Convention the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) and as such is bound to introduce legislation in this regard. Any such legislation should be in accordance with other international standards, including the Rome Statute, which Burundi has signed but not yet ratified. It should provide for universal jurisdiction over these crimes.

National Truth and Reconciliation Commission (NTRC)

A National Truth and Reconciliation Commission (NTRC) will be established (Protocol I, Article 8). The NTRC will be mandated to investigate serious acts of violence committed since independence in 1962. It will have the power to specify which crimes have been committed, but does not have the mandate to specify that genocide, crimes against humanity or war crimes have been committed. It will have the power to establish who was responsible for crimes, and to identify the perpetrators and victims.

- Amnesty International welcomes the recognition by participants in the peace negotiations of the necessity of investigating past human rights abuses. It is the organization's view that there can be no genuine reconciliation, and therefore no lasting peace, if the truth about human rights abuses is not established and those responsible held accountable and reparations made to the victims.

Once the NTRC's investigations are complete, it will submit proposals to relevant national institutions on measures to promote reconciliation and forgiveness, compensation and the return of property or any other social or political measures it deems appropriate (Protocol I, Article 8(1)(b)). It can also recommend that the Transitional National Assembly pass one or more laws granting an amnesty "in conformity with international legislation for political crimes" (Protocol I, Article 8(1)(b)).

- The meaning of this last point is not entirely clear. These terms have not been defined in the text of the Agreement, nor do they have a clear meaning under international law. Amnesty International is deeply concerned about this ambiguity, which leads to a serious danger that the term could include amnesties for crimes under international law.

- The NTRC will not have the power to initiate judicial procedures (as had initially been proposed) and while it may still play a vital role in establishing the truth about past violations, some of those who negotiated its creation are themselves accused of involvement in human rights abuses and appear to have protected their own interests. Many political leaders and members of the armed forces could be the first beneficiaries of any amnesty granted by the NTRC, which could include international crimes, due to the ambiguity referred to above.

Amnesties granted by peace agreements to those responsible for killings, mutilation, rape and abduction contradict fundamental human rights standards and provide no deterrent to further violations of international human rights and humanitarian law. Amnesty International calls for all perpetrators of crimes involving serious violations of human rights -- genocide, war crimes, crimes against humanity and torture -- to be brought to justice. To do otherwise contributes to the phenomenon of impunity, whereby those who have perpetrated serious crimes or might consider doing so could be encouraged to commit further atrocities, knowing that the matter will not be investigated, and they will not be held accountable. Impunity also denies victims their right to reparation, which includes the right to apology and to justice. Truth commissions should be a supplement to, not a substitute for, justice.

- Amnesty International recommends that such a truth and reconciliation process ensures that the victims are heard, not just political representatives or prominent members of civil groups. Reparations, including medical and psychological assistance, should be made available to victims. The NTRC should also make recommendations designed to prevent repetition of the crimes it has investigated.

Amnesty International is concerned that many other crimes, such as extrajudicial executions, deliberate and arbitary killings, torture, “disapperance” , “political trials” as well as abuse of due legal process will be submitted to the NTRC, rather than ordinary criminal courts (Article 7 (18) of Protocol) which may lead to impunity for these crimes. The organization notes furthermore with concern that there is no definition of “political trials” term in the text of the peace agreement, which as outlined above, may lead to impunity for serious crimes.

- The NTRC could nevertheless provide a useful role in preventing future violations by looking at their causes and making recommendations for legislative, administrative and educational reforms designed to ensure that such crimes are never repeated.

International judicial Commission of Inquiry, and possible international criminal court

The transitional government will request the UN Security Council to establish an international judicial Commission of Inquiry to investigate genocide, war crimes, other crimes against humanity and participation in coups d'état (Protocol I, Article 6(10)). This Commission of Inquiry will be mandated to investigate and establish facts from independence to the signing of the peace agreement, to specify which crimes have been committed, establish responsibility and submit a report to the Security Council.

In the event that the Commission of Inquiry finds that acts of genocide, war crimes and other crimes against humanity have been committed, the Government of Burundi will request the establishment of an international criminal court to prosecute those responsible (Protocol I, Article 6(11). The Peace Agreement states that the Commission of Inquiry will use a number of existing (specified) reports, including the 1996 UN Commission of Inquiry report of its findings in relation to the assassination of President Ndadaye and subsequent massacres and other acts of violence (Article 6, Protocol I).

Amnesty International welcomes the fact that the Peace Agreement allows for the results of the previous inquiries into the serious human rights violations in Burundi to be made available to the international Commission of Inquiry. However, these findings should not prejudice the outcome of new investigations. In particular, the 1996 UN Commission of Inquiry report acknowledged the limitations of its investigations and Amnesty International has consistently maintained that further, impartial, investigations are needed before it can be stated that acts of genocide did take place, as found by the UN Commission of Inquiry.[1]

- Amnesty International recommends that the International Commission of Inquiry focus on establishing the facts about human rights violations. The task of determining individual criminal responsibility should lie with an independent prosecutor and courts in fair trials.

- To avoid repeating the limitations of the 1996 UN Commission's work, measures need to be put in place to ensure that the new international judicial Commission of Inquiry can investigate independently and unhindered and have full access to all relevant witnesses, who should be protected from reprisal. Since certain political leaders and senior members of the armed forces, both from the government and opposition, may be identified as being responsible for serious human rights violations, the possibility that the work of the Commission of Inquiry may be threatened or hindered and the potential dangers for witnesses cannot be underestimated.

[1]The Commission of Inquiry itself stated, amongst other things, that it had inadequate resources to fully carry out its task, that access in particular to Hutu witnesses was difficult, and that independent access to witnesses was impossible. The Commission was unable to visit most parts of the country. The Commission failed to indicate why it concluded that killings of Tutsi were genocidal and not killings of Hutu.

- Any recommendations for criminal investigations and prosecutions should carefully weigh the costs and benefits of international and national proceedings. If an international court is created, Amnesty International considers that it should supplement, not replace, investigations and trials in an independent and extensively reformed national criminal justice system. Amnesty International calls for the death penalty to be abolished during any such reform of the domestic criminal justice system.

Commission overseeing prison conditions and political prisoners

Protocol II Article 15 (19)(a) requires the transitional government to create within 30 days of the start of the period of transitional government a commission overseen by a judge. This commission will have the mandate to inquire urgently into prison conditions and to make recommendations on the treatment of prisoners; the training and conditions of employment of prison guards; the release of remand prisoners whose case has taken an excessive amount of time to be processed; and the release of "political prisoners."

- Amnesty International is concerned that the term "political prisoners" is not defined in the text of the Peace Agreement and may refer to those who have committed acts of violence, including killings and torture, for political reasons; therefore although the tasks undertaken by this commission in regard to prison conditions, and investigations which may clarify the situation of detainees who have been detained for long periods without charge, are welcome, there is a concern that the commission may also have a role in providing amnesty to those who have committed serious crimes.

The debate on political prisoners

The question of what constitutes a political prisoner is a highly emotive subject in Burundi, particularly as many prisoners have been associated with acts of violence. The question has been discussed at length in the context of the Arusha negotiations, although no agreement was reached on a definition.

Different political leaders have indirectly sought amnesties for their supporters for acts of political violence. The current Government of Burundi has always refused to acknowledge that there are any political prisoners, and in particular that those accused of participation in the massacres of Tutsi civilians in 1993, classified by some as acts of genocide, are political prisoners. In June, Nelson Mandela caused outrage within the Tutsi community in Burundi by classifying the entire Burundi prison population as political prisoners and calling for their release. ITEKA issued a declaration in response expressing dismay at this statement given that impunity for heinous crimes remains one of the major challenges in Burundi.

Amnesty International's interpretation of the term "political prisoner" is deliberately broad and flexible. Amnesty International treats as a "political prisoner" anyone who is imprisoned, or on conviction risks being imprisoned, where there is a significant political element either in the motivation of the authorities, in the acts or motivation of the prisoner, or in the immediate context in which the trial or the alleged

crime took place. Political prisoners may be people imprisoned for membership of an armed opposition group or for committing ordinary crimes such as assault or murder in support of a political group or objective. The political element may also reside in the context of the crime, for example for crimes committed in a highly-charged political atmosphere. Amnesty International also recognizes the political dimensions of patterns of imprisonment grounded in systematic discrimination on the basis of gender, ethnic origin or other similar status.[2]

In this sense, Amnesty International considers the majority of people detained in relation to the 1993 crisis, participation in the armed opposition, or because of other opposition to the government or authorities, as political prisoners, and has been campaigning for their rights to be respected. At the same time, the organization has been campaigning continually to end the impunity enjoyed by so many in Burundi, and for the investigation into human rights abuses and for the prosecution of those responsible. The organization firmly opposes pre-trial amnesties and does not call for the release of political prisoners.

Reform of the judiciary

Extensive reforms are set out to ensure that the judiciary is more effective, independent and impartial.

- Ethnic and gender imbalance will be addressed through recruitment and accelerated training (Protocol II, Article 17(3)(a)).

- Measures will be taken against corruption of judges, including improving the conditions of judicial appointment, strict application of all laws against corruption, and the institution of effective methods of control and the requirement that cases of corruption be reported (Protocol II, Article 17(f)).

- Laws will be translated into Kirundi and unspecified measures shall be taken to promote respect for the law (Protocol II, Article 17(3)(d) and (e)).

- The government will seek international assistance in reforming and strengthening the judiciary although the nature of the assistance is not specified (Protocol II, Article 17(10)).

- Important legal reforms are providing for including potentially (and if it is deemed necessary) the Criminal Code, Code of Criminal Procedure (Protocol I, Article 7(18)(c)).

[2]When using the term "political prisoner", Amnesty International does not mean to suggest that such prisoners should enjoy any special status, or that their imprisonment is, in itself, a violation of human rights. Amnesty International does not call for the unconditional release of political prisoners but for their prompt and fair trial, in accordance with internationally recognized norms and without recourse to the death penalty. As such there is a distinction between the organization's definition of a political prisoner and a prisoner of conscience, who is defined as someone imprisoned for their beliefs, their ethnic origin, sex, colour, language, national or social origin, economic status, birth or other status, who has not used or advocated violence. Amnesty International calls for the unconditional release of prisoners of conscience.

- The *Conseil supérieur de la Magistrature* (CSM), Supreme Judicial Council (Protocol II, Article 9 (13) and (14) will be set up as the highest disciplinary body of the judiciary. It will examine individual complaints and complaints from the Ombudsman (see Protocol I, Article 17(18)(g)) about the professional conduct of the judiciary, and the appeals of judges against disciplinary procedures. A judge may be dismissed from his or her post only for reasons of professional incompetence, and only by decision of the CSM.

Members of the CSM will be composed of five members proposed by the executive branch of government, three Supreme Court judges (all members of the Supreme Court are appointed by the president, on the basis of recommendations by the CSM and approved by the National Assembly and Senate), two magistrates of the *Parquet général de la République*, two judges from the *Tribunaux de résidence*, High Courts, and three people who exercise the legal profession in the private sector (Protocol II, Article 9). Amnesty International is concerned that under this proposal, there is scope for undue influence of members of the executive which may undermine the role of the CSM in guaranteeing independence.

- An office of Ombudsman will be created (Protocol II, Article 10). In addition to submitting complaints about the professional conduct of the judiciary to the CSM, the Ombudsman will investigate complaints submitted to it by ordinary citizens of violations of their rights by agents of the state and make recommendations to the relevant authorities. An annual report submitted by the Ombudsman to the National Assembly will also be made public in the Official Gazette.

The Ombudsman should be empowered to act on his/her own initiative as well as on the basis of complaints by alleged victims and should be able to adopt any reasonable procedure he/she considers appropriated. When deemed necessary, the Ombudsman should be able to publicise his/her findings and views. Officials should have a legal duty to cooperate with investigations. In addition to investigating individual situations, the Ombudsman should be empowered to make recommendations about legislation and administration arrangements. The office should publicise its role and means of action and the ways people can have recourse to it. The office should have the power to investigate human rights violations which the government authorities have failed to investigate and prosecute, impartially, promptly and thoroughly.

- Accelerated training (Protocol II, Article 17(3)(b)) is proposed as one as a number of measures to promote ethnic balance within the judiciary. While accepting that the principles of impartiality of the judiciary are compromised, or perceived to be compromised by the composition of the judiciary, which is overwhelmingly dominated by Tutsi, Amnesty International is concerned that accelerated training may mean that new officials -- including judges, magistrates and prosecutors -- are not adequately trained, and that weaknesses within the judiciary are perpetuated. There should be a strong commitment to achieving a balanced representation of candidates from all ethnic groups, and a balanced representation of women, and ensuring that educational and professional opportunities are open to all. The method for

selecting the staff should ensure the prompt recruitment of the best possible personnel based on merit.[3]

Measures taken to reform the judiciary should be in line with the UN Basic Principles on the Independence of the Judiciary and the UN guidelines for their implementation, and should include further training of legal officials to ensure adequate knowledge of national procedures and national and international law.

II INSTITUTION OF OTHER GUARANTEES OF FAIR TRIAL

The Peace Agreement refers to important judicial or legal reforms but make no reference to guaranteeing the right to a full appeal.

Appeals

[3]The strengths, weaknesses and challenges of the Burundian legal system are explored in more detail in *Burundi: Justice on Trial* (AI Index: AFR 16/13/98, 30 July 1998) and *Burundi: No respite without justice* (AFR 16/12/99, 17 August 1999). Both reports contain detailed recommendations for reform.

The majority of political trials have taken place before the criminal chambers of the Appeal Courts, which try people accused of offences punishable by prison sentences of 20 years or more, including the death penalty. There is no right to a full appeal; people convicted by the criminal chambers may only submit a cassation plea on the basis of procedural irregularities or errors to the cassation chamber of the Supreme Court. In a minority of cases, defendants benefiting from a *privilège de juridiction*, attachment of privilege, have been tried in first and last instance by the Supreme Court. Again there is no full appeal and defendants may only submit a cassation plea which is considered by all chambers of the Supreme Court. The cassation procedure does not look at the facts of the case, and can only overturn the conviction and return the case of retrial. As such it does not amount to a full appeal and is a contravention of Article 14(5) of the ICCPR.[1]

- The transitional period of institutional reform is an opportunity to ensure that the right to a full appeal is guaranteed in all circumstances by introducing appropriate legislation.

- Exceptional provision should also be made to allow for a full review of all cases tried by the criminal chambers, or other jurisdictions which have acted as a court of first and final instance, and where there has been no opportunity for a full appeal.[2]

Military Tribunals

Reforms will be introduced so that no civilian can be subjected to the military code of justice or tried by military jurisdictions (Article 11(4), Protocol II). Amnesty International welcomes this provision and has expressed on numerous occasions its concerns at the failure of trials by military courts to reach minimum standards for fair trial.

- It recommends that further reforms will be implemented to guarantee fairness in military jurisdictions. In particular, military personnel suspected of genocide, crimes against humanity, war crimes or torture should be investigated and prosecuted in civilian courts. Amnesty International remains concerned that unless members of the security forces and armed opposition groups are

[1]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".*

[2]Please see *Burundi: Justice on Trial* (AI Index: AFR 16/13/98, 30 July 1998), *Memorandum to the Government of Burundi on Appellate Rights* (AI Index: TG AFR 16/98.69, November 1998) and *Burundi: No respite without justice* (AFR 16/12/99, 17 August 1999), for further information.

brought to justice for human rights violations decades of abuse cannot be effectively challenged.

REFORM OF THE SECURITY FORCES (Protocol III)

The question of reform of the army has been one of the most difficult subjects to be tackled by the negotiations in Arusha. Much discussion has revolved on the ethnic quotas to be included in the army, reflecting the general perception of the army as a protector of ethnic rather than national interests.

The peace agreement proposes that a new national defence force be created in which one ethnic group cannot represent more than 50%, to maintain "the essential ethnic balance" and as a "safeguard against acts of genocide and coups d'état" (Article 14). Article 14 also specifies that members of the current armed forces, armed opposition groups and political movements may be integrated provided that they have not committed human rights abuses, acts of genocide, coups d'état, violations of the constitution or war crimes. The integration will be progressive during the transitional period (Article16).

The same criteria and provisions apply to the new police force, the *Police nationale du Burundi,* but do not explicitly apply to the intelligence services (Article 13). The national police force will come under one ministry (unlike at present).

Although the Agreement refers to a Commission to be established to oversee recruitment into the security forces (Protocol III, Article 17(3)), no specific provision is made for such a body to investigate the background of applicants to the military and police forces, nor to ensure that the recruitment process is fair. Such a body needs to be effective and respect due process, so that the screening process is fair to applicants.

Article 12 sets out the different missions of the various units of the security forces (armed forces, police, security services).

- Amnesty International hopes that the clear separation of military and policing roles will ensure greater control over the security forces than is exercised at present. Armed forces should never perform law enforcement functions unless they have been properly trained to do so.

Article 18 states that training including on human rights and humanitarian law will be provided to the armed forces up to the grade of junior officers (*sous-officiers*).

- Unless effective training can be provided which ensures that the army is both disciplined and respectful of human rights and dignity, human rights violations will continue against all ethnic groups. Given the appalling human rights records of the Burundian armed forces and armed opposition groups, Amnesty International believes it is essential that all members receive thorough and effective training in human rights and humanitarian law and its application. Such training should not be limited to rote learning of the rules without explanation or application to specific instances.

Although the organization welcomes the exclusion of perpetrators of human rights abuses from the armed forces, it is unclear how they will be identified, given the total lack of accountability and investigation currently operated by all parties. The NTRC could potentially play a useful role in identifying people who should be excluded from the armed forces.

In the context of the integration of forces, an amnesty is provided for combatants and members of political parties for the political offence of having belonged to armed opposition groups, but not for acts of genocide, crimes against humanity or coups d'état. No mention is made of human rights abuses which constitute lesser crimes (Article 26, Protocol III).

CHILD SOLDIERS

The demobilisation of child soldiers is not explicitly mentioned in the Peace Agreement despite their particular needs, and although the Peace Agreement refers to the exclusion of people if they have not fulfilled the age criteria, (Protocol III, Article 17(1)(c)) it does not make provision for bringing the age limit into line with international law. The *Charte des Droits fondamentaux*, Charter of Fundamental Rights, states explicitly that no child can be used **directly** in a conflict (Protocol II, Article 3(27)).

- Amnesty International opposes the use of any child under 18 in any conflict, whether directly or indirectly, and opposes the voluntary or compulsory recruitment of any child by government forces or armed opposition groups.

THE RIGHTS OF REFUGEES AND THE DISPLACED (Protocol IV)

Protocol IV of the peace agreement makes clear reference to the international standards protecting the rights of refugees and the displaced (Article 2). It states that the return of refugees shall be in accordance with international law and shall be voluntary and with dignity and that access by humanitarian organizations to returnees shall be guaranteed.

A commission is to be set up to enter into the practical implementation of repatriation, return and rehabilitation of both refugees and the displaced (Article 3).

The agreement reaffirms the right to property and the right for refugees and the displaced to return to their land, or obtain compensation. It highlights the problem of land ownership as being problematic, with refugees who have been absent in some cases for nearly 30 years returning to claim their land (Article 8).

However, there is little detail on how such a process will be managed. Any legal process to determine ownership and compensation is likely to be cumbersome, and in the context of a mass return, to be particularly problematic.

PEACE-KEEPING (Protocol V)

Although Article 8 of Protocol V of the Agreement provides for an international peace-keeping force, in reality this has yet to be agreed to and is strongly opposed by the government, Tutsi-dominated parties and the armed forces. Hutu-dominated parties see a neutral international presence as an essential pre-condition to safe return and to oversee integration of combatants into the new armed forces. The exact mandate of any peace keeping force is yet to be determined and can only be sent at the request of the current government.

Amnesty International takes no position concerning whether a peace-keeping operation is necessary. However, any peace-keeping operation or other international monitoring operation should comply with certain essential principles, including the following:[1]

- international peace-keeping forces, however composed, should have the mandate and capacity to protect persons belonging to all ethnic communities and political groups in Burundi from violations of human rights;

- the duty to monitor and report on human rights abuses should be explicitly included in the mandate of any peace-keeping force;

- the agreement should be in line with the United Nations (UN) Department of Peacekeeping Operations guidelines on the minimum age for peacekeepers. They should be at least 18 years old, and preferably 21;

- all peace-keeping personnel should be fully trained in international human rights. humanitarian law and criminal justice standards and their duty to adhere to them at all times;

- a mechanism should be established with powers to investigate any allegations of human rights violations by peace-keeping personnel. States contributing troops to the peace-keeping operation should promptly conduct independent and impartial investigations into reports of violations of human rights and humanitarian law by their nationals and bring to justice those responsible. Those suspected of such violations should be suspended from duty pending the outcome of investigations.

[1]Several of these and other principles are set forth in *Amnesty International's 15-point Program for Implementing Human Rights in International Peace-keeping Operations* (AI Index: IOR 40/01/94).