



Background on the 2008 Penal Code of Burundi

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Prohibition of homosexual conduct

The 2005 Constitution bans marriage between persons of the same sex, but no previous law prohibited homosexual conduct in Burundi. By adopting such a prohibition, the Assembly has gone against the worldwide trend of abolishing so-called “sodomy” laws and, such a law, if passed, would be a violation of the rights to equality and privacy guaranteed by the International Covenant on Civil and Political Rights (ICCPR), to which Burundi is a party. Article 28 of the 2005 Constitution also protects the right to privacy.

The United Nations Human Rights Committee, which monitors compliance with the ICCPR, held in 1994 that sexual orientation should be understood to be a status protected from discrimination under articles 2 and 26. The committee also noted that criminalization of homosexual conduct runs “counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention.”

The enforcement of a prohibition of homosexual conduct is likely to undermine attempts to combat the spread of HIV/AIDS. Persons stigmatized for their sexual conduct may shun treatment for fear of being identified as homosexual. Civil society groups that educate gay men about HIV fear they will find it more difficult to carry on their work.

Self-identified gay Burundians interviewed by Human Rights Watch expressed fears that gays would be more likely to be beaten and mistreated by police or ordinary citizens if the code provision is passed. They suggested that a lack of awareness about homosexuality led to discriminatory laws, such as amendment 98. According to one man, “Sexuality is an identity; it’s something that you live. It’s something innate. Most Burundians don’t yet understand this. I would like to encourage them to

do research, to really understand what homosexuality is.... [The law] won't change anyone's identity. We were born homosexual, and that's what we'll continue to be.”

The president of the National Assembly's Human Rights Commission, Fidele Mbunde, a proponent of the amendment, told Human Rights Watch that he did not intend for arrests to be made under the law, but for it to “send a message” about Burundian values.

If the police are ordered to enforce the law, they will divert resources needed to investigate such crimes as murder and rape to enforcing the ban on homosexual conduct. One high-ranking judicial police officer told Human Rights Watch, “I don't understand why the legislature passed this law. The police should not be in the business of interfering with people's private lives.”

End to penalties for state agents who abuse human rights

Under Article 392 of the current penal code, state agents who violate the rights of citizens may be punished by imprisonment between 15 days and one year, or by a fine, or both. In the recent revision of the code, the Assembly removed this article.

A member of the Assembly, Jean Baptiste Manwangari, made several efforts to have the penalties restored and increased to a maximum of three years of imprisonment, but the Justice and Human Rights Committee rejected the motions, saying the matter would be dealt with in a proposed revision to the code of criminal procedure. However, a new criminal procedure code has not yet been introduced in the legislature, may take considerable time to be adopted, and, if based on the current code, would not provide penalties for violations of procedure.

Should this change in the law be carried out, citizens would be left vulnerable to arbitrary arrests carried out by police and other state agents, a practice frequently documented by Human Rights Watch.

The human rights division of BINUB, the UN mission in Burundi, has also documented thousands of cases of arbitrary detention by state agents in the last year, some of which appear to result from personal settling of scores or attempts to

extort bribes from detainees. Arbitrary arrests are carried out not only by police, but also by communal administrators and other local officials who have no legal authority to carry out arrests under any circumstance.

Limits on prosecuting spousal violence

The requirement that victims of spousal violence themselves file complaints in order to elicit state action represents a disturbing departure from standard principles of criminal law, under which the state has a duty to prosecute crimes. It would draw an arbitrary distinction between spousal violence and all other forms of assault.

If this provision stands, family members of victims and others concerned will no longer be able to file complaints.

Although Burundi does not have official statistics on the prevalence of sexual and gender-based violence at home, spousal violence is rampant, and several women have been tortured and mutilated by their spouses in the last year. According to a survey by the Association of Catholic Women Jurists, one out of every three women in the capital, Bujumbura, is beaten at home.

Article 218 of the new criminal code, which replaces Article 146 of the old code, states that anyone who has intentionally injured another person is subject to two to eight months in prison, a fine, or both, with harsher penalties if the violence is premeditated. The previous law provided for eight days to six months in prison.

However, unlike the old law, the new code specifies that, “The prosecution of spouses who have committed this crime follows a complaint being filed by the victim.” Such a restriction on the prosecutor’s powers creates a separate and unequal situation for persons assaulted by their spouses, since most of the victims are women.

The provision also conflicts with a Burundian law that penalizes “the failure to provide assistance to a person in danger.”

Beatrice Nyamoya, former president of the Association of Women Jurists, pointed out in an interview with a Burundian radio station that the provision could lead to a situation in which “a man could beat his wife to death ... and organizations [like ours] could do nothing to help.”

In rejecting an amendment proposed by three members of Parliament that would eliminate the new clause, the Justice and Human Rights Commission argued, “The Prosecutor’s office and the police shouldn’t intervene in family affairs. This could compromise the possibility of reconciliation between spouses.”

Making prosecution dependent on a complaint by the victim appears to violate United Nations General Assembly resolution 61/143 of December 19, 2006, which stresses that “States have the obligation to promote and protect all human rights and fundamental freedoms of women and girls and must exercise due diligence to prevent, investigate and punish the perpetrators of violence against women and girls and to provide protection to the victims, and that failure to do so violates and impairs or nullifies the enjoyment of their human rights and fundamental freedoms.” The United Nations Committee on the Elimination of Discrimination against Women (the CEDAW Committee) expressed its concern in 2007 about the number of women and girls who are victims of spousal violence in Burundi.

Notable Achievements

Abolition of the death penalty and establishment of alternative sentences

In the past, Burundian judges imposed the death penalty for murder, kidnapping with ransom, threatening state security, espionage, treason, and participation in armed bands. It was last carried out in 1997.

The new penal code sets life imprisonment as the maximum penalty for a crime. The abolition of the death penalty brings Burundi into conformity with the Second Optional Protocol to the ICCPR.

The new penal code also provides for alternative penalties, such as community service for less serious crimes, which will help address prison overcrowding and provide greater opportunities for rehabilitation.

Incorporation of the crimes of genocide, war crimes, crimes against humanity, and torture into Burundian law

The new code adopts the comprehensive definitions of genocide, war crimes, and crimes against humanity included in the Rome Statute establishing the International Criminal Court, the Geneva Conventions of 1949, and the Convention against Genocide. In its article 197, point 2aa, the law goes beyond the Rome Statute by defining the recruitment of children under 18 years of age as a war crime.

The law also brings Burundi into compliance with a provision of the Convention against Torture that requires the criminalization of torture in domestic law. Under previous law, torture could be prosecuted only under general assault charges, which provided relatively minor penalties for such a grave crime.

Defining rape and sexual violence

Under article 385 of the 1981 penal code, rape was made a crime with penalties of up to 20 years in prison, but the law provided no clear definition of the crime of rape.

The new code defines rape as vaginal, anal, and oral penetration by the male sexual organ, as well as penetration of the female sexual organs by an object. Sentences for rape range from five years to life imprisonment, with the longer sentences applicable to persons in positions of authority over the victim (including teachers, doctors, and family members), persons who know they carry the HIV virus, and persons found guilty of rape of a minor or other vulnerable person.

Age of criminal responsibility and alternative sentences for youth

The new penal code declares that no child under age 15 can be held criminally responsible, an increase from the previous minimum age of 13. Children between 15 and 18 who are convicted of serious crimes may be imprisoned, but under the new code must be sentenced to terms equal to one quarter of the term imposed upon

adults found guilty of the same crime. Crimes that carry life sentences for adults are punishable by up to 10 years in prison for children.

Although several prisons in Burundi have established separate quarters for children under the age of 18, others detain children with adults, placing them at risk of sexual and other forms of violence. This practice, in violation of international law, makes it particularly critical to remove children from the prison system when possible.

The new law, recognizing that prison often fails to rehabilitate, also provides for new alternative sentences for children, including probation and assignment to a remand home or other institutions aimed at rehabilitation.

Under international law, the detention of a child should always be a measure of last resort and for the shortest appropriate period of time.

Recommendations

Senators should amend the penal code in the following ways:

- 1) Reject Amendment 98, which criminalizes homosexual conduct between consenting adults;
- 2) Reinstate penalties for arbitrary detention and other abuses of human rights by state agents; and,
- 3) Eliminate the arbitrary distinction between spousal violence and other forms of assault and end the requirement that a victim of spousal violence must file a complaint in order for the state to begin prosecuting the abuse.