Constitutionality of Criminal Procedure and Prison Laws in Africa

Burundi

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The aim of CSPRI is to improve the human rights of people deprived of their liberty through research-based advocacy and collaborative efforts with civil society structures. The key areas that CSPRI examines are developing and strengthening the capacity of civil society and civilian institutions related to corrections; promoting improved prison governance; promoting the greater use of non-custodial sentencing as a mechanism for reducing overcrowding in prisons; and reducing the rate of recidivism through improved reintegration programmes.

CSPRI supports these objectives by undertaking independent critical research; raising awareness of decision makers and the public; disseminating information and capacity-building.

Introduction

Constitutionalism as a specific approach to developing constitutions has been on the rise since the 1980s, and has exerted particular influence on the constitutional recognition of human rights, especially on the African continent.[1] Several African constitutions, including that of Burundi, adopted in 1992, have introduced an array of constitutional rights aimed at being self-executing, by limiting, in the legal sense of the word, all state powers.

However, the implementation and realisation of these extensive constitutional rights have raised several difficulties. Legally, this is due mainly to two reasons. On the one hand, constitutional law and subordinate legislation constitute two different levels of values and interests. On the other, the legal principles and rules they convey differ in their degree of abstraction. Therefore, a tension exists between the founding values of a society, which are reflected in a constitution, and the requirements of everyday life, which are regulated by subordinate legislation – which then raises the question of the extent to which constitutional rights have been translated into subordinate legislation and, possibly, regulations.

Criminal law and criminal procedure are on the frontline of this tension, as their content is directly related to fundamental freedoms. Indeed, criminal law is by its nature a limitation on fundamental freedoms, in that it restricts not only everyone's behaviour in general but also the physical freedom of movement of those accused and sentenced under the law of the land.

The purpose of this study is to briefly examine major developments in Burundi's criminal procedure legislation and prison laws since the adoption of its 2005 Constitution and to assess how these developments may have impacted on human rights. In effect, this study seeks to understand whether subordinate legislation in Burundi is in line with constitutional provisions and international standards relating to procedural safeguards for arrested and detained persons.

[1] Jacques-Yvon Morin, « L'Etat de droit : émergence d'un principe du droit international » [1995] *Collected Courses Academy of International Law* 9 ; spec. 158-59.

1. General information

Since its independence on 1 July 1962, Burundi has undergone several constitutional amendments due to its political instability; at the same time, this instability has had a significant effect on the general crime situation and, consequently, on the legislation that, over time, has tried to regulate it.

1.1. Recent constitution-making history

Burundi's Constitution can be considered as recent. It was adopted by referendum in February 2005 and entered into force on 18 March 2005. It should also be regarded as the last step of a recent constitutional race revived on several occasions by the various political crises that have occurred in the country.[2]

1.2. General constitutional principles

The 2005 Burundian post-transition Constitution was adopted in the aftermath of a civil war that afflicted the country for more than ten years. The general constitutional principles it puts in place reflect this history.

Article 48 of the Constitution states that 'the Constitution is the supreme law of the country'.[3] The result is a set of fundamental values (equality, dignity, peaceful coexistence, democracy and governance, unity and reconciliation).[4] These values are the basis for the interpretation and implementation of the Constitution. This view is supported by article 61 of the Constitution which, as a major interpretive clause, indicates that 'no one shall abuse the rights recognised by the Constitution or by the law to compromise national unity, peace, democracy, the independence of Burundi, infringe the secularity of the State or violate in any other manner this Constitution'.

In this report, regular reference will be made to article 38 of the Constitution, which states that 'every person has the right, in any judicial or administrative proceeding, to an equitable hearing and to be tried within a reasonable time'. Although it would be difficult to base litigation solely on this right, given that it lacks sufficient precision to be effectively justiciable, it provides a constitutional basis for many of the rights examined below.

1.3. Overview of judicial system

The general structure of the judiciary makes a distinction between ordinary and specialised courts. The ordinary judicial system is pyramidal. At the lowest level, residence courts (*Tribunaux de résidence*) are established at each 'commune' level.[5] In total, there are 123 of these courts, whose

[2] Filip Reyntjens, 'Constitution Making in Situations of Extreme Crisis: the Case of Rwanda and Burundi' (1996) 40 Journal of African Law 242.
[3] All direct quotations of constitutional and legislative provisions are the author's translation.
[4] Constitution of Burundi 2005, arts. 13-18.
[5] Burundi has 17 provinces, divided into 129 *communes*, which are divided into 2908 *collines*.

jurisdiction is to hear civil cases, land cases, small claims and minor criminal cases punishable by a sentence of imprisonment of less than two years (article 6 of the *Code de l'Organisation et de la compétence judiciaires* (Code on the organisation and jurisdiction of the judiciary, cited as 'Judiciary Code')).

High courts (*Tribunaux de grande instance*) sit at provincial level; they constitute appellate bodies for decisions handed down by the residence courts, and also have extensive jurisdiction in criminal cases, including international crimes, more serious civil cases, as well as orders implementing foreign decisions.

In addition, four courts of appeal (*Cour d'Appel*) cover the entire country. Decisions from high courts can be appealed before them. Apart from the appellate function, they hear criminal cases involving senior appointed officials, including judges, as courts of first instance.

The Supreme Court of Burundi, as the apex court of the country, ensures correct implementation of the law by the courts.[6] It consists of three chambers: a judicial chamber (for both civil and criminal matters), an administrative chamber, and a highest chamber of appeal (*chambre de cassation*).

The specialised judicial system is composed of labour tribunals, commercial courts, administrative courts, the Constitutional Court, and an anti-corruption court.

The Constitutional Court has exclusive jurisdiction over constitutional matters.[7] Its rules on standing are relatively easy to meet: apart from political bodies,[8] any individual or legal person, either by direct action or indirectly through a case before another court, can seize the Court regarding the constitutionality of laws.

All things considered, the judiciary is constitutionally entrusted with the task of protecting and ensuring respect for human rights. Article 60 of the Constitution presents the judiciary as 'the guardian of human rights and civil liberties'. For this purpose, the independence of the judiciary is enshrined in the Constitution, which provides for a High Council of the Judiciary to be entrusted with the task of ensuring a proper functioning of justice as well as the independence of judges.[9] Those provisions are translated into subordinate legislation, ie, in the Judiciary Code, and the constitutionality of some of these have been challenged.[10]

1.4. Overview of law enforcement structure

Law enforcement as set up in the Constitution consists of the defence and security forces. The rules of their composition and operations are testimony of the post-conflict spirit of the Burundian Constitution. At the end of the civil war, institutional reforms of the judiciary and the security forces

[6] Constitution of Burundi 2005, art. 221.
[7] Constitution of Burundi 2005, art. 225.
[8] A constitutional litigation can be referred to the Court by the President, the Chairperson of the National Assembly or the Senate, by a quarter of the Members of each House or the Ombudsman.
[9] Constitution of Burundi 2005, arts. 209 and 210.
[10] Cour constitutionnelle du Burundi, *Affaire RCCB 252 du 11 août 2011, Gahungu Athanase, Bizimana Isaac, Bashir Tariq et autres* (Inconstitutionnalité de l'article 117 du Code de l'organisation et de la compétence judiciaires), Bulletin officiel du Burundi, n°2/2013, p. 273.

were provided for and effectively carried out to ensure better representation of the two major ethnic groups of the country. As such, the Constitution provides for an equal quota of Hutu (50 per cent) and Tutsi (50 per cent) in the army and the police, while, in the exercise of their duties, they are obliged to respect the rights and the dignity of their members within the framework of the normative constraints of discipline and instruction.[11]

The national police is divided into several branches, one being the judicial police (*police judiciaire*) and the most relevant here. It is mandated to support the judiciary in carrying out its duties. The organisation and functions of the judicial police are regulated by the *Loi n° 1/023 du 31 décembre 2004 portant création, composition et fonctionnement de la Police Nationale du Burundi* (Act No. 1/023 of 31 December 2004 on the creation, composition and operation of the National Police of Burundi ('Police Act')). Previously called *Police judiciaire des parquets*, the *Commissariat général de la police judiciaire* is now placed administratively under the authority of the Minister of Interior, whereas it used to fall under the responsibility of the Minister of Justice.

1.5. Overview of criminal procedure legislation, prison laws and other legislation regulating arrested and detained persons

Article 107(3) of the Constitution identifies criminal matters as falling within the domain of the law.[12]

In this context, the Criminal Procedure Code (CPC)[13] was adopted in 2013 to replace the 1999 legislation. This new legislation seems to have been prompted mainly by the entry into force of a new Criminal Code (CC) in 2009,[14] which made it difficult to implement certain provisions of the 1999 CPC.

Beyond these two key pieces of legislation, other laws either govern related fields or complement them.[15]

Correctional facilities are regulated by the *Loi n° 1/026 du 22 septembre 2003 relative au Régime pénitentiaire* (Act No. 1/026 of 22 September 2003 on the penitentiary regime) ('Act on the Penitentiary Regime'). Its subordinate regulations are the *Ordonnance n° 550/782 du 30 juin 2004*

[11] Constitution of Burundi 2005, art. 257.
[12] The following, listed in the provision as being regulated by the law, are relevant for this research: organisation of the judiciary and procedure before the courts; determination of the crimes and misdemeanours as well as the penalties applicable to them; and penitentiary regime.
[13] *Loi n°1/ /10 du 3 avril 2013 portant révision du code de procédure pénale*.
[14] *Loi N°1 /05 du 22 avril 2009 portant révision du Code pénal.*
[15] These include: *Loi n° 1/08 du 17 mars 2005 portant Code de l'organisation et de la compétence judiciaires ; Loi n° 1/37 du 28 décembre 2006 portant Création, organisation et fonctionnement de la Brigade Spéciale anti-Corruption ; Loi n° 1/07 du 25 février 2005 régissant la Cour Suprême ; Loi n° 1/007 du 30 juin 2003 portant Organisation et fonctionnement du Conseil Supérieur de la Magistrature ; Ordonnance ministérielle n° 560/189 du 6 septembre 1983 pour Fixation des ressorts et des sièges des tribunaux de province et de résidence ; Loi n° 1/006 du 16 juin 2000 portant Statut des agents de l'ordre judiciaire ; Loi n° 014 du 29 novembre 2002 portant Réforme du statut de la profession d'avocat ; Loi n° 1/026 du 22 septembre 2003 relative au Régime pénitentiaire ; Ordonnance n° 550/782 du 30 juin 2004 portant Règlement d'ordre intérieur des établissements pénitentiaires ; Loi n°1/004 du 8 mai 2003 portant répression du crime de génocide, du crime contre l'humanité et du crime de guerre ; Loi n° 1/12 du 18 avril 2006 portant mesures de prévention et de répression de la corruption et des infractions connexes*, etc.

portant Règlement d'ordre intérieur des établissements pénitentiaires (Ordinance no. 550/782 of 30 June 2004 on the internal regulations of penitentiary facilities) ('Prison Regulations')

2. Constitutionality of provisions relating to arrest

2.1. Policies leading to arrest

Constitutional provisions that can be considered as the basis of the policies leading to arrest include the principle of equality (article 22), the prohibition of arbitrary treatment by the state or its organs (article 23(1)), the right to privacy (articles 28 and 43) and the principle of legality (articles 42, 47 and 48).

The Burundian legislation on policies leading to arrest seems broadly in line with these constitutional principles. Two provisions in particular are illustrative of this. First, the Police Act requires, generally, that the police act with professionalism, particularly so in protecting citizens and their individual rights.[16] To this end, all police officers are expected to perform their duties in strict compliance with the Constitution as well as with the international agreements which Burundi has ratified.[17] These provisions also apply to arrests.

Moreover, article 12 of the *Loi No. 1/06 du 2 mars 2006 portant statut du personnel de la police nationale du Burundi* (Act No. 1/06 of 2 March 2006 regulating the personnel of the National Police of Burundi) provides that any member of the national police must show respect for the public and avoid any behaviour that may affect public trust in the police or compromise the decorum of the position.

2.2. Rights during arrest

2.2.1. Prohibition of arbitrary or unlawful arrest

Article 39(1) and (2) of the Constitution state that 'no one shall be deprived of their liberty, if it is not in accordance with the law. One may only be charged, arrested, detained or tried in cases determined by law promulgated prior to the acts alleged against them.'

Burundian law appears to be consistent with the Constitution. First, the CPC clearly identifies who can perform an arrest (namely, the judicial police officer, who can arrest on his or her own volition or upon instruction of the prosecutor,[18] or the prosecutor[19]). The CPC determines that an arrest can be performed in cases of *flagrante delicto*.[20] It is silent in other circumstances, with the exception of cases where the offence is punishable by a prison sentence of at least a year and the accused may

[16] Police Act 2004, art. 2.
[17] Police Act 2004, art. 3.
[18] Criminal Procedure Code (CPC) 2013, arts. 15 and 31(2). See also article 143 of the Judiciary Code.
[19] CPC 2013, art. 50.
[20] CPC 2013, art. 26(2).

flee, in which case the police may arrest a person to bring him or her 'immediately' (within 36 hours) before a judge.[21] Secondly, judicial police officers, as auxiliaries of the Office of Prosecutor, can make an arrest upon instruction of the prosecutor and are obliged to perform investigative and other required duties as per the instruction of the prosecutor.[22] When the prosecutor orders an arrest to bring a person in remand detention, he or she is in effect issuing an arrest warrant.[23]

2.2.2. Obligation of law enforcement to use reasonable force

The constitutional background can be found in three articles: the right to life (art 24), the prohibition of torture and cruel treatment (art 25), and the prohibition of slavery (art 26).

Apart from the legislative provisions already identified under section 3.1, articles 13 and 15 of the *Décret-loi n° 1/035 du 4 décembre 1989 portant statut général de la police judiciaire* (Decree-law No. 1/035 of 4 December 1989 on the general status of the judicial police ('Police Decree-law')) state that judicial police officers may only make arrests within the limits of the law and are only allowed to use force in cases of absolute necessity.

2.2.3. Right to be promptly informed of the reasons for arrest

Although not directly enshrined in the Constitution, the right to be promptly informed of the reasons for arrest can be inferred from its article 38, which enshrines the right to have one's case equitably heard in all judicial or administrative procedures.

There is no explicit legal obligation on the police to inform a person of the reasons for arrest immediately after arrest. However, article 11 of the CPC requires the judicial police to keep minutes of a hearing or interrogation of a suspect, minutes which the person being heard or interrogated must sign; the person has the possibility, by law, to read the minutes before signing them and to ask that amendments be made. The obligation to keep minutes and ask that the arrested person, after having been interrogated (whether or not interrogation is followed by detention), sign the said minutes, can be regarded as enshrining the right to be informed of the reasons for arrest. However, the obligation of promptness is lacking.

2.2.4. Right to conditional release before being brought into police custody

The constitutional background of this right lies both in article 38 of the Constitution, which enshrines the right to have one's cause equitably heard, and article 47 of the same, which is the clause on limitations on constitutional rights (the limitations relate to the principle of proportionality and need to be justified by the general interest or the fundamental rights of others). Therefore, the conjunction of articles 38 and 47 imposes on all public authorities, including the police, the

[21] CPC 2013, art. 15.
[22] CPC 2013, arts. 1, 3(2) and 8.
[23] CPC 2013, arts. 110 and 338.

requirement to take into consideration the principles of necessity and proportionality when effecting an arrest.

The CPC provides for this right only once a suspect has been taken into police custody (see section 4.2.4. of this report).

2.2.5. Right to remain silent

The Constitution does not provide for this right, but the general right to be heard equitably, enshrined in article 38 of the Constitution, could constitute an indirect basis for it.

Article 10(5) of the CPC guarantees to every person heard by the police the right to remain silent in the absence of their counsel, a right which must be read out before he or she is interrogated. Therefore, the law does not expressly state that this right is granted during arrest. The same wording is found in article 95(5) of the CPC, which lists all the rights guaranteed to the accused during the pre-trial phase.

2.2.6. Privilege against self-incrimination

The relevant constitutional background of this privilege can be identified in the general right to be heard equitably, contained in article 38 of the Constitution.

The CPC does not guarantee the privilege against self-incrimination at the moment of arrest.

2.2.7. Right to privacy

This right finds its constitutional basis in article 43 of the Constitution, which spells out the right to not be subject to arbitrary infringement of one's private life; the article also refers to the principle of legality of searches and domiciliary visits.

The CPC guarantees the right to privacy during body searches. Searches must be executed under the responsibility of a member of the judicial police, cannot last longer than 'necessary', and must be performed by a person of the same gender as the suspect.[24]

The CPC sets out additional requirements for house searches. First, the property owner or the alleged perpetrator of the offence requiring the search must be present, and a statement must be drawn up listing all items that were taken away and copy be given to the person whose house is searched; furthermore, house searches can take place only between 06h00 and 18h00.[25] Secondly, article 14 of the of the Police Decree-law states that judicial police officers will visit the homes of individuals solely for the purposes of investigations or searches ordered by the competent authority.

[24] CPC 2013, arts. 45(2) and 4.
[25] CPC 2013, arts. 88, 90 and 91.

2.2.8. Right to be informed of one's rights

There is no direct constitutional basis to the right to be informed of one's rights (with the exception of the general provision of article 38), but article 10(5) of the CPC indicates that before any interrogation, the person arrested shall be informed of his or her rights. However, this would refer to police custody rather than arrest.

2.3. Right to redress following rights violations

Article 23 of the Constitution imposes an obligation on the state to indemnify any person who is a victim of arbitrary treatment by actions of the state or any of its organs.

The right to redress is, however, only partially enshrined in subordinate legislation. Indeed, the only relevant provisions relate to the possibility for the prosecutor to apply, ex officio or following a complaint, for proceedings to be declared null following procedural errors (some of which were identified above and with none relating to arrest).[26] This decision can be taken by any court.[27] The accused can also directly raise the defence of nullity for violation of procedural rights him- or herself before the court.

Any person can also raise a question of constitutionality of a legal provision before the Constitutional Court, either directly or indirectly (by raising the matter before a subordinate court, which has to refer the matter to the Constitutional Court and suspend proceedings while the matter is heard before the Court).

In addition, the prosecutor can institute disciplinary or criminal proceedings against officials involved in such violations.[28]

Furthermore, article 289 of the CPC provides that victims of torture at the hands of state officials can claim for damages from the state if they institute a civil action during the criminal trial of the official who allegedly committed the offence of torture. Therefore, obtaining civil damages is dependent on a criminal conviction of the perpetrator. This action can also be brought by civil society organisations on behalf of the victim.[29]

Finally, article 411 of the CC makes it a criminal offence for public officials to commit any arbitrary act that violates a fundamental right, while article 392 of the CC provides that a police or prosecution officer faces a sentence of imprisonment of eight days to one month when he or she, without reasonable excuse, fails to comply with the time limits prescribed by the CPP.

[26] CPC 2013, arts. 2, 5, 9, 52, 73, 74, 154, 158-62, 165, 224 and 236.
[27] CPC 2013, art. 161.
[28] CPC 2013, arts. 47, 52, 111 and 115.
[29] CPC 2013, arts. 64(5) and (6).

2.4. Regime applicable to children

Two provisions of the Constitution are relevant in relation to children in conflict with the law. Article 44 of the Constitution lists general rights afforded to children, namely the right to specific measures aimed at guaranteeing well-being, health, physical security and protection against abuse. Article 46 of the Constitution stipulates that children in detention younger than 16 be separated from adults and be treated under conditions adapted to their age.

The Constitution does not set the minimum age of criminal capacity. Article 28 of the CC and article 66(a)8° of the CPC determine that children are criminally responsible only from the age of 15.

Article 94 of the CPC determines that a body search of a child younger than 15 must be authorised in writing by the parents as well as by the child if he or she is aged between 15 and 18.

Articles 222 to 234 of the CPC determine the specific regime on the arrest and detention of children. Article 222(2) states that the best interests of a child must guide the entire criminal procedure. Furthermore, article 222(4) specifies that the need to maintain access to education must be borne in mind whenever a decision in the criminal justice process is taken against a child, including when he or she is detained.

3. Constitutionality of provisions relating to custody prior to first court appearance

This section refers to all forms of deprivation of liberty ('*détention*' and '*rétention*'). *Rétention* is outlined in article 31 of the CPC. First, it includes police custody aimed at conducting police investigative work or judicial acts.[30] Secondly, it refers to what the CPC defines as a 'short' detention period (that is, 36 hours) in police custody before being brought before a judge, in cases of *flagrante delicto*.[31] However, according to international best practice, this should be seen as regular police custody. The CPC also lists cases where '*rétention*' is authorised for what it sees as measures of safety, and will not automatically lead to a person being brought before a judge: that is, for public drunkenness, for illegal stay in the country, to verify one's identity, if one is in a 'dangerous mental state', or to conduct a body or vehicle search.[32] The latter cases can usually not last for more than 24 hours.

3.1. Outline of the different places of custody prior to first court appearance: police, secret services, special units, etc.

Suspects can be detained either at the place of arrest, in police custody, or at a 'place of safety'.[33] A 'place of safety' refers to other places of detention, in particular in relation to powers of arrest and detention (generally, to all powers of judicial police officers) granted to some administrative authorities.[34] Mayors can detain suspects in *'cachots communaux'*, which are municipal places of custody.[35]

Likewise, suspects can also be detained by the secret services (*Service National des Renseignements*), since Intelligence Officers and Intelligence Inspectors are granted the powers of judicial police officer with general jurisdiction for any offence relating to the mandate of the *Service National des Renseignements*.[36]

[30] CPC 2013, art. 32.
[31] CPC 2013, art. 15.
[32] CPC 2013, arts. 41-46.
[33] CPC 2013, arts. 31 and 32.
[34] CPC 2013, art. 1.
[35] Article 26 of the *Loi n°1/33 du 28 novembre 2015 portant revision de la loi n°1/02 du 25 janvier 2010 portant organisation de l'administration communale (Act no. 1/33 of 28 November 2015 amending Act no. 1/02 of 25 January2010 on the organisation of municipal administration)*.
[36] Article 13 of *Loi n° 1/05 du 2 mars 2006 portant statut du personnel du service national de renseignement (Act no. 1/05 of 2 March 2006 determining the status of the national intelligence service)*.

Finally, after a prosecutor has issued a warrant of remand detention, the accused can be detained in a prison.[37]

3.2. Rights in custody prior to first court appearance

3.2.1. Prohibition of arbitrary or unlawful detention

The relevant constitutional background can be identified in article 39(1) of the Constitution, which determines that no one may be deprived of his or her liberty if not within the boundaries of the law.

Articles 31 and 32 of the CPC prohibit arbitrary or unlawful retention.

Article 52 of the CPC is also relevant to unlawful detention. First, it establishes the general principle that freedom is the rule and detention is the exception. Secondly, it states that the prosecutor shall ensure strict compliance with laws authorising restrictions on individual freedom, including those relating to detention and retention. If a prosecutor witnesses a case of unlawful detention, he or she is entitled (but not obliged) to take all appropriate measures to terminate it immediately. In addition, the prosecutor must take appropriate legal action if the facts constitute a criminal offence, are subject to disciplinary sanctions, or both.

Remand detention is ordered by the prosecutor and can be done only if there is sufficient prima facie evidence against the accused and that the offence is punishable by a prison sentence of at least one year's imprisonment.[38] This measure, which significantly limits the right to freedom (since it results in the incarceration of a person who is still presumed innocent), is accompanied by several procedural guarantees (including the requirement that the prosecutor issue a duly motivated arrest warrant, which must be confirmed by a judge within a short period of time).

What is important to note is that in Burundi the prosecutor (*Ministère Public*) is in charge of prosecuting but also plays the role of an investigating judge (*magistrat instructeur*), who will investigate for both the state and the accused and therefore collect both inculpatory and exculpatory evidence.

Finally, article 13 of the Police Decree-Law confirms that the police may proceed to an arrest and detention only within the boundaries of the law.

3.2.2. Right to be presumed innocent until proven guilty

There is no specific constitutional basis for this right, with the exception of the general right to be heard equitably; the latter is enshrined in articles 38 and 40, which confirm that that a person is presumed innocent until proven guilty by a court of law that has followed due process.

[37] CPC 2013, art. 110 and art. 5 of the *Loi n° 1/026 du 22 septembre 2003 relative au Régime pénitentiaire (Act No. 1/026 of 22 September 2003 on the penitentiary regime) (*'Act on the Penitentiary Regime').
[38] CPC 2013, arts. 110 and 111.

The right is not reflected in the CPC, with the exception of a general reference to the 'presumed author' of an offence in different provisions concerning the pre-trial phase.[39]

3.2.3. Right to be promptly charged or released

There is no specific constitutional basis for this right, with the exception of the general right to be heard equitably, enshrined in article 38.

Nothing in the CPC provides for a right to be promptly charged in police custody. The legal regime deals only with the length of police detention before being brought before a judge (see section 4.2.5. of this report).

3.2.4. Right to conditional release

The constitutional background of this right lies in article 38 of the Constitution, which enshrines the right to have one's cause equitably heard.

The legal basis is found in article 16 of the CPC, which determines that for any offence punishable by a prison sentence of less than one year, the judicial police officer may, if he or she considers that the trial court would simply impose a fine and possible confiscation of goods, invite the alleged offender to pay the Treasury an amount that cannot exceed the maximum fine that can be imposed for the offence.

However, this provision raises an issue of separation of powers, since a police officer, who is a member of the executive, has the possibility to determine a judicial sentence. But articles 18 and 19 of the CPC attempt to place some form of control on the exercise of these powers, by imposing that the police officer immediately inform the prosecutor that the accused chose the option of a fine and leaving the possibility to the prosecutor to reinstate criminal charges within a month from the date of payment of the fine.

Police bail does not exist under Burundian law.

3.2.5. Right to be promptly brought before a judge

There is no specific constitutional basis for this right, with the exception of the general right to be heard equitably, enshrined in article 38.

Several provisions of the CPC relate to the length of police custody. They establish a legal regime that differs depending on the nature of the detention.

[39] CPC 2013, arts. 91 and 95.

Police custody can last for a maximum period of seven days, which can be extended by another seven days by a prosecutor, who also has the power to end police custody at any time.[40] In cases of *flagrante delicto*, this period is reduced to 36 hours.[41]

However, the CPC also establishes that a suspect must be brought before a prosecutor in order to be charged as soon as the investigation has established that there is serious and corroborating evidence against him or her; such person must then be released or transferred to prison.[42] When the maximum legal period for police custody expires, the suspect must be be brought automatically before the prosecutor.[43] However, the 14-day police detention is contrary to international standards and could be found unconstitutional, since international law ratified by Burundi forms an integral part of the Constitution.[44] The Prosecutor must then immediately either release the person or issue an arrest warrant.

The suspect must appear before the judge within 14 days of the issuing of the arrest warrant.[45]

The 'retention' regime provided for under article 15(2) of the CPC (offence punishable by a prison sentence of minimum one year and a suspect that is a flight risk or whose identity is unknown or doubtful) can last only for the duration of the transportation to the relevant judicial authority, and for a maximum of 36 hours.

Retention for reasons of safety can last only for 24 hours and will not lead to a charge, with the exception of the provisions relating to illegal foreigners, in which case the same rules apply as in the case of normal police custody.[46]

Following the detention order issued by the prosecutor, the accused must be brought before a judge within 15 days to rule on the regularity of the said order.[47]

In cases of non-compliance with legal time-frames, the prosecutor can challenge the detention following a complaint by a suspect or accused that he or she was kept in police custody beyond the legal limit. However, this is not automatic and is dependent on the action of the prosecutor.[48]

3.2.6. Right to remain silent

There is no specific constitutional basis for this right, with the exception of the general right to be heard equitably, enshrined in article 38.

Article 95(5) of the CPC guarantees the right of the suspect and the accused to remain silent in the absence of his or her lawyer. However, it is unclear whether the law then requires that a suspect or

[40] CPC 2013, art. 34.
[41] CPC 2013, art. 22.
[42] CPC 2013, art. 37.
[43] CPC 2013, art. 38.
[44] Constitution of Burundi 2005, art. 19.
[45] CPC 2013, art. 111(3).
[46] CPC 2013, arts. 41-46.
[47] CPC 2013, arts. 111(1) and (3).
[48] CPC 2013, art. 64(1).

accused always respond to questions of an investigator or the judge in the presence of his or her legal representative.

3.2.7. Privilege against self-incrimination

There is no specific constitutional basis for this right, with the exception of the general right to be heard equitably, enshrined in article 38.

The privilege against self-incrimination when being interrogated by the prosecutor is guaranteed in article 74 of the CPC, which indicates that the accused, not yet brought before the judge, has the right not to be compelled to testify against him- or herself or to confess guilt and, if being forced to do so, the fact that the accused was compelled to testify against him- or herself can nullify the interrogation.

3.2.8. Right to communicate

Two constitutional provisions enshrine the (general) right to communicate. Article 28 of the Constitution guarantees the right of privacy of personal communications, while article 43(3) of the same guarantees the secrecy of correspondence and communication.

This right is reflected in article 36 of the CPC, which states that placing someone in custody entails restrictions on the freedom to communicate. However, the police official has the obligation to inform the family of the person held in custody (or any other interested person) of the said custody. Regrettably, it must be noted that the law does not specify how the family is notified. Furthermore, it must be emphasised that communication with the person held in custody is subject to approval by the judicial police officer, depending on the circumstances of each case.

3.2.9. Right to legal representation

There is no specific constitutional basis for this right, with the exception of the general right to be heard equitably, enshrined in article 38.

The right to a defence during the stage prior to first court appearance (whether the person is detained in police custody, in another ‘place of safety’ or in prison) is reflected in article 95 of the CPC. This provision establishes not only the right to choose counsel but the right to communicate freely with such counsel in order to get help in drafting correspondence and in the production of exculpatory evidence; the right to have the assistance of his or her counsel during the investigative measures; and, finally, the right to remain silent in the absence of his or her counsel.

However, in remand detention, articles 97 and 98 of the CPC provide that the prosecutor may suspend the right to counsel when required by the discovery of the truth or proper administration of justice. These provisions appear to be contrary to the principle enshrined in article 14 of the International Covenant on Civil and Political Rights (ICCPR), in article 11 of the Universal Declaration of Human Rights, and in articles 19 and 39 of the Constitution. In any case, it is difficult to

understand how a lawyer could hinder the expression of the truth, or interfere with the proper administration of justice, since lawyers should be regarded as *auxiliaires de justice*, or agents of the law. Nevertheless, these provisions not only reflect distrust, enshrined in law, towards lawyers or other legal representatives, but are also likely to obstruct the exercise of the rights of defence.

3.2.10. Right to an interpreter

There is no specific constitutional basis for this right, with the exception of the general right to be heard equitably, enshrined in article 38.

Article 27 of the CPC determines that a police official may request the assistance of an interpreter whenever the need arises. However, this is not a right granted to the suspect and is entirely dependent on the decision of the police official.

3.2.11. Right to be separated from different categories of arrested persons

This right can be inferred from the general right to human dignity enshrined in articles 21 and 27.

The legal basis for this right is found in article 32(4) of the CPC, which states that men and women have to be separated in police custody and guarded by people of the same gender.

Furthermore, as mentioned in the introduction to this section, individuals suffering from mental illness and who are a danger to themselves or to others must be placed in a place of care or, as a measure of last resort, in police custody, for a maximum of 24 hours.[49]

For the regime applicable to children, see section 4.7. below.

3.2.12. Right to safe custody

There is no specific constitutional basis for this right, with the exception of the general right to human dignity enshrined in articles 21 and 27.

Although implicitly stated, this right can be identified in article 35(2) of the CCP, which requires the police officer to draw up a report of custody, establishing in particular the conditions in which the suspect was presented to him or her.

3.2.13. Right to humane conditions of detention

See sections 4.2.12. and 4.2.11. above.

[49] CPC 2013, art. 44.

3.2.14. Right to be informed of one's rights

The constitutional background of this right lies in article 38 of the Constitution, which enshrines the right to have one's cause equitably heard.

Article 73 of the CPC enshrines the right to be informed of the charges brought against the accused when appearing before the prosecutor (before being brought before a judge). Proceedings may be invalidated if this procedure is not complied with.

3.3. Right to have one's case summarily decided upon before the first court appearance

The constitutional background of this right lies in article 38 of the Constitution, which enshrines the right to have one's cause equitably heard.

Article 66 of the CPC grants the privilege to the prosecutor to take no further action for certain reasons, including if he or she finds there is a lack of sufficient evidence to proceed. However, this constitutes an administrative measure that does not prohibit the resumption of the investigation or prosecution. See also section 4.2.4. on the possibility to pay a fine instead of proceeding to trial.

3.4. Rights of foreigners

The Constitution states that extradition is authorised only within the limits specified by the law. It also states that no Burundian is to be extradited abroad unless he or she is prosecuted by an international criminal court.[50] It also establishes equality of protection for foreigners and Burundian citizens alike.[51] However, a derogation is provided in paragraph 2 of the same provision, which authorises extradition of foreigners prosecuted abroad for crimes of genocide, crimes against humanity, war crimes or acts of terrorism.

Burundi currently has no national legislation on extradition. Extradition requests are most probably reviewed on an ad hoc basis or under the principle of reciprocity.

With specific regard to rights, article 36(b) of the Vienna Convention on Consular Relations provides consular protection; although the Convention has not been ratified by Burundi, it may be relevant as it is considered as setting a customary norm[52] and a human right.[53]

3.5. Right to redress following rights violations

See the information in section 3.3. of this report, which is relevant here.

[50] Constitution of Burundi 2005, arts. 50(2) and (3).
[51] ibid, art. 59(1).
[52] International Court of justice, LaCrand (*Germany v United States of America*), Judgment, I. C.J. Reports 2001, §§74-77.
[53] Inter-Amercican Court of Human Rights, Advisory Opinion of 1st October, 1999, *El derecho a la información sobre la asistencia consular en el marco de las garantías del debido proceso legal*, série A n°16, §§57-65.

3.6. Complaints and oversight mechanisms

As highlighted in section 3.3. above, during judicial proceedings suspects and accused can formally complain of having had their fundamental rights violated. This can also be raised automatically by both the prosecutor and the judge.

Burundi's National Human Rights Institution, the *Commission Nationale Indépendante des Droits de l'Homme* (CNIDH), and the Ombudsman can receive complaints of human rights violations and investigate these.[54] However, their powers are limited and they can only issue opinions and recommendations. In addition, the CNIDH has the power to visit all places of detention, including police cells.

3.7. Regime applicable to children

Information provided under section 3.4. remains relevant here.

The relevant constitutional background is found in article 46 of the Constitution, which imposes that children in detention younger than 16 must be separated from adults, and must be treated under conditions adapted to their age.

At a legislative level, the custody of children younger than 18 prior to first court appearance is regulated by articles 222 to 232 of the CPC. The general principle is outlined in article 222(2) of the CPC, which states that any measure taken by the criminal justice system relating to a child (under the age of 18) must be taken in the best interests of the child. Furthermore, article 222(4) of the CPC states that detention of a child must be a measure of last resort.

Other provisions provide more detail on certain rights examined above. In particular, article 224 of the CPC imposes that a child may be interrogated only in the presence of a legal representative or a person with knowledge of child law and authorised to provide such assistance by the judge in charge of that particular case. Furthermore, article 229 of the CPC states that children, if they must be detained as a measure of last resort, can be detained only in a special place of care or a wing of the prison that caters specifically for children. If this is not possible, the child must be separated from adults at all times.

[54] Article 237 of the Constitution and *Loi N° 1/04 du 05 janvier 2011 portant creation de la Commission Nationale Indépendante des Droits de l'Homme* (Act no. 1/04 of 5 January 2011 creating the National Independent Human Rights Commission), arts. 4 and 36.

4. Constitutionality of trial-related provisions

4.1. Universal trial-related rights

International trial-related rights were given constitutional ranking[55] through article 19 of the Constitution, which provides that

> the rights and duties proclaimed and guaranteed by, among others, the Universal Declaration of Human Rights, the International Covenants on Human Rights, the African Charter on Human and Peoples' Rights, the Convention on the Elimination of all Forms of Discrimination Against Women and the Convention on the Rights of the Child are an integral part of the Constitution of the Republic of Burundi.

Therefore, under this provision, the domestic implementation of these international standards is a constitutional obligation.

4.1.1. Principle of legality

The act/omission for which the accused is tried must constitute a criminal offence at the time of commission/omission, as per articles 39 and 41 of the Constitution.

Different legislative provisions support this cardinal principle. Articles 1 to 11 of the CC give substance to different principles of criminal law, such as the non-retroactivity of criminal law, no crime without law, or no sentence without law. In criminal matters, articles 6 to 11, 17 to 21 and 30 to 34 of the Judiciary Code determine the material jurisdiction of the relevant courts, whereas articles 100 to 107 of the same Code outline their territorial jurisdiction. Finally, a 1962 ruling by the court of first instance confirmed the principle that if legislation is amended between the time of the commission of the offence and the trial, the most favourable provision must apply.[56] This is also reflected in article 41 of the Constitution.

4.1.2. Right to be presumed innocent until proven guilty

The constitutional basis of this right is found in article 40 of the Constitution, which confirms that a person is presumed innocent until proven guilty by a court of law that has followed due process.

The right is not reflected in the CPC, with the exception of a general reference to the 'presumed author' of an offence in different provisions.

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[55] Charles Fombad, 'Internationalization of Constitutional Law and Constitutionalism in Africa' (2012) 60(2) *American Journal of Comparative Law* 439.

[56] Arrêt du 10 août 1962 par le Tribunal de Première instance du Burundi, cited in *Revue juridique du Rwanda et du Burundi*, 1963, p. 12.

What is important to note is article 1 of *Loi n° 1/37 du 28 décembre 2006 portant création, organisation et fonctionnement de la brigade spéciale anti-corruption* (Act No. 1/37 of 28 December 2006 on the creation, organisation and functioning of the anti-corruption special brigade), which lays out the mandate of the anti-corruption brigade and indicates that it has jurisdiction over those 'presumed guilty' of acts of corruption. This latter provision raises an issue of constitutionality, since the wording used may indicate that judicial officers in charge of corruption cases would have a preconceived idea regarding the responsibility of the accused.

4.1.3. Right to be promptly charged or released

There is no specific constitutional basis for this right, with the exception of the general right to be heard equitably, enshrined in article 38.

The CPC does not provide that a person must be brought before a judge or charged swiftly. Remand detention is decided by the prosecutor. Once his or her investigation is complete and if he or she decides to proceed with trial, the prosecutor must summon the accused and indicate, among other information, the nature, date and place of the facts which the accused will have to answer as well as the court in which the person is summoned to appear, the place and time of appearance.[57] There is no time-frame, from the moment of arrest or remand detention, within which this must occur. Furthermore, the accused need not be informed in detail of the charges against him or her before his or her first court appearance, and cannot therefore adequately prepare his or her defence, which is probably in contravention of article 14 of the ICCPR.

4.1.4. Right to challenge custody

There is no specific constitutional basis for this right, with the exception of the general right to be heard equitably, enshrined in article 38.

The CPC contains detailed provisions on the right to appeal one's pre-trial detention (*détention provisoire*). Generally, article 132 of the CPC states that the accused may ask the court before which he or she is tried to be released from pre-trial detention. Furthermore, the possibility to appeal pre-trial detention orders is granted to both the prosecutor and the accused, who must lodge the appeal within two working days.[58] However, the appeal process does not suspend the detention order; this means that the accused remains in detention while the application is being considered, although the CPC urges the judge to consider the appeal expeditiously.[59]

See also section 6.2.1 on the right not to be detained while on trial.

[57] CPC 2013, arts. 134, 138, 148(2) and 209.
[58] ibid, arts. 124 and 125.
[59] ibid, arts. 127(2) and 128.

4.1.5. Right to remain silent

There is no specific constitutional basis for this right, with the exception of the general right to be heard equitably, enshrined in article 38.

There is no legal basis for this right at the trial stage.

4.1.6. Privilege against self-incrimination

There is no specific constitutional basis for this right, with the exception of the general right to be heard equitably, enshrined in article 38.

Article 174 of the CPC establishes that the accused cannot be compelled to testify against him- or herself or to make a confession.

Furthermore, the CPC requires the judge to verify the admissibility of a confession and guilty plea and ensure that the accused made a confession in full knowledge of the law and not under torture. The accused must repeat his or her confession in court.[60]

4.1.7. Right to equality before the courts

The constitutional basis of this right is found in two provisions. First, article 38 of the Constitution enshrines the right to be heard equitably in all judicial and administrative procedures. Secondly, article 40 of the Constitution reflects the principle of the presumption of innocence and the right to be tried by a public court complying with procedural safeguards. Hence, although the right to equality is not expressly reflected in the Constitution, the general principle of equality of arms is reflected in the wording of these two constitutional provisions. Criminal proceedings must therefore be fair and adversarial and maintain a balance between the rights of the parties.

The principle of equality of arms is also reflected in the CPC. Its article 170 lays out the different stages of the trial, emphasising that both the prosecutor and the accused have the right to present and challenge evidence. According to this provision, the floor is first given to the prosecutor, then to the defence, which can respond to the charge. Both parties can call their own witnesses and both can challenge the evidence of the other party and cross-examine witnesses. The judge can also order that any relevant evidence be presented in court. If a victim instituted civil action, he or she will also make a submission and can challenge evidence of the prosecutor and the defence. The accused always has the final word.

That being said, the Supreme Court ruled in 2005 that a judge can interrupt pleadings when he or she considers that the court has been presented with sufficient information and evidence to be able to make a ruling. However, doing so could be seen as contradictory to the principle of equality

[60] CPC 2013, arts. 244-52, and more specifically art. 251.

before the courts, since it may take place before the defence is able to present his or her evidence fully.[61]

4.1.8. Right to be declared not competent to stand trial

There is no specific constitutional basis for this right, with the exception of the general right to be heard equitably, enshrined in article 38.

There is no legal basis to the right to be declared not competent to stand trial.

4.1.9. Right not to be tried in absentia

There is no specific constitutional basis for this right, with the exception of the general right to be heard equitably, enshrined in article 38.

Although the right is not directly recognised in legislation, the CPC contains some limitations to a trial in absentia. It limits the possibility of a default judgment by guaranteeing certain procedural rights to the person tried in absentia, including those related to subpoena of the accused albeit that they do not require that the accused personally receive summons.[62] The same provisions apply for the accused tried in absentia, who must be notified of a court ruling against him or her and can then 'oppose' the judgment in absentia.[63]

4.1.10. Right to be tried *and* sentenced in a public and open court

The constitutional basis of this right lies in article 40 of the Constitution, which enshrines the right to be tried in public. The Constitution does not make a direct reference to the right to be sentenced in public. Furthermore, article 206 of the Constitution states that all court proceedings must be held in public, except if the judge rules to hear *in camera* when a public hearing may affect public safety or 'morality'.

Articles 167, 169 and 170 of the CPC confirm the constitutional provisions and mandate the presiding judge to regulate the proper conduct of proceedings. For this purpose, he or she may decide to hold a closed hearing at the request of the prosecutor, the accused or his lawyer or the victim.

See section 5.5. for the regime specifically applicable to children.

[61] Cour suprême du Burundi/Chambre administrative, Affaire R.A.A 597 du 30.12.2005, C.S./Adm. Nouvelle Revue de Droit du Burundi, avril/mai 2007, 7.

[62] CPC 2013, arts. 137-55.
[63] ibid, arts. 253-60.

4.1.11. Right to be informed of an upcoming hearing

See section 5.1.3 above.

4.1.12. Right to an individualised trial

There is no specific constitutional basis for this right, with the exception of the general right to be heard equitably, enshrined in article 38.

This specific right is, to some extent, in article 25 of the *Ordonnance ministérielle n° 550/132/98 du 3 mars 1998 portant Règlement d'ordre intérieur des parquets et des secrétariats des parquets* (Ministerial Ordinance No. 550/132/98 of 03 March 1998 on the internal regulations of the public prosecutors and the secretariats of the public prosecutors), which indicates that in cases with multiple accused but which have been decided upon for some accused only, a new case number has to be assigned to the remaining cases.

4.1.13. Right to legal representation

The relevant constitutional background is found in article 39(3) of the Constitution, which guarantees the right to present a defence before any jurisdiction, and article 40 of the same, regarding the right to be tried in public.

The CPC appears to reflect this right as an imperative procedural requirement. The CPC guarantees that proceedings against an accused will only take place with adequate representation of the case by the defence.[64] However, there is no legal consequence if the accused is not represented. Therefore, the general principle appears to be that the accused has a *right* (but without this being a procedural obligation) to be represented, at all stages of criminal proceedings, by counsel of his or her choice. Access to a legal representative of one's choice follows a ruling by the African Commission on Human and Peoples' Rights (*Avocats sans Frontières (on behalf of Bwampamye) v Burundi*) that condemned former legislation leaving the freedom to the judge to appoint a defence lawyer for the accused or not.[65]

In cases of flagrancy, in which the time period for investigation and appeal is shortened, the period (time-limit) of investigation and appeal is also shortened. This has been the subject of constitutional litigation. The applicants contested the constitutionality of the procedure outlined in Chapter VII of the CPC relating to the investigation and trial of cases of *flagrante delicto*.[66] They contended, inter alia, that the deadlines provided for in the Code were too short to allow the accused to prepare his or her defence and communicate with counsel of his or her choice. The Court concluded, however, through reasoning based mainly on the jurisprudence of the European Court of Human Rights

[64] CPC 2013, arts. 95, 113, 154 and 166.
[65] African Commission on Human and Peoples' Rights, *Avocats Sans Frontières (on behalf of Bwampamye) v Burundi*, Comm. No. 231/99, 14th Activity Report 2000-2001, para 30.
[66] See specifically arts. 209, 211, 216, 218, 219 and 221 of the CPC 2013.

regarding article 6 of the European Convention on Human Rights, that the challenged provisions were consistent with article 38 of the Constitution, article 10 of the Universal Declaration of Human Rights and article 14(3) of the ICCPR.[67]

The right to access a lawyer in all criminal trials is also reflected in the *Loi n° 014 du 29 novembre 2002 sur Réforme du statut de la profession d'avocat (*Act No. 014 of 29 November 2002 on the reform of the status of legal counsel). Indeed, article 55 indicates that a judge who considers that an accused lacks sufficient means to pay for his or her own defence may appoint ex officio counsel or invite the Bar to assign one of their counsel.

However, the Supreme Court in 2000 ruled that the right to legal representation cannot be regarded as having been violated if the accused cannot prove that he or she requested free legal representation but was not able to obtain it.[68]

There is no legislation on legal aid at state expense in Burundi, and/or the determination of how legal aid is understood and under which conditions it is made available. A draft Legal Aid Bill was prepared in 2009 by the Ministry of Justice and the United Nations Office in Burundi; it is focused on regulating the provision of legal representation in court, but is not currently before Parliament.[69]

4.1.14. Right to an interpreter

There is no specific constitutional basis for this right, with the exception of the general right to be heard equitably, enshrined in article 38.

However, this right is reflected in article 77 of the CPC, which determines that an accused can request an interpreter when being interrogated during the investigation phase. Furthermore, article 195 of the CPC indicates that when an accused, civil party or witness does not speak one of the official languages used by the court, or if it is necessary to translate a document admitted into evidence, the president of the court shall designate an interpreter. However, the wording of the legislation is not geared to ensuring that the accused can him- or herself request an interpreter.

Article 108 of the CPC determines that the state pays for the interpretation service.

4.1.15. Evidence-related rights

There is no specific constitutional basis for this right, with the exception of the general right to be heard equitably, enshrined in article 38.

[67] Cour Constitutionnelle du Burundi, *Affaire RCCB 284 du 2 juin 2014, Buntinimana et consorts* (Inconstitutionnalité de certaines dispositions du Code de procédure pénale), Bulletin officiel du Burundi n°6bis et 7/2014, 928-31.
[68] Cour suprême du Burundi/Chambre judiciaire, Affaire RPC.1243 du 27.11.2000.
[69] *Avant-projet de loi portant cadre légal de l'aide juridique et de l'assistance judiciaire au Burundi* (Bill determining the legal framework on legal aid and legal assistance in Burundi), ss 27-60.

Although the CPC contains several provisions on the administration of evidence, it does not lay down any principles on evidence-related rights as such.[70] The admissibility of evidence and its assessment are matters primarily decided by the courts. They have the duty, on the one hand, to conduct a proper examination of the submissions, arguments and evidence adduced by the parties; and, on the other, to ascertain whether the proceedings as a whole were fair, including the way in which evidence was taken.

The most relevant provisions of the CPC include the following: the right to obtain copies of all pleadings at the cost of the party requesting it;[71] the right to have access to adequate facilities to prepare one's defence;[72] the right to declare null and void evidence collected by means that violate fundamental rights, including private communication between the accused and his or her counsel and evidence obtained under torture;[73] the right to access records of the trial;[74] and the right to examine (and cross-examine) witnesses and evidence.[75]

Lastly, a 2005 judgment of the Supreme Court ruled that a judge may order that additional investigation measures be conducted if these are necessary to fully understand the facts of the case. This, however, cannot affect the charge sheet.[76]

4.1.16. Right to privacy

The constitutional basis for this right can be found indirectly in article 28 of the Constitution, which is related to the right to privacy.

At the trial stage, there is no legal basis to the right to privacy.

4.1.17. Right to be informed of one's rights

Although not directly enshrined in the Constitution, the right to be informed of one's rights can be inferred from article 38 of the Constitution, which enshrines the right to have one's case equitably heard in all judicial or administrative procedures.

At the trial stage, there is no legal basis to this right.

4.2. Rights of foreigners

See section 4.4. above.

[70] CPC 2013, arts. 171-99.
[71] ibid, art. 175.
[72] ibid, art. 190.
[73] ibid, arts. 52(3) and 179.
[74] ibid, art. 199.
[75] ibid, art. 170(4).
[76] Cour Suprême, Chambre Judiciaire (pénale), Affaire RPS 52 du 21.2.2005, Nouvelle Revue de Droit du Burundi. juin/juillet 2005, 19.

4.3. Rights specific to the trial

4.3.1. Right to a speedy trial

There is no specific constitutional basis for this right, with the exception of the general right to be heard equitably, enshrined in article 38.

The Burundian CPC only partially reflects the right to a speedy trial. The law requires that the judge take all necessary measures to find the truth, but does not put any time limit on a trial.[77] Furthermore, article 200(2) requires that a judgment be issued immediately after the conclusion of proceedings and at the latest within one month of these. However, the maximum length of proceedings is not set in law, neither does any legislation contain a reference to a 'reasonable' length of trial. The plea bargaining procedure does not address the impact it could have on the duration of the trial. Therefore, the adequate length of trial is assessed on a case-by-case basis.

4.3.2. Protection against double jeopardy (non bis in idem)

This international standard is reflected only indirectly in the Constitution (through the general provision of article 38) and is not reflected in the legislation.

4.3.3. Right to compensation for malicious prosecution

The relevant constitutional background can be identified in the general provision of article 38 and in article 23 of the Constitution, which enshrines the right to be compensated if one is the subject of arbitrary treatment by the state or one of its organs. This right is not expressly provided in Burundian legislation.

4.4. Rights specific to sentencing proceedings

4.4.1. Right to submit evidence in mitigation of sentence

There is no specific constitutional basis for this right, with the exception of the general right to be heard equitably, enshrined in article 38.

There is no direct recognition of this right in law, but it could be said that the provisions on the accused's right to present evidence at trial (see section 5.1.13.) partially satisfies this requirement**.** There is, however, an automatic reduction of sentence if the accused pleads guilty (life imprisonment will be converted to 20 years maximum, and any sentence with a maximum period of

[77] CPC 2013, art. 184.

imprisonment will be reduced to half that maximum), a reduction which can be lowered further on a case-by-case basis on the appreciation of the judge.[78]

4.4.2. Right to an individualised sentence

There is no specific constitutional basis for this right, with the exception of the general right to be heard equitably, enshrined in article 38.

This right is not directly reflected in the legislation. However, article 18 of the CC determines that criminal responsibility is personal and that one can be sentenced only for one's own (wrong-)doing. Furthermore, article 176 of the CPC establishes that a court may use the statement of a co-accused against another accused only if that statement is corroborated by the testimony of a third party not involved in the case or by other material evidence.

4.4.3. Right to life

The constitutional background of this right is found in three articles in the Constitution: article 24 on the right to life; article 25 on the prohibition of torture and other ill-treatment; and article 26 on the prohibition of slavery.

The death penalty as a legal sentence was abolished in 2009 through the adoption of the new Criminal Code.

Life imprisonment without the option of parole is examined in section 6.4. below.

4.4.4. Right not to impose unusual or degrading punishment as a sentence

The constitutional background can be found in two articles of the Constitution: article 25 on the prohibition of torture and other ill-treatment; and article 26 on the prohibition of slavery.

Since 2009, the Criminal Code authorises a court to impose a sentence of 'public presentation of the perpetrator'.[79] While in theory this measure aims to have the perpetrator express repentance and brings a dimension of restorative justice to criminal proceedings, the fact that mob justice is a major problem in Burundi carries the risk that such a measure could lead to a violent response from the community.[80] In addition, if a guilty verdict is reversed on appeal, the public image of the accused is already tainted.

What is important to note is article 205 of the CPC, which imposes a requirement to deduct the length of time spent in pre-trial detention from the final sentence.

[78] See CPC 2013, art. 252.
[79] Criminal Code (CC) 2009, art. 92.
[80] Human Right Watch, *Mob Justice in Burundi: Official Complicity and Impunity* (March 2010) 105.

4.4.5. Right to be sentenced to an appropriate facility, including a psychiatric hospital

This right is not reflected in the Burundian Constitution or legislation.

4.4.6. Right to review or appeal one's sentence

Apart from the general principle contained in article 38 of the Constitution, there is no specific constitutional basis to this right.

This right is, however, reflected in the legislation, first in articles 4 to 38 of the Judiciary Code and, secondly, in articles 261 to 271 of the CPC, with the latter dealing with appeals of verdicts in criminal cases specifically. In particular, article 261 of the CPC contains a closed list of the parties who can appeal: the accused, the prosecution, the person declared liable to pay civil damages, and/or the person who was granted civil damages. Further provisions specify both the deadline for appeal, which is set at 30 days from the issuing of the judgment, and the effects of the appeal on one's sentence.[81] (The latter point is discussed further in section 6.3.1. below.) The right to appeal is also granted to those sentenced under the expedited procedure applicable to cases of *flagrante delicto*, although the accused has to appeal within five days of having been notified of the ruling (the prosecutor may appeal within five days of the ruling).[82]

In 2011, the Constitutional Court declared article 117 of the Judiciary Code unconstitutional. The provision authorised a judge to continue with the proceedings even if a party had appealed a ruling opposing an application for recusal of a judge. It was found to be in violation of the right to a defence and a violation of articles 19 and 39(3) and (4) of the Constitution.[83]

4.4.7. Right to a non-custodial sentence

This right is not reflected in the Burundian Constitution.

The CC allows, since 2009, for the imposition of a new penalty in the Burundian legislative framework: that of community service.[84] However, community service amounts to up to 120 hours of unpaid work a month, which arguably constitutes forced labour.[85] It is also difficult for the person sentenced to full-time community service to take steps towards social reintegration.

4.5. Regime applicable to children

[81] CPC 2013, arts. 262, 266(5) and (6).
[82] ibid, arts. 215-16.
[83] Cour constitutionnelle du Burundi, Affaire RCCB 252 du 11 août 2011, Gahungu Athanase, Bizimana Isaac, Bashir Tariq et autres (Inconstitutionnalité de l'article 117 du Code de l'organisation et de la compétence judiciaires), Bulletin Officiel du Burundi N°2/2013, 273.
[84] CC 2009, art. 44.
[85] ibid, art. 54.

There is no express constitutional basis to the rights of a child during a criminal trial. However, article 44 of the Constitution, which lists general rights afforded to children, namely the right to specific measures aimed at guaranteeing well-being, health, physical security and protection against abuse, could serve as a constitutional basis for what follows.

Article 29 of CC provides for reduced sentences when the perpetrator was between 15 and 18 years old at the time of the commission of the offence.

The trial of children younger than 18 is specifically regulated by articles 233 to 243 and 357 to 359 of the CPC. Children are tried in juvenile courts *(Chambre des Mineurs du Tribunal de Grande Instance* and *Cour d'Appel siégeant en Chambre des Mineurs* for appeals).[86] Importantly, the CPC provides that court proceedings involving children (accused or victims) must always be held *in camera*.[87] Extending from the provisions applicable to police custody, the CPC provides that children under the age of 18 must have a legal representative during trial.[88]

4.6. Right to redress following rights violations

Information provided under section 3.3. remains relevant here.

4.7. Impartiality and independence of the courts

See section 2.3.

4.8. Jurisdiction/competence of courts

See section 2.3.

[86] CPC 2013, arts. 234, 235 and 239.
[87] ibid, arts. 170 and 236.
[88] ibid, arts. 166(3) and 210.

5. Constitutionality of detention-related provisions

5.1. Universal detention-related rights

5.1.1. Right not to be arbitrarily or unlawfully detained

The constitutional basis of this right is found in article 39(1) and (2) of the Constitution, enshrining the right not to be detained if it is not in accordance with the law and for that did not constitute a criminal offence at the time of commission/omission.

Apart from the procedural rules highlighted in section 4.2.1 of this report, the right is enshrined in the relevant provisions of the Act on the Penitentiary Regime, which establishes the right to be detained in a place managed by the prison administration. The definition of a 'prison' is contained in article 5 of this Act, and includes all places where remand and sentenced detainees are kept but excludes all other places of detention, among them police cells. Moreover, article 8 lists the different types of warrants that can authorise prison admission.

5.1.2. Right to be informed of the reasons for one's detention

The indirect constitutional basis of this right is found in article 39(1) and (2) of the Constitution, enshrining the right not to be detained if it is not in accordance with the law and for acts that did not constitute a criminal offence at the time of commission/omission; a further indirect basis for the right is the general principle contained in article 38.

Article 208 of the CPC imposes that the judge indicate in the judgment the reasons for sentencing. Furthermore, article 16 of the Prison Regulations provides that prisons must keep an accurate register of the prisoners, including details on the reasons for their detention. However, the Ordinance does not impose that prison authorities communicate this information to the prisoner.

5.1.3. Right to challenge one's detention

Apart from the general principle contained in article 38 of the Constitution, there is no specific constitutional basis to this right.

The CC guarantees the right to parole[89] and the right to pardon to sentenced prisoners.[90]

[89] CC 2009, arts. 127-34.
[90] ibid, arts. 161-70.

It is important to mention that article 50 of the Act on the Penitentiary Regime grants automatic parole to detainees reaching the age of 70 who fulfil certain conditions outlined in the CC.

5.1.4. Right not to be detained for civil debt

Apart from the right not to be detained if it is not in accordance with the stipulations contained in article 39(1) of the Constitution, there is no specific provision in the Constitution.

Burundian law does not allow that persons be detained if they fail to reimburse their debt.

5.1.5. Right to family visits

The constitutional basis for this right can found indirectly in article 28 of the Constitution, which relates to the right to privacy and the respect of family life.

Article 38 of the Act on the Penitentiary Regime enshrines the right to family visits and other visits, while at the same time authorising the prison administration to set conditions for these visits, that could have the effect of limiting the exercise of this right.

Articles 95 and 100 of the 2004 Prison Regulations determine the times during which family visits are allowed (10h00 to 12h00 and 14h00 to 16h00), including for prisoners in the hospital wing.

5.1.6. Right to legal representation during detention (including post-sentence)

Apart from the general principle contained in article 38 of the Constitution, there is no constitutional basis for this right.

Article 37 of the Act on the Penitentiary Regime and article 99 of the 2004 Prison Regulations reflect this right, by establishing freedom of communication between the lawyer and the prisoner; the articles also guarantee of the confidentiality of their conversations.

5.1.7. Right to be separated from different categories of detainees

An indirect constitutional basis for this right can be found in article 21 of the Constitution, which recognises the right to human dignity.

Article 229(2) of the CPC determines that children under the age of 18 have to be separated from adults. Although article 7 of the Act on the Penitentiary Regime timidly evokes the possibility of creating specialised institutions, it says pragmatically that if this type of institution is lacking, the prison administration should develop specific places for minors and women. Article 46 of the 2004 Prison Regulations determines that women have to be separated from men.

5.1.8. Right to safe custody

The constitutional basis for this right may be found in the Constitution indirectly in article 23, on the prohibition of arbitrary treatment by the state or its organs, and in article 27, on the right to human dignity.

At the legislative level, this right is reflected in the prohibition of corporal punishment as a form of discipline or punishment in prison and the prohibition of extended solitary confinement (solitary confinement cannot last for more than two days, and those in solitary confinement should be able to leave their cells and go outside for at least two hours in the morning and two in the afternoon).[91]

However, the right to safe custody does not imply a right to classification, that is, to detention with 'like-minded' inmates. Indeed, under article 46 of the 2004 Prison Regulations, it is forbidden to divide the prisoners on the basis of religion, ethnicity, race, and political or other opinions'.

5.1.9. Right to humane conditions of detention

The constitutional basis may be found indirectly in article 23 of the Constitution, on the prohibition of arbitrary treatment by the state or its organs, and in article 55, on the right to access health care.

Legislation and regulations guarantee access to food;[92] health care;[93] choice of clothing (uniform or not);[94] access to programmes and services preparing the inmate for his or her release;[95] and special measures for inmates with mental or physical disabilities.[96] However, the language used in the legislation is vague and does not set minimum standards that have to be met by prison authorities and against which implementation could be verified by oversight mechanisms.

5.1.10. Right to be informed of one's rights

Apart from the general principle contained in article 38 of the Constitution, there is no constitutional basis to this right.

Article 11 of the Act on the Penitentiary Regime guarantees the right to be informed of one's rights, by providing that the prisoner is informed upon admission to a prison of the laws and regulations that apply to him or her as well as of the rights and duties he or she has.

[91] Prison Regulations 2004, arts. 87 and 89.
[92] Act on the Penitentiary Regime, art. 31.
[93] ibid, arts. 32-4.
[94] ibid, art. 35.
[95] ibid, arts. 12 and 41.
[96] Prison Regulations 2004, art. 138.

5.2. Right specific to pre-trial detention: Right not to be detained awaiting trial

Although there is no specific constitutional basis for this right, articles 52(1) and 110(1) of the CPC set out as a main principle that pre-trial detention is the exception rather than the rule. Grounds for detention are clearly defined in articles 110(2) and 209 of the CPC. Pre-trial detention can be ordered only if it constitutes the sole means to maintain evidence or avoid witness intimidation, maintain public order, end the crime or prevent its recurrence, or ensure that the accused will be present at trial.

The maximum duration of police custody and detention prior to first court appearance are outlined above in section 4.2.5.

The CPC also provides the right to a regular review of detention. Its articles 124 to 133 regulate pre-trial detention and provide that an accused and the prosecutor may appeal a pre-trial detention order or a decision to grant the accused bail, or the conditions of bail. Appeal must be lodged within two days of the decision (for the prosecutor) or within two days of being notified (for the accused). The decision on the appeal must be taken within seven days during the trial and within two weeks between closing of arguments and sentencing.

Finally, Burundi has a system in place for the regular review of pre-trial detention. Pre-trial detention orders can be issued only for a maximum duration of 30 days, renewable for a total maximum duration of one year if the maximum sentence of the offence for which the accused is tried is less than five years. Pre-trial detention can last for a maximum of three years if the maximum sentence of the offence for which the accused is tried is more than five years.[97]

The right to bail has been clarified by the courts. The Supreme Court has established that the precarious health of an accused in custody justifies bail.[98] In addition, this Court ruled that the prosecutor cannot appeal a decision to release an accused during trial on the sole basis that he or she is accused of a violent crime.[99]

However, the courts have also limited the scope of the right to bail by stating that irregularities in pre-trial detention that have not been raised before the trial judge cannot justify appeal to the *cour de cassation*.[100]

In cases of non-compliance with legal time-frames, the prosecutor can challenge the detention following a complaint by a suspect or accused that he or she was kept in police custody beyond the legal limit. However, this is not automatic and is dependent on the action of the prosecutor.[101]

[97] CPC 2013, art. 115.
[98] Cour d'appel de Ngozi, Affaire RPCA.7 du 27.10.2004.
[99] Cour suprême, Affaire RPC.1291 du 09.10.2000.
[100] Cour suprême, Affaire RPC.1283 du 28.10.2002.
[101] CPC 2013, art. 111(4).

5.3. Rights specific to detention while under appeal: Right not to be detained while the case is heard on appeal

Apart from the general principle contained in article 38 of the Constitution, there is no specific constitutional basis to this right.

Detention while awaiting outcome of appeal is regulated by article 266(6) of the CPC, which states that the appeal does not suspend a court decision of acquittal, sentence or suspended sentence. This means that the detention of a person whose case is heard on appeal is regulated by the ordinary pre-trial detention regime outlined in section 4.2.5. above.

5.4. Specific rights of sentenced prisoners: Prohibition of unlawful detention

The constitutional basis of this right is found in article 39(1) of the Constitution, enshrining the right not to be detained if it is not in accordance with the law.

Articles 127 to 134 of the CC regulate the release of a person on parole. A prisoner is entitled to parole after having served a quarter of his or her sentence, or 10 years imprisonment if he or she was sentenced to life in prison. The decision is taken by the Minister of Justice and the director of the prison. However, a person cannot be released on parole until he or she has paid the civil damages associated with the criminal conviction. Some sentences are not eligible for parole, including those for crimes of genocide, crimes against humanity, war crimes, voluntary manslaughter (including murder), sexual offences and armed robbery. Genocide, crimes against humanity, war crimes, voluntary manslaughter (including murder), torture resulting in the death of the victim, aggravated cases of rape, and armed robbery resulting in the death of the victim face a minimum sentence of life imprisonment.[102]

A prisoner's release on the day of the expiration of the sentence is guaranteed.[103] If the release day is a holiday, all measures must be taken, by the prison director, to ensure the release on the said day.[104]

Finally, a series of provisions place obligations on prison officials to keep accurate and complete records of prisoners in order to guarantee compliance with the terms of sentence.[105]

5.5. Right to redress following rights violations

Information provided under section 3.3. remains relevant here.

[102] CC 2009, arts. 200, 207, 211, 262(6) and 558.
[103] Prison Regulations 2004, art. 145.
[104] See also Act on the Penitentiary Regime, art. 55 and Prison Regulations 2004, art. 121.
[105] Prison Regulations 2004 arts. 5, 6, 16, 17, 21, 26, 26, 31, 32 and 40.

5.6. Oversight and complaints mechanisms

Information provided under section 4.6. remains relevant here.

5.7. Regime applicable to children

The relevant constitutional background can be identified in article 44 of the Constitution, which lists general rights afforded to children, namely the right to specific measures aimed at guaranteeing well-being, health, physical security and protection against abuse.

Apart from information provided under section 4.7. of this report, it is important to note that the Act on the Penitentiary Regime specifically addresses the issue of the imprisonment of mothers and their babies, who are identified as a vulnerable group.[106] There are two categories of rights to pregnant women and mothers of young children who are in prison. First, they have the right to enjoy special facilities to cater for their special needs.[107] Secondly, they have the right to be informed of their rights and duties as parents and of children's rights. Women prisoners keep their children up to the age of three, after which the social services of the prison administration will ensure the placement of these children in foster care.[108]

5.8. Impact of detention on all other fundamental rights

Civil disabilities imposed following sentencing or after having served one's sentence are exhaustively listed in the CC and are considered to be supplementary penalties to various types of offences.[109] These include the prohibition of civic, civil and family rights;[110] the prohibition to hold public office, or exercise certain professional or social activities; the exclusion from public procurement; the prohibition to issue cheques; the prohibition to use payment cards, the prohibition to leave the country; the prohibition to live in certain areas; and house arrest.

The judge will assess the opportunity to impose these on a case-by-case basis, while being guided by the legislative framework. Indeed, such civil disabilities may not exceed a certain number of years (for example, the prohibition to practise a profession cannot exceed 20 years, while the prohibition of civic, civil and family rights cannot exceed five years).[111]

[106] Act on the Penitentiary Regime, art. 44.
[107] ibid, art. 46.
[108] ibid, art. 47.
[109] CC 2009, arts. 65, 338, 443, 532, 562 and 619.
[110] However, the prohibition of civic, civil and family cannot cover all of the rights, which are the right to vote; eligibility; the right to exercise judicial office or be an expert before a court, to represent or assist a party before the courts; the right to testify in court other than to simple declarations; the right to be guardian or trustee if it is only for his own children, after consulting the Family Council; the right to carry arms; and the right to wear any decoration. Moreover, its delivery is subject to the enactment of a main sentence exceeding 10 years imprisonment (article 67(2)).
[111] CC 2009, arts. 66(2) and 68.

6. Conclusion and recommendations

The Burundian constitutional and legal landscape has been extensively amended in the past 15 years to respond to a double imperative: the pursuit of a 'perfect' legal regime and the necessity both to address the pains of the past and respond to the needs of the future. The law also aims to address many challenges still encountered by Burundian society. As a result, the Constitution and criminal legislation has partially met the international standards reflected in international treaties adopted by Burundi. Of particular note are the following:

First, a positive finding must be made in the constitutionalisation of several international instruments, including international standards for the protection of human rights. By virtue of article 19 of the Constitution, all these standards are 'an integral part of the Constitution' and therefore have constitutional value. More importantly, this integration extends the set of rights guaranteed by the Constitution and provides a solid basis for the interpretation of rights originally guaranteed by it.

Secondly, while successive reforms of criminal procedure legislation have improved the legislation and corrected various provisions, certain practices appear to be unconstitutional.

However, several shortcomings and gaps remain in the legislation, and were highlighted in this study. These include the following:

- The legislation is very weak on regulating arrests. Relevant provisions of the CPC mostly only apply from the moment a person is taken into police custody. The CPC lacks a section that would deal substantially with the organisation and terms and conditions of arrest. Similarly, the right to be informed of other rights or of procedures is not enshrined in legislation, with the exception of the right to be informed of prison regulations upon admission.

- Of particular concern is the fact that a suspect, at the end of police custody and before being transferred to prison, is not brought before a judge but before a prosecutor. Presentation before a judge can take place up to a month after arrest. Although the prosecutor is tasked with collecting both inculpatory and exculpatory evidence, the person remains a prosecutor and as such will lead only inculpatory evidence at trial.

- In the same vein, it must be noted that often 'rights' contained in the legislation are actually procedural standards that have to be initiated by, or left to the appreciation of, the prosecutor. This is particularly the case for the investigation and trial phase. The prosecutor has extensive powers to raise the violation of procedural safeguards, which a suspect or accused cannot raise him- or herself with the judge directly. Therefore, it should be questioned whether these can be elevated as 'rights'.

- Complaints and oversight mechanisms over places of detention are almost non-existent. The mandate of the CNIDH is too general and their staff complement too low for them to be able to proactively visit places of detention. As a result, they mostly receive individual complaints, on which they can then act. While they have some investigative powers, they do not have the power to search and seize or to subpoena, and have to rely on the police to exercise some of their powers. In addition, there has been increasing politicisation in the

appointment of CNIDH commissioners and the Ombudsman, a trend that severely affects the credibility of these institutions.

- Obtaining reparations for gross human rights violations committed by law enforcement officials, including torture, is entirely dependent on the individual official who committed the violations having been found guilty through criminal proceedings. In practice, this is a rare event, with the result that the vast majority of victims are not able to seek redress.

- The rights of defence available at different stages appear to be insecure, in that they can be restricted at the discretion of the judicial authorities (prosecutor or judge).

- A number of pieces of legislation that could give full effect to certain rights (particularly with regard to compensation by the state of judicial extradition, assistance or legal aid) have not yet been adopted.

- Constitutional litigation could facilitate effective implementation of the guarantees in the Constitution; however, the low volume, or even virtual non-existence, of such litigation is a shortcoming, one influenced both by socio-cultural factors (such as resistance to the notion of litigating against the state) as well as structural considerations (related to the availability of necessary skills).

Furthermore, there remains considerable resistance from the judiciary to comprehensively implement the constitutional and legal prescripts outlined in this study. It appears that the main reason for this deficiency is the lack of independence of the judiciary. This was noted on various occasions: by an evaluation study commissioned by the Burundian government, the UN and the government of the Netherlands in February 2014; by the UN Human Rights Committee in its concluding observations of November 2014; and by the UN Committee against Torture in its concluding observations of December 2014.

The evaluation study stressed that the executive still enjoyed too much control over the appointment, promotion and recusal of judges and magistrates, as well as over the budget of the judiciary. This could be observed in particular in the fact that courts generally ruled in favour of senior officials implicated in serious human rights violations.[112]

The UN Committee against Torture highlighted the executive's interference in the daily running of the judiciary, the sanctions of judges who made adverse rulings against the government, and the reaching of 'amicable' rulings in cases of sexual violence against women and children. The Committee also pointed to the lack of training and human and financial resources, to delays in processing cases, and to the failure to enforce some decisions, citing these, among others, as indicative of the dire state of the judiciary.[113]

[112] Evaluation de la réforme de la sécurité et de la justice au Burundi, février 2014. Rapport effectué à la demande du gouvernement du Burundi, soutenu par le gouvernement des Pays-Bas et le Bureau des Nations Unies au Burundi, 66 ; spec. p. iii.
[113] Committee against Torture, Concluding observations on the second periodic report of Burundi. CAT/C/BDI/CO/2, 12 December 2014, para 13.

Finally, the UN Human Rights Committee identified the shortage in resources including judges and prosecutors, the serious backlogs, the lack of access to legal aid and other due process rights, and the overall lack of independence of the judiciary, as key elements of the crisis facing the Burundian judiciary.

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