MEMORANDUM

To: Raboteau Case File

From: Mario Joseph, Bureau des Avocats Internationaux
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Date: June 6, 2005

Re: Analysis of Cour de Cassation Decision Vacating Raboteau Massacre Convictions

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On April 21, 2005 the *Cour de Cassation*, Haiti's highest court, issued an order vacating the convictions of all those convicted during the jury trial for the Raboteau Massacre, because the Court felt that the case was inappropriately submitted to a jury. This memorandum will analyze the decision, in light of Haitian law and previous decisions by Haitian Courts. All documents cited herein are available at www.ijdh.org/raboteau.

The decision of the *Cour de Cassation* (hereinafter, the "Supreme Court") reversed a determination that the Haitian Constitution required a jury trial for the Raboteau Massacre case. The original determination was made by a trial court judge in 1999, and was confirmed by both the Court of Appeals of Gonaïves and the Supreme Court itself in 2000. That determination was never contested by the defendants' lawyers at trial or in any of their three appeals.

The Supreme Court based this dramatic reversal on a law of March 29, 1928 amending Haiti's *Code d'Instruction Criminelle* (Code of Criminal Procedure). Article 3 of that law requires a trial without jury for all cases of *délits connexes* (multiple but related crimes). Although all prior analyses recognized that the Raboteau Massacre involved *délits connexes*, they ruled that the Law of 1928 was superseded by the 1987 Constitution's requirement of a jury trial for all *crimes de sang* (literally "blood felonies," in Haitian practice murder, parricide, infanticide and poisoning). The Supreme Court acknowledged the Constitutional requirement, but asserted that since the Constitution did not define *crimes de sang*, it could not have overruled the Law of 1928.

I. Procedural History

On August 27, 1999, the *Juge d'Instruction* (Investigating Magistrate) of the Gonaïves Trial Court, Jean Sénat Fleury, issued the *ordonnance* in the Raboteau case. In the Haitian system, the *ordonnance* is the final pre-trial document in a case. It is issued following the Magistrate's investigation, and sets forth the charges against each defendant to be tried. The Raboteau *ordonnance* is 173 pages long, and has been called the most thorough document ever prepared by the Haitian justice system.

The *ordonnance* addresses the jury trial issue on pages 150 and 151. It acknowledges that the language of the *Code d'Instruction Criminelle* requires a trial without jury for all cases of *délits connexes*, and that the Raboteau case involves *délits connexes*. But the *ordonnance* determines that that law does not apply, because it is contrary to Article 50 of the Constitution of 1987, which states that "a jury trial is established in felony cases for *crimes de sang* and political infractions." It noted that the two principal infractions of the Raboteau Massacre were both in the category of voluntary homicide, which is a *crime de sang*. As the Constitution, by its own terms abrogates all contrary laws, Article 50's requirement of a jury trial for *crimes de sang* controls over the 1928 law.

Several defendants filed an appeal of the *ordonnance*. They contested several aspects of the document, but not the decision to send it to a jury trial. Many of the defendants were represented by lawyers, including some of Haiti's most prominent attorneys.

The Gonaïves Appeals Court conducted several days of hearings on the defendants' exceptions. The defendants' lawyers presented an extensive oral argument, but never contested the decision to send the case to the jury. On February 15, 1999, the Appeals Court confirmed the *ordonnance* in its entirety, implicitly affirming the decision to try the case before a jury.

Seven defendants appealed the Gonaïves Appeals Court decision to the Supreme Court. Once again, the defendants were represented by lawyers, and once again they claimed several errors of substance and procedure, without mentioning the jury issue. The Supreme Court issued its decision on April 17, 2000. The Court did not address the jury issue in depth, but it did note both that the defendants were charged with multiple crimes committed over multiple days (*délits connexes*), and that the Investigating Magistrate had ordered a jury trial. The Supreme Court rejected the appeal in its entirety, thereby implicitly affirming the decision to try the case before a jury.

Twenty-two defendants were tried by a jury in the Raboteau case over six weeks, from September 29 to November 9, 2000. The trial was the most observed trial in Haitian history. Haitian human rights groups, the UN Civilian Mission in Haiti and journalists observed every day of trial. Most of it was broadcast over national television and radio. The defendants were all represented, by a total of ten lawyers. The defense lawyers adopted a highly aggressive strategy, making numerous challenges throughout the trial. They challenged the selection of jurors, the evidence, the plaintiffs, the jury instructions and the hours of trial. The lawyers did not, however, take exception to the decision to send the case to the jury, and the issue was never mentioned by any of the national or international observers. On November 8, the jury convicted sixteen of the defendants.

On November 16, 2000 a second trial was held in the Raboteau Massacre case, for the *in absentia* defendants. *In absentia* cases are not full trials: the defendants are not allowed to present evidence or witnesses, as they have not accepted the jurisdiction of the court. The prosecution does not, typically present witnesses, but relies on the Investigating

Magistrate's findings. There is no jury. Defendants convicted *in absentia* have the right to ask for a new trial if they are arrested or they turn themselves in, with no presumptions of guilt carrying over from the *in absentia* conviction.

By the end of November 2000, fifteen of the defendants convicted in the jury trial for the Raboteau Massacre appealed their convictions. They cited four types of exceptions, but not the decision to send the case before a jury. Pursuant to Haitian law, appeals of jury verdicts go directly to the Supreme Court.

From November 2000 until April 21, 2005, almost four and one-half years, the Supreme Court declined to rule on the appeals, despite constant efforts by prosecutors, victims of the Raboteau massacre and their attorneys to encourage them to take up the case. Ordinarily, an appeal involving imprisoned appellants would be expedited, taking about three months.

II. The Decision

The crux of the Supreme Court's decision is in five paragraphs. After agreeing with the Investigating Magistrate that the Raboteau massacre involved *délits connexes*, the Court stated (all translations unofficial):

> "Whereas article 50 of the Constitution of April 28, 1987 [note: the Constitution was effective as of March 29, 1987] established a jury in felony cases for *crimes de sang*, but did not include a definition of *crimes de sang* [or] explain what it meant by *crime de sang*s.
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> Whereas this article of the Constitution said nothing regarding *délits connexes* or the law of March 29, 1928.
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> Therefore this article of the Constitution neither modified nor abridged the law of March 29, 1928.
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> Whereas, pursuant to article 119 of the Criminal Procedure Code and of article 2 of the law of March 29, 1928, the judge must limit himself to sending the case to a felony court without saying whether this court must sit with or without a jury,
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> Therefore, as a consequence the Felony Court of Gonaïves sitting with a jury lacked subject matter jurisdiction over the crimes and misdemeanors charged against the accused, which leads to the nullification of the challenged decision with full legal consequences."

The Court's decision rests on the conclusion that Article 50 of the Constitution does not apply to this case. The Court does not assert that the massacre was not a *crime de sang*

under Haitian law or practice, only that Article 50 does not define the term. The Court does not explain the crucial link: why the failure to define *crime de sang* makes Article 50 inapplicable. The Court may be implying that the lack of a definition makes the article so vague as to be inapplicable, which would void Article 50 in all cases. But the Court does not explicitly say this, despite the importance of the link to its decision.

The failure to explain the reasoning is more notable because the Supreme Court's decision appears to void an entire article of the Constitution. The Court does not try to distinguish the case, or explain what could be a *crime de sang* if this case of multiple killings and aggravated assaults is not.

The reason for not applying Article 50 to the Raboteau case- the lack of a definition of *crime de sang* is unusual because Haiti's Constitution, like most constitutions, does not define such terms, leaving it to the courts and the legislature to determine the parameters. The Constitution does not define "freedom of association", "private property" or many other terms that can be subject to interpretation, but those constitutional rights are respected nonetheless.

With *crime de sang*, the Court has ample guidance: as the decision notes, the same 1928 law that required a judge trial for complex cases also required a jury for a set of serious felonies- murder, parricide, infanticide and poisoning. These four crimes are treated together in the Penal Code, all carry the same penalty, and are in fact referred to in Haitian legal usage as *crime de sang*. The Investigating Magistrate, using Haitian practice, determined that the voluntary homicides charged in the Raboteau Massacre case were *crimes de sang*, and in its two reviews of the *ordonnance*, the Supreme Court never questioned this finding.

III. The Remedy

The Supreme Court's remedy for the improper jury trial goes beyond simply voiding the convictions. The Court's states that the non-applicability of Article 50 "leads to the nullification of the challenged decision with full legal consequences." That should mean that the convictions themselves are dismissed, that the defendants have the right to a new trial, without a jury, but that they should remain under the control of the justice system pending that new trial. The decisions in the case prior to the jury trial should remain intact, especially since the *Cour de Cassation* itself already approved the *ordonnance*.

Instead, the Court goes further in fashioning a remedy, revoking the judgment "*sans renvoi*", or without the possibility of a new trial, and ordering the defendants freed. In doing so, the Court in practice nullifies, without explanation, the entire *ordonnance*, which it confirmed in 2000. The Court's only fault with the *ordonnance* this time around, the fact that it sent the case to a jury, should have no bearing on the fundamental issue that an Investigating Magistrate found probable cause for the defendants to be tried for the Raboteau Massacre. As long as the *ordonnance* itself is not voided, all the Raboteau defendants should remain at the disposition of the justice system, until the case

is decided.

IV. The Scope of the Court's Decision

The Court's decision, by its own terms, applies only to the jury trial for the Raboteau massacre, not to the *in absentia* trial. If it stands, therefore, the decision will only apply to the defendants present at that trial. Sixteen defendants were convicted at the trial, none of whom is currently in prison. One completed his sentence and was released, at least two died in prison, one escaped from prison in August, 2002, and the remainders escaped in February, 2004. None of the escapees has been reported re-arrested. The decision arguably applies to the six people acquitted as well: if there acquittal was done by a court without jurisdiction, they should be retried by the proper court.

The *in absentia* defendants did not participate in the original jury trial, or the appeal of it. Neither they nor their trial were mentioned in the April 21 Supreme Court decision. The only issue raised by the decision, the presence of a jury, had nothing to do with their *in absentia* convictions. The *in absentia* defendants continue to enjoy the right to a new trial, as they always have had since their conviction. But the April 21 decision does not provide any basis for freeing them unless they either serve out their sentence or are acquitted in a new trial.

The only *in absentia* defendant in custody is Louis Jodel Chamblain, co-founder of the *FRAPH* paramilitary organization. Three members of the Army High Command during the *de facto* dictatorship, Major-General Jean-Claude Duperval, and Colonels Hebert Valmont and Carl Dorelien, had been deported from the U.S. to face justice in the Raboteau case, but they escaped on February 29, 2005. There have been reports, none of them by Haitian judicial authorities, that an order for the liberation of Chamblain has been prepared, but not executed. The April 21 *Cour de Cassation* provides no basis for such an order.

V. Next Steps

The lawyers for the victims of the Raboteau Massacre intend to file a *requete civile* (motion for reconsideration), asking the same Supreme Court panel to reconsider its motion.