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## Transitional Justice for Burundi: A Long and Winding Road

Study “Workshop 10 – Alternative Approaches to  
Dealing with the Past”

WS 10 is organized by the Crisis Management Initiative

International conference  
Building a Future on Peace and Justice  
Nuremberg, 25 – 27 June 2007

Conférence internationale  
Bâtir l'avenir sur la paix et la justice  
Nuremberg, 25 – 27 juin 2007

Conferencia internacional  
Paz y Justicia – Elementos Conformadores del Futuro  
Núremberg, 25 – 27 de junio 2007

Internationale Konferenz  
Frieden und Gerechtigkeit – Bausteine der Zukunft  
Nürnberg, 25. – 27. Juni 2007

**BUILDING A FUTURE ON PEACE AND JUSTICE  
NUREMBERG, 25 – 27 JUNE 2007**

**WORKSHOP 10  
REPORT**

**TRANSITIONAL JUSTICE FOR BURUNDI: A LONG AND WINDING ROAD**

*Stef Vandeginste*

**ABSTRACT: Transitional Justice for Burundi: A long and winding road**

This paper constitutes a summary attempt at reconstructing Burundi's approach to dealing with the past. First, a brief presentation is made of the kind of legacy of violence Burundi is facing. Next, it summarizes how in the immediate aftermath of the various cycles of violence, justice was rendered (or, more adequately, not rendered). Thirdly, a presentation will be made of what, at least at the level of public discourse - both at the national and at the international level - constituted the stated transitional justice policy for Burundi. Fourthly, the paper will show how essentially political parameters have determined the practice of transitional justice during and after the period of transition. In a fifth session, the current state of affairs will be summarized. Section six briefly refers to the traditional Bashingantahe mechanism. Finally, some tentative conclusions will be formulated.

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## INTRODUCTION

In September 1996, Neil Kritz<sup>1</sup> started off his presentation to the conference “Creating an Agenda for Peace in Burundi” (USIP, Washington) with the following opening sentence: “*Some observers would suggest that the best way to achieve reconciliation in a situation such as that present in Burundi is to leave the past in the past*”. Somewhat further on, he stated his own opinion on the Burundi peace negotiations process and the importance it should award to transitional justice: “*If the goal, however, is something more than a tenuous, temporary pause in the violence, dealing in a clear and determined manner with past atrocities is essential*”. And he concluded with the following recommendation for immediate implementation: “*the parties should agree in principle that the subject of justice and impunity will be part of the agenda for negotiations*”.<sup>2</sup>

More than a decade later, we can conclude that Kritz’ recommendation has been put into practice. Important attention was paid to transitional justice during Burundi’s peace negotiations process and the successive cease-fire agreements (concluded in 2000, 2003 and 2006) do pay attention to how justice should be rendered for a legacy of several decades of gross and systematic human rights violations. At the same time, however, we are also forced to conclude that, in reality, Burundi has gone through a process of political transition<sup>3</sup> without meaningfully dealing with its own past. Negotiations between the United Nations (UN) and the Government of Burundi (GOB) – which was put in place following democratic parliamentary elections in 2005 – about the establishment of a Special Tribunal (ST) and a Truth and Reconciliation Commission (TRC) are dragging on, facing several fundamental difficulties.

Overall, Burundi is a fascinating case in which both at the national and at the international level, the use of formal retributive justice mechanisms was strongly favoured by the large majority of political and other players, but where, in practice, there has so far been a complete failure to establish any kind of mechanism to deal with truth, accountability, reparation and/or reconciliation. The objective of reaching a negotiated settlement for the armed conflict and for more than a decade of political instability has constantly outweighed the transitional justice agenda. For mainly political reasons, no traditional dispute settlement mechanism has been used either. Compared to the past fourteen years, Burundi is now significantly more peaceful<sup>4</sup> and politically stable. The truth about the past has not been told, hardly anyone had been held accountable for the crimes that were committed and victims are left without any reparation for the injury suffered. Should much more be done in order to end the long-

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<sup>1</sup> In 1995, Neil Kritz edited the seminal work *Transitional Justice. How Emerging Democracies Reckon with Former Regimes* (USIP, Washington D.C.), three volumes that launched the term ‘transitional justice’ on the international scene.

<sup>2</sup> N. Kritz, *The problem of impunity and judicial reform in Burundi* (Washington, 1995).

<sup>3</sup> When using the term ‘political transition’ here, we essentially refer to the process through which one political regime is replaced by another political regime (with, in the case of Burundi, important constitutional and institutional reforms and a significant change of the top political leadership). It is too early to tell to what extent the Burundian transition also fully meets the classical definition of ‘political transition’ under the transition paradigm, i.e. of a transition from an authoritarian regime to a democratic system of governance. See, i.a., Thoms Carothers, ‘The end of the transition paradigm’ (2002) 13 (1) *Journal of Democracy* 6; G. O’Donnell and P. Schmitter, *Transition from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (Johns Hopkins University Press, Baltimore 1986).

<sup>4</sup> ‘Peace’ should here be understood as the absence of armed conflict or other political violence.

standing culture of impunity in Burundi and in order to ensure long-term political stability? Or would any serious attempt to deal with the past inevitably mean that short-term stability is under threat and that a new cycle of violence might start? Is this the right time or is it simply too early to engage in a true transitional justice exercise for Burundi? The current position of the Burundian government comes close to the position suggested in Kritz' opening sentence of 1996 referred to above: reconciliation and forgiveness should be the top priorities, criminal justice should be no more than an auxiliary instrument to 'motivate' those otherwise unwilling to firmly commit themselves to the reconciliation process.

## **1. BRIEF HISTORICAL OVERVIEW – THE NATURE OF BURUNDI'S LEGACY OF VIOLENCE**

Starting after its day of independence (1 July 1962), Burundi has been the scene of different cycles of gross and systematic human rights violations that have decisively shaped its post-colonial identity. Although four decades of violence can certainly not be reduced to specific 'incidents', there were five outbursts that were marked by remarkably intense and large-scale crimes (in 1965, 1972, 1988, 1991 and 1993 and beyond). In the report of the UN assessment mission on the establishment of an international judicial commission of inquiry for Burundi<sup>5</sup>, it is suggested that the future transitional justice mechanisms concentrate particularly on these five sets of events<sup>6</sup>.

(1) In October 1965, following important power struggles within the leading political party (Uprona) and increasingly ethnico-political tensions, a coup attempt was staged by Hutu military officers. The coup was suppressed and over one hundred Hutu military and political leaders were either physically eliminated or politically sidelined. In turn, in Muramvya province (the region most strongly associated with Hutu opposition leaders), Tutsi families were attacked, their houses set fire to and many Tutsi were killed. By means of retaliation, an estimated five thousand Hutu civilians were killed at the hands of Tutsi military and associated armed groups. In 1966, a one-party system was installed and the monarchy was overthrown through a military coup led by Minister of Defence Michel Micombero (member of a Tutsi Hima clan from Rutovu, in southern Bururi province), who became the first president of Burundi. Political power was increasingly concentrated in the hands of southern Tutsi Hima.

(2) In April 1972, a Hutu led insurgency and violent uprising was launched in the southern part of the country, with some groups of insurgents crossing the border from Zaïre and Tanzania. Government posts and military installations were attacked and thousands of Tutsi were killed. In return, from mid-May onwards,

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<sup>5</sup> Hereinafter referred to as the 'Kalomoh report', named after the Assistant Secretary-General for Political Affairs in lead of the mission. As we will explain below, the mission was dispatched at the request of the UN Security Council (UN Doc. S/2004/72 of 26 January 2004) to consider to advisability and feasibility of establishing an international judicial commission of inquiry, as provided for in the Arusha Peace and Reconciliation Agreement of August 2000. The Kalomoh report (UN Doc. S/2005/158 of 11 March 2005) forms the basis for the ongoing negotiations between the UN and the Burundian Government on the establishment of a Truth and Reconciliation Commission and a Special Tribunal for Burundi.

<sup>6</sup> The term 'events' (or '*événements*') is the euphemistic and neutral term that Burundians themselves use to describe the horrendous crimes that were committed. Alternatively, each of the five events described above, is sometimes also referred to as 'the crisis' (e.g. '*la crise de 1993*'), also in order to avoid having to use more contentious terms as 'the 1993 genocide'.

in what appeared to be a well-orchestrated campaign of so-called ‘pacification’, all educated and wealthy Hutu and their families were targeted. The Hutu ‘elite’ that was targeted included teachers, priests, civil servants, skilled workers, medical personnel, agronomists, school children, etcetera. Estimates of the number of casualties of what is sometimes called a ‘selective genocide’<sup>7</sup> range from 100,000 to 300,000 Hutu. Some 200,000 Burundians went into exile.<sup>8</sup>

(3) One year after Major Pierre Buyoya (also a Tutsi Hima from Rutovu) came to power, Marangara and Ntega, two districts in the northern provinces of Ngozi and Kirundo, were the scene of an outburst of ethnic and political violence in 1988. A Hutu uprising, during which hundreds of Tutsi were killed, their houses burned and destroyed, was violently suppressed by the army, in a manner which, according to Amnesty International<sup>9</sup>, was aimed at repression rather than at merely restoring order. The estimated number of casualties ranged from some 5,000 to 20,000. In response to these events, President Buyoya engaged in a process of political liberalization.

(4) This process of political liberalization went too far for some (notably on Tutsi side) and too slow for others (notably on Hutu side). While a new Constitution – reintroducing multipartyism – was under preparation, a new Hutu uprising in November 1991 was followed by a severe repression of Hutu civilians suspected of sympathizing with the clandestine Palipehutu<sup>10</sup> movement. Lemarchand<sup>11</sup> estimated that hundreds of Tutsi civilians were killed, while the estimated number of Hutu casualties ranged from 551 (official government figure) to nearly 3,000.<sup>12</sup>

(5) Democratic presidential and parliamentary elections were held in June 1993. They resulted in the victory of the predominantly Hutu party Frodebu. Melchior Ndadaye became the first Hutu president of Burundi. In October 1993, Ndadaye and most of the political leadership (including the speaker and deputy speaker of the National Assembly) were killed during a coup attempt by a group of Tutsi military.<sup>13</sup> In an immediate reaction to the coup staged in Bujumbura, violent attacks were launched against Tutsi (or even Hutu supporters of the Uprona party), either as a spontaneous reaction by Hutu or as the result of a systematic operation - sometimes qualified as genocide<sup>14</sup> - organized and supported by local authorities (many of whom were Frodebu members). This was the start of years

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<sup>7</sup> See United Nations, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Revised and updated report on the question of the prevention and punishment of the crime of genocide. Prepared by Mr. B. Whitaker*, E/CN.4/Sub.2/1985/6, 2 July 1985.

<sup>8</sup> See, in more detail, Marc Manirakiza, *Burundi: de la révolution au régionalisme. 1966-1976* (Le Mat de Misaine, Bruxelles 1992) and Minority Rights Group, *Génocide sélectif au Burundi* (London 1974).

<sup>9</sup> Amnesty International, *Burundi: killings of children by government troops* (London 1988).

<sup>10</sup> *Parti pour la libération du peuple hutu*.

<sup>11</sup> René Lemarchand, *Burundi. Ethnocide as discourse and practice* (Cambridge University Press, Cambridge 1994) 154.

<sup>12</sup> B. Erler and F. Reyntjens, *Les événements de novembre-décembre 1991 au Burundi: rapport d'une mission d'enquête* (NCOS, Brussels 1992).

<sup>13</sup> Although the coup attempt was aborted, in particular because of the international reaction, a process of destabilisation of the institutions was irreversibly set in motion and, in July 1996, the ‘creeping coup’ (the term was used by F. Reyntjens, *Burundi: Prospects for Peace* (Minority Rights Group, London 2000), 14) was ‘officialised’ by the return to power of Major Pierre Buyoya.

<sup>14</sup> United Nations, Security Council, *Letter dated 25 July 1996 from the Secretary-General addressed to the President of the Security Council*, S/1996/682, 22 August 1996, § 483.

of civil war between the army and a Hutu rebellion (primarily the CNDD-FDD<sup>15</sup> and the FNL<sup>16</sup>-Palipehutu). A peace negotiations process started in June 1998, with former Tanzanian president Julius Nyerere as mediator. After his death in October 1999, he was replaced by former South African president Nelson Mandela. As we will deal with in further detail below, the Arusha Peace and Reconciliation Agreement for Burundi was signed on 28 August 2000<sup>17</sup>, between the government, the national assembly and two coalitions of a total of seventeen political parties (one predominantly Hutu, the other predominantly Tutsi). The Arusha Agreement did not bring an end to the civil war. It took until 16 November 2003 before a Global Ceasefire Agreement was concluded between the transitional government and the main rebellion, the CNDD-FDD. General elections were held in 2005, resulting in a victory of the former rebel movement and the election of its chairman Pierre Nkurunziza as the new president of Burundi. On 7 September 2006, a Comprehensive Ceasefire Agreement was signed with the last remaining rebel movement, the Palipehutu-FNL.

This short historical account can be concluded with the following observations on the main characteristics of the Burundian legacy of large-scale past abuses, in particular insofar as these are relevant from a transitional justice perspective.

(a) The degree of victimization is enormous. Even if only for merely logistical and quantitative reasons, telling the truth, establishing responsibilities, dealing with reparations, etcetera is an enormous challenge.

(b) The subsequent cycles of violence together span a lengthy period of time. Since, furthermore, they are closely related to one another, isolating and disregarding some of them would be artificial. This obviously has important repercussions on the temporal mandate of any transitional justice mechanism.

(c) Each cycle of violence shows elements of repetition and reciprocity. Despite many possibly important differences between and within each of the above-mentioned sets of events (for instance as far as the degree of intention and orchestration is concerned), part of the violence of each cycle repeats or is done in retaliation (or fear of repetition) of violence carried out during a previous cycle or during the new cycle.

(d) From the immediate post-colonial violence to the recently ended civil war, the past violence shares the common characteristic of being primarily political in nature. It is about control of governance functions and access to resources. Essentially political violence is based on a combination of shifting ethnic, regional and clan alliances or cleavages.

(e) The context in which the legacy of large-scale past abuses was committed was one of, partly, one-party authoritarian rule and, partly, (failed) democratisation evaporating into civil war.

(f) The political transition that came to an end with the 2005 elections started off through an internal reform process but was decisively shaped through compromise and negotiated settlement.

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<sup>15</sup> *Conseil National pour la Défense de la Démocratie – Forces pour la Défense de la Démocratie*

<sup>16</sup> *Forces Nationales de Libération*

<sup>17</sup> Text available on the USIP website: [http://www.usip.org/library/pa/burundi/pa\\_burundi\\_08282000\\_toc.html](http://www.usip.org/library/pa/burundi/pa_burundi_08282000_toc.html) (last visited on 23 April 2007).

(h) From the 1993 events onwards, there was an increasingly active involvement and intervention by the international community, through different actors, including the United Nations, the Organization of African Unity, the European Union and the Regional Peace Initiative for Burundi.

(i) Written Burundian sources provide us with sometimes radically different accounts of what happened. Very factual data are presented differently, using different terminology, providing different interpretations, referring to different contextual explanatory factors, and this very often occurs along ethnic lines. This in itself is indicative of both the importance and the difficulty of truth telling.

## **2. RESPONSES IN THE AFTERMATH OF THE EVENTS**

Current negotiations between the UN and the GOB are about a transitional justice policy and the establishment of transitional justice mechanisms (a TRC and a ST) that would - ideally - deal with the entire post-independence period. One of the stated objectives is to put an end to the cycle of impunity. This raises the question how, in the weeks, months and years after the above-mentioned events, issues of truth, accountability, reparation and reconciliation were dealt with. It is impossible to describe this in much detail here, but, generally, the following types of aftermath-responses can be distinguished. Sometimes, several of them were combined. All of them were designed and implemented at the national level, without any significant international involvement. This radically changed from the aftermath of the 1993 onwards.

(1) In some instances, the state of emergency was declared and the government established military tribunals to replace all civil courts, including to prosecute civilians through summary trials. This was the case, for instance, in the days after 19 October 1965, when a coup attempt was staged by a group of Hutu military.<sup>18</sup>

(2) On several occasions, amnesty legislation was adopted in order (not) to deal with the past. In some cases, the amnesty was collective but nevertheless one-sided, benefiting only those perpetrators that were friendly to the regime in power. In other cases, under the stated objective of national reconciliation, the amnesty legislation was more or less balanced and benefited members from different ethnic and political groups. In most cases, amnesty was limited to so-called political offences, although these were defined very broadly. In all cases, the amnesty legislation prevented the truth from being told. Reference can be made here to amnesty laws of 1 September 1962<sup>19</sup>, 27 November 1967<sup>20</sup>, 30 August 1990<sup>21</sup> and 9 September 1993<sup>22</sup>.

(3) On various occasions, grossly unfair trials were instrumentalized to eliminate (politically but sometimes also physically) political opponents, such as the trials

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<sup>18</sup> Arrêté royal N° 001/792 du 20 octobre 1965 instaurant le régime militaire et d'exception dans toutes les provinces du Royaume, *Bulletin Officiel du Burundi (B.O.B.)* 12 (1965) 845; Arrêté-loi N° 001/795 du 21 octobre 1965 modifiant l'arrêté-loi N° 001/791 du 20 octobre 1965 déterminant les règles applicables au régime militaire et d'exception, *B.O.B.* 12 (1965) 841.

<sup>19</sup> Arrêté royal N° 1/80 du 1er septembre 1962 portant actes de clémence à l'occasion de l'indépendance du pays du Burundi, *B.O.B.* 8 (1962) 195.

<sup>20</sup> Décret-Loi N° 1/119 du 27 novembre 1967 portant actes de clémence en faveur de détenus et auteurs de certaines infractions, *B.O.B.* (1968) 51.

<sup>21</sup> Décret-Loi N° 1/034/90 du 30 août 1990 portant mesure d'amnistie en faveur de prévenus ou condamnés de certaines infractions, *B.O.B.* (1990) 287.

<sup>22</sup> Loi du 9 septembre 1993 portant amnistie, *B.O.B.* (1993) 543.

against Tutsi Banyaruguru, opponents of the Tutsi Hima, for an alleged conspiracy in 1971. Thousands of Hutu suspects were arrested – very often on an arbitrary basis – and spent years in pre-trial detention – almost systematically in violation of the Code of Criminal Procedure – for their alleged involvement in the 1993 massacres. What constituted a systematic and repressive abuse of criminal procedure for the suspects and their relatives, was – at the same time - by others experienced and denounced as a failure to render justice to victims and their families.

(4) Very often, gross and systematic human rights violations were followed by de facto impunity, in particular as far as those responsible at the top political level or in the military hierarchy were concerned. This was the case after the events of 1965 and 1988, both as far as Hutu as well as Tutsi casualties were concerned. The massacres of Hutu in 1972 probably constitute the most striking example of this long-standing culture of impunity.

(5) At the institutional level, there has been a quasi-permanent control of the government on the judicial branch. Taking into account the constitutional context of the time, this was not even all that surprising. Under the constitutions of 1974 and 1982, the judicial branch was put under the control of the Uprona party. It was not until 1992 (at the same time as when multi-partyism was introduced) that the independence of the judicial branch was laid down in the Constitution. The interference by the executive branch became furthermore apparent in the activities of the commissions that were put in place to deal with land disputes and property restitution issues for returnees.

International concern for the lack of truth, accountability and reparation in Burundi was largely absent during nearly three decades. In particular after the 1993 events, the attention of the international community for Burundi gradually increased. Its top priority, however, was to negotiate an end to the violent conflict, through power-sharing arrangements.<sup>23</sup> Transitional justice, and in particular the establishment of mechanisms to prepare for the criminal prosecution of politicians, top government army officials and rebel leaders for their involvement in the large-scale violence, was time and again delayed in order not to undermine ongoing efforts to negotiate short-term stability. Several missions were sent by the UN, all of which issued reports, most of which were made public with considerably delay and none of which ever received any further follow-up.<sup>24</sup> The Government Convention of 10 September 1994, which was signed by most of Burundi's political parties and which essentially rendered the 1992 Constitution and the outcome of the 1993 elections meaningless, had

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<sup>23</sup> Three days after the coup of 21 October 1993, UN Secretary-General Boutros-Ghali sent his Special Envoy on a good offices mission to promote the return of the country to constitutional rule. After the mission of the Special Envoy, the UN SG appointed a Special Representative for Burundi, Mr. Ould Abdallah who took up his duties on 25 November 1993.

<sup>24</sup> Reference is made here to the following reports: United Nations, Security Council, *Report of the Preparatory Fact-finding mission to Burundi to the Secretary-General*, S/1995/157, 24 February 1995 (also known as the Ake-Huslid report); United Nations, Security Council, *Letter dated 7 September 1994 from the members of the Security Council mission to Burundi addressed to the President of the Security Council*, S/1994/1039, 9 September 1994; United Nations, Security Council, *Report of the Security Council mission to Burundi on 10 and 11 February 1995*, S/1995/163, 28 February 1995; United Nations, Security Council, *Report of the Special Envoy appointed to examine the feasibility of establishing either a commission on the truth or a judicial fact-finding commission in Burundi*, S/1995/631, 28 July 1995 (also known as the Nikken report); United Nations, Security Council, *Letter dated 25 July 1996 from the Secretary-General addressed to the President of the Security Council*, S/1996/682, 22 August 1996.

explicitly called for the establishment of an international judicial commission by the UN to investigate the 1993 events<sup>25</sup>. Against the background of a radicalisation of (armed / rebel) forces at both Hutu and Tutsi side, this clause was never put into practice. This embryonic transitional justice process in response to the 1993 events was decisively aborted when a new coup in July 1996 formalised the ‘creeping coup’ that had been taking place since October 1993 and brought back Pierre Buyoya to power.

### **3. BURUNDI’S STATED TRANSITIONAL JUSTICE POLICY**

Contrary to other countries dealt with in this workshop, Burundi did not officially decide to forget the past. There was no publicly stated discourse in favour of forgetting and no formally declared ‘pact of silence’ that was openly advocated as the most viable strategy to ensure a peaceful and stable future of unity and reconciliation. On the contrary, on various occasions, starting with the above-cited Government Convention of September 1994 and culminating in the Arusha Peace and Reconciliation Agreement of August 2000, the use of (national and international) formal retributive mechanisms was strongly favoured and agreed upon, by most – if not all – political parties, by the successive transitional governments and by the international mediators. Nevertheless, in practice, there has been a complete failure to establish any kind of truth, accountability and/or reparation mechanism. Before summarizing Burundi’s stated transitional justice policy and contrasting it with its transitional justice practice (in Section IV), we will, by way of an introduction, briefly refer to Jelena Subotic’ analysis of why states adopt certain policies and models of transitional justice. This may help in understanding and explaining the gap between Burundi’s stated policy (or public discourse) and actual practice.

#### **3.1. Introductory note: why was a transitional justice policy adopted?**

In her paper ‘Hijacked Justice: Domestic Appropriation of International Norms’, Subotic argued that

*“the motivation of states to adopt international models of transitional justice has changed over time. The transitional justice norm - that posits that war crimes and massive human rights abuses must be dealt with in a proper legal setting and not through “victors’ justice” or impunity - was institutionalized in large part as the result of a strong domestic demand for transitional justice in countries like Argentina and South Africa. However, as this norm began to diffuse through the international system, states began to adopt international justice but now for very different reasons – to achieve international legitimacy, to get rid of domestic political opponents, to appease international coercion, or out of uncertainty.”<sup>26</sup>*

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<sup>25</sup> The text of the Government Convention was reproduced in A. Guichaoua (ed.), *Les crises politiques au Burundi et au Rwanda (1993-1994). Analyses, faits et documents* (Karthala, Paris 1995) 588-598.

<sup>26</sup> J. Subotic, *Hijacked Justice: Domestic Appropriation of International Norms* (Human Rights and Human Welfare Working Paper Series, University of Wisconsin, 2005) 2. Available at <http://www.du.edu/gsis/hrhw/working/2005/28-subotic-2005.pdf> (last visited on 24 April 2007).

Without analyzing this aspect in much further detail here, it is clear that Burundi's stated transitional justice policy was not the result of a strong domestic demand. This is not so much due to the fact that there was no such demand – it would require further anthropological research to verify this – but because, assuming that the demand were there, the channels through which society at large might participate in the policy debate about transitional justice were largely absent. Burundi's stated transitional justice policy – laid down in peace agreements and partially incorporated in national law – was largely based on the other factors mentioned by Subotic: (i) comparative experiences of other countries and the international trend to incorporate human rights and transitional justice concerns into peace agreements in order to legitimize negotiated settlements, (ii) the growing activism and lobbying by international<sup>27</sup> groups (including non-governmental human rights organisations) to end Burundi's tradition of impunity, (iii) political calculations by negotiating parties and also by mediators. Some further explanation is needed to explain this third element.

For the international mediators, the particular transitional justice arrangement that was laid down in the peace agreements and their various protocols had at least one major advantage. It enabled them to postpone the 'thorny' issue of accountability (and punishment) for human rights abuses. From this particular perspective, a transitional justice approach was designed that could, at the same time, give international legitimacy to the negotiated peace settlement and be used as delaying tactics in order not to jeopardize the negotiated settlement.

For the negotiating parties, transitional justice was among the instruments used in order to maintain, attain or reinforce political power. Two examples may illustrate this.

(i) During the negotiations process, the predominantly Tutsi parties urged that transitional justice mechanisms be put in place before elections were held. This would have at least two favourable effects. First, elections would be delayed, at a time when the predominantly Tutsi parties did not have much reason to hope for an electoral victory.<sup>28</sup> Secondly, it could reasonably be expected that a number of Hutu politicians, in particular those who had joined the armed rebel movements, were to fear for criminal prosecution and, as a result, the end of their political career.

(ii) For the leaders of the armed rebellion, the transitional justice arrangement needed to be designed in such a way as to temporarily protect them against possible prosecution for war crimes (or other crimes of international law). Furthermore, they had every reason to believe that, after the elections, the political context would drastically change<sup>29</sup> and that they would have much more control

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<sup>27</sup> It should be noted that these concerns were also voiced at the national level through a (relatively small) group of Bujumbura-based civil society organisations.

<sup>28</sup> In 1993, the elections had resulted in an overwhelming victory of the predominantly Hutu party Frodebu.

<sup>29</sup> This was true despite the important consociational power-sharing arrangements that were laid down in the Arusha Agreement, in the transitional Constitution of 28 October 2001 and in the post-transition Constitution of 18 March 2005. See in more detail S. Vandeginste, *Théorie consociative et partage du pouvoir au Burundi* (Discussion Paper, Institute of Development Policy and Management, University of Antwerp, February 2006). Available at <http://www.ua.ac.be/main.aspx?c=.IOBE&n=38974> (last visited on 24 April 2007).

on the (possible) implementation of the stated transitional justice policy. The latter scenario indeed materialized. We will elaborate this in more detail below.

### 3.2. What transitional justice policy was adopted?

The Burundian peace process has left a ‘complex documentary trail’<sup>30</sup>, composed of pre-negotiation agreements, substantive agreements and implementation agreements between various (political and/or armed) parties to the conflict. Several of them contain provisions that deal with transitional justice.

<b>Signatories</b>	<b>Date of signature</b>	<b>Title</b>
1. The Government (of President P. Buyoya) 2. The National Assembly 3. A total of seventeen political parties	<b>28/08/2000</b> <b>Arusha</b>	<b>Arusha Peace and Reconciliation Agreement for Burundi</b> , made up of: <ul style="list-style-type: none"> <li>- Protocol I. Nature of the Burundi conflict, problems of genocide and exclusion and their solutions</li> <li>- Protocol II. Democracy and Good Governance</li> <li>- Protocol III. Peace and Security for All</li> <li>- Protocol IV. Reconstruction and Development</li> <li>- Protocol V. Guarantees on Implementation of the Agreement</li> </ul>
1. The Transitional Government (of President D. Ndayizeye) 2. The CNDD-FDD (of P. Nkurunziza)	<b>16/11/2003</b> <b>Dar Es Salaam</b>  02/02/2002 27/01/2003 08/10/2003  02/11/2003 02/11/2003	<b>Global Ceasefire Agreement (GCA)</b> , including as integral parts: <ul style="list-style-type: none"> <li>- the Ceasefire Agreement</li> <li>- the Pretoria Protocol</li> <li>- the Pretoria Protocol on political, defence and security power-sharing</li> <li>- the Pretoria Protocol on outstanding issues</li> <li>- the Forces Technical Agreement</li> </ul>
1. The Government (of President P. Nkurunziza) 2. Palipehutu-FNL (of A. Rwaswa)	<b>07/09/2006</b> <b>Dar Es Salaam</b>  18/06/2006	<b>Comprehensive Ceasefire Agreement (CCA)</b> , including as an integral part: <ul style="list-style-type: none"> <li>- the Dar Es Salaam Agreement of Principles towards Lasting Peace, Security and Stability</li> </ul>

This table implicitly refers to some of the politically relevant aspects of the successive peace agreements.

First of all, while, in legal terms, the Burundian government is a signatory to all of the three agreements and its constitutive parts, the dominant political actors within the government are fundamentally different for each of the three. At the time of signing of the Arusha Agreement, the government was politically dominated by the Buyoya regime installed following the July 1996 coup d’Etat, with, however, important modifications brought about by the internal partnership for peace. At the time of signing of the GCA, the Burundian state was represented by a transitional government, led by President Domitien Ndayizeye

<sup>30</sup> The Burundian peace process nicely meets the description by Christine Bell who noted that “Most peace processes leave a complex documentary trail, as different issues are dealt with at different stages, as political actors come and go, as agreements are accepted and rejected, and as agreements themselves shape a conflict, and its central issues mutate accordingly” (C. Bell, *Peace Agreements and Human Rights* (Oxford University Press, Oxford 2000) 20.

(Hutu, Frodebu). At the time of signing of the CCA, the Burundian government was dominated by the former rebel movement CNDD-FDD. In particular from the side of predominantly Tutsi political parties, this has been the subject of major criticism. The CCA constitutes, in their view, an agreement among allied anti-Tutsi rebel movements, namely the CNDD-FDD and Palipehutu-FNL.

Secondly, closely related to the above, the chronological order of the three agreements is not a coincidence. The transitional government concluding the GCA was put into place as a result of the Arusha Agreement. In turn, the CCA was signed as a result of negotiations conducted by a government that emerged from the elections that were held after the signing of the GCA.

As a result, the political willingness to implement the transitional justice provisions under the Arusha Agreement is not necessarily the same for those who negotiated and signed the GCA and the CCA. Particularly because of the new post-electoral political context, this has indeed turned out to be a relevant issue in practice, despite the fact that the GCA explicitly refers to the Arusha Agreement as being part of one overall agreement.

We will, in our analysis, refer to the peace agreements<sup>31</sup> and to subsequent legal and institutional reforms that were adopted to implement the agreed transitional justice approach.

### 3.2.1. *Accountability legislation and mechanisms*

The Arusha Agreement considered combating the impunity of crimes as one of the solutions for the Burundian conflict. It was agreed in Prot. I, Chapter II, that legislation needed to be enacted to counter genocide, war crimes and other crimes against humanity, as well as other human rights violations (art. 6, para. 9).<sup>32</sup> More specifically, the Agreement stipulated that the transitional government request the establishment by the UN Security Council of an international judicial commission of inquiry on genocide, war crimes and crimes against humanity. This commission would be responsible for: (a) investigating and establishing the facts relating to the period from independence to the date of signature of the Agreement; (b) classifying them; (c) determining those responsible.

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<sup>31</sup> As far as their legal status is concerned, it should be noted that these peace agreements have been adopted as law by the National Assembly and therefore constitute a legal source of Burundi's transitional justice.

<sup>32</sup> As agreed, national legislation was adopted to integrate the crimes of genocide, crimes against humanity and war crimes in Burundi's national criminal law (*Loi N°1/004 du 8 mai 2003 portant répression du crime de génocide, des crimes contre l'humanité et des crimes de guerre*, B.O.B., 5 (1 May 2003) 136). With explicit reference to the Statute of the International Criminal Court – which Burundi ratified on 21 September 2004 – and other international human rights conventions, the law of 8 May 2003 defines the above-mentioned crimes as criminal offences under Burundian criminal law (art. 2-4). The law also defines the criminal sentences applicable to those found responsible (art. 8-18). The law of 8 May 2003 is, however, because of its final provisions, not an instrument to deal with past violations but solely creates the possibility to prosecute crimes of international law committed after its promulgation. In its final provision, the law of 8 May 2003 integrates the Arusha Agreement insofar as it relates to crimes of genocide, crimes against humanity and war crimes committed prior to the promulgation of the law: “*l'enquête et la qualification des actes de génocide, des crimes de guerre et des autres crimes contre l'humanité commis au Burundi depuis le 1 juillet 1962 jusqu'à la promulgation de la présente loi, seront confiés à la Commission d'Enquête Judiciaire Internationale*” (art. 33, para. 1). Should the report of the Commission conclude that crimes of international law were committed during that period, the government will call upon the UN to establish an international criminal tribunal for Burundi (art. 33, para. 2).

Furthermore, the Arusha Agreement stipulated that the government would request the establishment of an international criminal tribunal by the UN Security Council to try and punish those responsible “should the findings of the report point to the existence of acts of genocide, war crimes and other crimes against humanity”. On 24 July 2002, nearly two years after the signature of the Arusha Agreement and some nine months after the establishment of a transitional government, interim President Buyoya addressed a letter to the UN Secretary-General, requesting the establishment of an international judicial commission of inquiry for Burundi.<sup>33</sup> Nearly one year later, during a mission of the UN Security Council to Central Africa, in June 2003, the request was discussed with the Burundian government. The report<sup>34</sup> of that mission noted that “the Government asked the mission to respond positively to the request of the transitional Government for the establishment of an international judicial commission of inquiry, as provided for in the Arusha Agreement, to help Burundi put an end to impunity” (para. 39). The mission recommended that urgent attention be paid to putting an end to impunity in Burundi and that the Security Council “assist Burundi in this regard and that it consider carefully the Government’s request for the establishment of the international judicial commission of inquiry as provided for in the Arusha Agreement” (para. 44). It was not until 23 January 2004 that the UN Security Council, in response to the letter by President Buyoya, approved the terms of reference of a mission to be sent to Burundi.<sup>35</sup> These terms of reference were not those of the international judicial commission of inquiry requested by the Burundian government, but of an assessment mission by the UN Secretariat, of which the objective was “to consider the advisability and feasibility of establishing an international judicial commission of inquiry for Burundi, as requested by the President of Burundi” (para. 1). Among the subjects mentioned for consideration by the assessment mission was the division of competencies between the requested international judicial commission of inquiry and the national truth and reconciliation commission provided for under the Arusha Peace Agreement. The timing and the delay in dealing with President Buyoya’s request were clearly no coincidence. The Security Council decision came one month after South African Vice-President Jacob Zuma, the main facilitator of the Regional Peace Initiative on Burundi, declared to the members of the Council that “*We can now say without fear of contradiction that the Burundi peace process has entered a decisive and irreversible stage*”<sup>36</sup>. The timing was fully in line with the UN’s earlier strategy on Burundi, of prioritizing (at least in chronological terms) peace and political stability over the transitional justice process.<sup>37</sup> We will deal in more detail with the report of the UN assessment mission below.

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<sup>33</sup> The Transitional Constitution of 28 October 2001 reaffirmed these provisions of the Arusha Agreement (art. 228). Neither the GCA nor the CCA altered or supplemented any of the provisions of the Arusha Agreement relating to this specific issue.

<sup>34</sup> United Nations, Security Council, *Report of the Security Council mission to Central Africa, 7 to 16 June 2003*, S/2003/653, 17 June 2003.

<sup>35</sup> United Nations, Security Council, *Letter dated 26 January 2004 from the President of the Security Council addressed to the Secretary-General*, S/2004/72, 26 January 2004.

<sup>36</sup> United Nations, Security Council, *Report of the meeting of 4 December 2003*, S/PV.4876, 3.

<sup>37</sup> According to the former Minister of Human Rights Eugène Nindorera, “*A mon avis, je pense que l’ONU n’est pas du tout pressé. Je doute même de sa volonté de mettre en place une CEJI et surtout un Tribunal pénal international pour le Burundi. Comme une enquête sérieuse devra nécessairement mettre en cause les signataires des compromis négociés durement avec son concours, l’ONU peut ne pas vouloir prendre le risque de déstabiliser un équilibre et une situation déjà bien fragiles*” (E. Nindorera, *L’agencement et l’applicabilité des différentes lois en matière de lutte contre l’impunité au Burundi*, Bujumbura, Octobre 2003, 13).

### 3.2.2. *A truth and reconciliation commission*

Prot. I, Chapter II of the Arusha Agreement provided for the establishment of a National Truth and Reconciliation Commission (TRC) (art. 8), with three main functions: (i) investigation, (ii) arbitration and reconciliation, and (iii) clarification of history. First, the Commission was charged with bringing to light and establishing the truth regarding the serious acts of violence committed during the cyclical conflicts committed between 1 July 1962 and 28 August 2000. The Commission was also requested to classify the crimes and establish the responsibilities, as well as the identity of the perpetrators and the victims. This provision endowed the Commission with an important component of accountability and raises the issue of how the Commission would be able to interact with judicial investigative bodies, an issue that would continue to complicate the negotiations on Burundi's transitional justice process for years to come. It was furthermore specified that the Commission would not have the powers to classify acts of genocide, crimes against humanity and war crimes (art. 8, para. 1, (a) in fine). The latter provision has an obvious impact on the Commission's truth telling potential: how to tell the truth about events without using the appropriate terms? Second, in order to promote reconciliation, it was stipulated that the Commission shall, upon completion of its investigations, (i) adopt or propose to the competent institutions those measures that are likely to promote reconciliation and forgiveness, (ii) order indemnification or restoration of disputed property, or (iii) propose any political, social or other measures it deems appropriate. This provision left some ambiguity as to the powers of the Commission to merely recommend or to actually decide on measures in a wide range of areas, including those related to reparation. One of the latter measures the Commission might possibly find appropriate was explicitly mentioned in the Agreement: "*the transitional National Assembly may pass a law or laws providing a framework for granting an amnesty consistent with international law for such political crimes as it or the National Truth and Reconciliation Commission may find appropriate*" (art. 8, para. 1 (b) in fine). This provision, as well, turned out to be one among the thorny issues for the negotiations process on Burundi's transitional justice. Finally, the Commission was to be given the responsibility to clarify the entire history of Burundi, "*going back as far as possible in order to inform Burundians about their past*", with the overall purpose "*to rewrite Burundi's history so that all Burundians can interpret it in the same way*" (art. 8, para. 1 (c)). In December 2004, a law on the establishment of a national TRC was promulgated.<sup>38</sup> In general, the TRC was endowed with the mandate and the powers agreed upon in the Arusha Agreement. In article 2, it was reaffirmed that the TRC did not have the powers to legally qualify offences as being acts of genocide, crimes against humanity or war crimes. Article 3 provided for the TRC to be operational during a period of two years, with the possibility of extending its mandate for one year or more. On the possibility to propose an amnesty law in order to promote reconciliation, the law reaffirmed the principle laid down in the Arusha Agreement: "*La Commission peut déterminer les crimes politiques pour lesquels une loi d'amnistie pourrait être votée*" (art. 4, para. 1). However, it was specifically mentioned in a second paragraph that genocide, crimes against humanity and war crimes could not be amnestied: "*Les crimes de génocide, les crimes contre l'humanité et les crimes de guerre ne sont pas amnistiables*" (art. 4, para. 2).

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<sup>38</sup> *Loi N° 1/ 018 du 27 décembre 2004 portant missions, composition, organisation et fonctionnement de la Commission Nationale pour la Vérité et la Réconciliation.*

The law of 27 December 2004 was never implemented and a TRC was never put in place. The CCA of 7 September 2006 stipulated that the TRC needed to be given a new name: “the Commission of Truth, Forgiveness and Reconciliation” (“*Commission Vérité, Pardon et Réconciliation*”). Although the CCA failed to elaborate on the specific implications of this newly named Commission, it is clear that the general objective had changed. Its mission was defined as bringing to light the facts and establish the responsibilities of the various actors (“*dégager les responsabilités des uns et des autres*”), in order to promote forgiveness and reconciliation among Burundians. Terminology under the Arusha Agreement, including “crimes” and “perpetrators”, was no longer mentioned, which, at the very least, was indicative of a different vision on the role of the commission.

### 3.2.3. *The Kalomoh proposal*

The report of the UN assessment mission (which is commonly referred to as the Kalomoh report) was submitted to the Security Council on 11 March 2005.<sup>39</sup> The Kalomoh report noted that the delineation between the mandate and the powers of the national TRC and the IJCI as envisaged by the Arusha Agreement was blurred. As a result, there was a serious risk of overlapping jurisdictions, contradictory findings and a waste of resources. This led the assessment mission to the recommendation that a combination of both mechanisms was preferable, through the creation of a single truth commission of mixed (national / international) composition (para. 31). The mandate of the TC would, in accordance with the Arusha Agreement, consist of: (i) establishing the facts and determine the causes and nature of the conflict in Burundi, (ii) classify the crimes committed since independence and identify those responsible for crimes of genocide, crimes against humanity and war crimes committed during the various cycles of conflict. The TC would be composed of two units. The research unit would be responsible for establishing the causes and facts of the conflict and the nature of the crimes committed during the various cycles of violence. The investigative unit would be responsible for investigating the crimes and identifying those responsible. It was added that “*while the investigation conducted by the truth commission would not be a criminal or judicial investigation, investigators would conduct their information-gathering activities in full respect of the rights of witnesses and due process of law*” (para. 56, c). In addition to a national TC of mixed composition, the Kalomoh report also recommended the establishment of a judicial accountability mechanism in the form of a Special Chamber within the court system of Burundi, composed of national and foreign judges. The report found inspiration in the model of the War Crimes Chamber which, at that time, was in the process of being established in the State Court of Bosnia and Herzegovina. It was proposed that the Special Chamber (SC) have jurisdiction to prosecute those bearing the greatest responsibility for the crime of genocide, crimes against humanity and war crimes. Its temporal mandate would be limited to specific phases of the conflict and would include, as a minimum, the events between 1972 and 1993 (para. 61). The report also warned that a follow-up on the side of the UN was essential: “*It is the view of the mission that the United Nations can no longer engage in establishing commissions of inquiry and disregard their recommendations without seriously undermining the credibility of the organisation in promoting justice and the rule of law*” (para. 72). It was therefore recommended that the

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<sup>39</sup> United Nations, Security Council, *Letter dated 11 March 2005 from the Secretary-General addressed to the President of the Security Council*, S/2005/158, 11 March 2005.

Security Council mandate the Secretary-General to engage in negotiations with the government on the practical implementation of the proposal to establish both mechanisms. On 20 June 2005, the UN Security Council unanimously adopted resolution 1606. Three pre-ambular paragraphs indicated the approach which inspired the SC. First, the SC expressed the view that, in order to consolidate peace and reconciliation in Burundi, it was necessary (i) to establish the truth, (ii) to investigate the crimes, (iii) to identify and bring to justice those bearing the greatest responsibility for crimes of genocide, crimes against humanity and war crimes committed in Burundi since independence, (iv) to bring an end to the culture of impunity, in Burundi and in the region of the Great Lakes of Africa as a whole. Furthermore, the SC emphasized that appropriate international assistance was needed to help the Burundian people end impunity, promote reconciliation and establish a society and government under a rule of law. Finally, the SC acknowledged the crucial importance of reconciliation for peace and national unity in Burundi and shared the view that a future truth commission should contribute to it. On that basis, the SC requested the Secretary-General “*to initiate negotiations with the government and consultations with all Burundian parties concerned on how to implement his recommendations, and to report to the Council by 30 September 2005 on details of implementation, including costs, structures and time frame*” (operative paragraph 1) and decided to remain seized of the matter (operative paragraph 2).

A first round of negotiations between the Government of Burundi and the UN took place in March 2006. We will return to the difficulties met during the negotiations process in Section V when presenting the current state of affairs. First, in Section IV, we will confront the stated transitional justice policy (including the agreement to establish the above-mentioned mechanisms) with actual transitional justice practice.

#### **4. BURUNDI’S TRANSITIONAL JUSTICE PRACTICE**

Between August 2000 and today, none of the above-mentioned agreements and proposals has been implemented in practice. Other provisions, however, have determined Burundi’s actual transitional justice practice.

##### **4.1. Temporary immunity**

In its Prot. II (Democracy and Good Governance), Chapter II (Transitional Arrangements), the Arusha Agreement contained a provision stating that the national assembly – as one of the signatories of the Agreement – agreed to enact, within four weeks following its signature, “*such legislation as is necessary for the granting of temporary immunity against prosecution for politically motivated crimes committed prior to the signature of the Agreement*” (art. 22, para. 22, (c)).<sup>40</sup> While recognizing the need to fight impunity (both during the period of transition and after the end of the transition), it was at the same time felt that a temporary shelter against criminal prosecution needed to be inserted, which was done through the provision on the granting of a so-called provisional or temporary immunity. Several reasons may help to explain why this was done. First, the Arusha Agreement did not put an end to the civil war nor to the peace

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<sup>40</sup> Art. 22, para. 22 (c) left considerable ambiguity, as the Arusha Agreement did not specify what should be understood as “politically motivated crimes”. Neither did it define the scope of the immunity, nor its “temporary” (or, according to the French version, “provisional”) character. These issues were left to the legislator to determine.

negotiations process. It was clear that additional negotiations would be necessary, both on the implementation of Arusha Agreement and on several issues that were left unresolved, as well as with those rebel movements that had not signed the Agreement. Secondly, several political leaders had left the country and lived in exile. As a condition for their return, they requested a guarantee that they would not be prosecuted by what they considered to be a one-sided and arbitrarily operating judicial system. In order to implement this part of the Arusha Agreement, the law of 21 November 2003<sup>41</sup> defined immunity as the suspension of criminal prosecution: beneficiaries could not be arrested, indicted or prosecuted (“*arrêté, inculpé ou poursuivi*”) during the period of the immunity (art. 1 and 3).

Article 2 of GCA Pretoria Protocol on Outstanding Matters of November 2003 stipulated that:

*“2.1. The parties agreed that all leaders and combatants of the CNDD-FDD shall receive temporary immunity; 2.2. They agreed that this shall also apply to the security forces of the Government of Burundi; 2.3. They agreed to establish a Joint Commission, which shall study individual cases of civilians currently serving sentence to determine that they should be granted temporary immunity”.*

There are some remarkable developments when comparing the notion of provisional immunity under the Arusha Agreement and under the GCA. Firstly, there is no longer any restriction *ratione materiae* to ‘politically motivated crimes’. Secondly, there is an explicit reference to the scope *ratione personae*: the temporary immunity would benefit all leaders and combatants of the CNDD-FDD as well as members of Burundi’s security forces. Thirdly, the immunity would also benefit to civilians already serving sentence, when a Joint Commission considered them to be eligible. The latter provision adds to the already ambiguous nature of the immunity. While, normally, immunity (both personal and functional immunity of individuals as well as state immunity) constitutes a safeguard against criminal prosecution, and, more generally, immunity from jurisdiction, the intention of the signatories of the GCA was clearly to extend immunity also to people already serving sentences as a result of a completed criminal trial. The text of the GCA remained unclear on how exactly this should be understood. In order to clarify and implement the latter provision of the GCA, a decree was adopted on 23 March 2004.<sup>42</sup> The decree established a commission, charged with identifying CNDD-FDD combatants, their ‘collaborators’ as well as members of the security forces in detention and eligible for a provisional immunity in accordance with the GCA (art. 1). The notion of collaborators was defined in article 2 and covered a broad range of persons, including: people who supplied weapons or other equipment, people who fed combatants, people who transported combatants, ammunition or equipment, people who incited the population to join the rebel movement, people who

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<sup>41</sup> *Loi N° 1/022 du 21 novembre 2003 portant immunité provisoire de poursuites judiciaires en faveur des leaders politiques rentrant de l'exil, B.O.B., N° 11/2003, 1 November 2003, 780.* The adoption of the law on 27 August 2003 by the National Assembly had given rise to a major controversy. A group of 28 members of parliament, calling themselves ‘a coalition of MP’s against genocide’ boycotted the vote. Other opposition members considered the law to be part of a political deal between Uprona and Frodebu to grant themselves “*a kind of auto-amnesty*” (IRIN, *Approval of temporary immunity law sparks heated debate*, Nairobi, 3 September 2003).

<sup>42</sup> *Décret N° 100/023 du 23 mars 2004 portant modalités d'application de l'immunité provisoire prévue par l'Accord Global de Cessez-le-feu du 16 novembre 2003*

provided information, etcetera. Members of the security forces were further defined as being ‘in particular’ those army soldiers fighting rebel fighters, members of the police force who supported the army as well as members of the ‘gardiens de la paix’ militia (art. 3). The decree also explicitly stated that combatants and military guilty of acts of genocide or crimes against humanity were excluded from the provisional immunity (art. 6). However important as a statement of principle, in practice, article 6 was meaningless, since no detainee in Burundi’s prisons had ever been convicted for genocide or crimes against humanity. Only people suspected of or convicted for offences committed after 24 November 1994 (the date of creation of the CNDD-FDD) were eligible for immunity (art. 5). This meant that those detained for their (suspected) involvement in the massacres of 1993 were not concerned by the decree. Many persons, including those who under the terms of the decree did not fall within the scope of application, put all their hope in the work of the commission, rather than in the justice system. By the end of 2004, some 539 people had been released on the basis of this decree and of the work of the commission established the same day.<sup>43</sup>

The difficulty with applying the notion of immunity to people who have already been found guilty of a criminal offence was further exacerbated by the introduction and legal treatment of another notion, that of political prisoners. This culminated, in early 2006, in the release (on the basis of a provisional immunity) of approximately 3,300 political prisoners, primarily those suspected of or convicted for involvement in the 1993 massacres.

#### **4.2. The release of ‘political prisoners’**

The replacement of the late Tanzanian president Julius Nyerere by former South African president Nelson Mandela gave rise to an increasingly central role of the issue of political prisoners<sup>44</sup> during the negotiations process between January and August 2000. International Crisis Group convincingly demonstrated how diametrically opposed positions on the prisoners’ issue nearly jeopardized the whole peace process.<sup>45</sup> On the one hand, there was CNDD-FDD leader Jean-Bosco Ndayikengurukiye who considered many (if not most) of Burundi’s prisoners to be “*people who voted for democracy*”. Their release was a pre-condition for his movement to participate in the negotiations. On the other hand, the government stated that Burundi’s prisoners and pre-trial detainees were people found guilty or suspected by Burundi’s justice system of having committed serious crimes, including homicide, rape, theft, arson, etcetera (in other words, they were ‘common law criminals’, ‘*criminels de droit commun*’).<sup>46</sup>

In Chapter II of Protocol II of the Arusha Agreement, it was agreed that

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<sup>43</sup> Quoted in UNDP, *Rapport national sur le développement humain* (Bujumbura 2005), 90

<sup>44</sup> When using the term ‘political prisoners’ throughout this section, we merely rely on the terminology used in the various sources mentioned, without agreeing or disagreeing with the qualification of the persons involved as political prisoners.

<sup>45</sup> International Crisis Group, *Unblocking Burundi’s peace process: Political parties, political prisoners and freedom of the press*, Brussels, June 2000, 40-58.

<sup>46</sup> As of March 2000, Burundi’s prison population totalled 9,173 persons, including 6,717 pre-trial detainees and 2,456 convicts. The official capacity of the prison system was limited to 3,650 people. The very large majority of detainees were Hutu, suspected of or convicted for their involvement in the 1993 massacres of Tutsi and/or their support to the armed rebel movements.

*“the Transitional Government shall within 30 days of the commencement of the transition establish a commission under the chairmanship of a judge to investigate, as a matter of urgency, and to make recommendations on: (i) the conditions in jail, the treatment of prisoners and the training and conditions of service of warders, (ii) the release of prisoners awaiting trial in respect of whom there has been an undue delay in the prosecution of their cases, (iii) the existence of and release of any political prisoners”* (art. 15, para. 20).

One month after its establishment by law on 30 October 2001, the transitional government created the commission, which would soon become known among prisoners and the general public as “the political prisoners’ commission” (much to the dissatisfaction of several of its members, who insisted that the very existence of political prisoners remained to be determined by the commission itself).<sup>47</sup> The government appointed eight members<sup>48</sup> and ‘took notice’ of the members proposed by the UN. The commission was chaired by a French judge, Philippe Chemithe. The commission report noted, first of all, that not only in the Burundian context, the definition of a political prisoner or a political crime was far from unequivocal. It also found that the issue of political prisoners was particularly divisive in Burundian society, already characterized by important other ethnic and socio-political cleavages. Furthermore the commission noted that there was an important degree of confusion and assimilation between the concepts of political prisoner on the one hand, and, on the other, impunity, absence of guilt, infringement of victims’ rights, oblivion, pardon, amnesty, etcetera.<sup>49</sup> The Commission failed to find a consensus on how to define political prisoners in the specific Burundian context and to formulate clear recommendations. The government decided to make use, within the limits of the law, of provisions allowing for a provisional release of pre-trial detainees (*“mise en liberté provisoire”*) and a conditional release of convicts (*“libération conditionnelle”*). In all, by the end of 2004, around 3,200 persons had been released, including those benefiting from provisional immunity.

In the GCA of November 2003, the term ‘political prisoners’ was not explicitly used. However, the agreement laid down in the Pretoria Protocol on Outstanding Matters, *“to establish a Joint Commission, which shall study individual cases of civilians currently serving sentence to determine that they should be granted temporary immunity”* (art. 2, para. 3) is obviously quite directly linked connected to the issue of political prisoners. Indeed, shortly after the Nkurunziza government was sworn in (in August 2005, after the parliamentary elections), a new commission was established through presidential decree on 7 November 2005, in charge of identifying political prisoners in all of Burundi’s prisons. A presidential decree of 3 January 2006 decided that all those identified by the commission would benefit from a provisional immunity. Three ministerial orders

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<sup>47</sup> Author’s interviews conducted in September 2004.

<sup>48</sup> *Décret N° 100/028 du 30 novembre 2001 portant nomination des membres burundais de la Commission indépendante chargée d’étudier les questions relatives aux prisonniers conformément au paragraphe 20 de l’article 15 du protocole II de l’Accord d’Arusha pour la paix et la réconciliation au Burundi*, B.O.B., N° 11ter/2001, 1 November 2001, 1609. It is worth noting that one of the members of the Commission was Ms. Clotilde Niragira, at that time a lawyer and member of the bar, who later became Minister of Justice in the Nkurunziza government after the 2005 elections and who, as of early 2006, decided on the release of some 3,300 prisoners through ministerial order.

<sup>49</sup> Commission indépendante chargée d’étudier les questions relatives aux prisonniers, *Rapport de mission*, (Bujumbura, 14 February 2002) 36.

by Minister of Justice Niragira gave further effect to this decree, as a result of which around 3,300 persons (nearly all of them Hutu) were released. The Minister motivated the measure by referring to the necessity of a national reconciliation and underscored that the release was in all cases provisional, since all released persons would need to be heard by the Special Chamber or the TRC that would be set up as a result of the negotiations between the Government and the UN.<sup>50</sup> On 9 March 2006, three civil society groups introduced a procedure before the Constitutional Court requesting the annulment of the two ministerial orders on the basis of a violation of article 48 of the Constitution and of the International Covenant on Civil and Political Rights.<sup>51</sup> According to OAG, FORSC and Ligue Iteka, the ministerial orders constitute an ‘amnesty in disguise’ for grave violations of human rights, which is contrary to national and international law. In accordance with article 230, para. 2 of the Constitution, the request was declared inadmissible by the Constitutional Court.<sup>52</sup>

## 5. CURRENT STATE OF AFFAIRS

The above analysis of Burundi’s long and winding road towards transitional justice shows a remarkable discrepancy between stated policy and actual practice. Notwithstanding the principled stance against impunity that was reaffirmed time and time again, Burundi has been remarkably creative in circumventing – at least temporarily – the amnesty prohibition for crimes of international law by combining three instruments: (i) the reference to a yet to be established international judicial body as the sole institution with jurisdiction to investigate and prosecute acts of genocide, crimes against humanity and war crimes; (ii) the use of temporary immunity legislation; and (iii) the broad interpretation of the notion of political prisoners, in combination with the use of temporary immunity. In the meantime, in the public discourse of the new Burundian government, the need to promote reconciliation as the basis for sustainable peace and stability – even the term ‘forgiveness’ is being used here and there - has gradually taken priority over the need to fight impunity as far as the crimes of the past are concerned.<sup>53</sup> In the current government’s vision of how to deal with the past, the “reconciliation procedure” before the TRC is placed centrally. We will now further explain this position while briefly summarizing the current state of affairs of the negotiations process between the UN and the Government.

In October 2005, a Governmental Delegation was established, in charge of negotiating the establishment of a TRC and a Special Tribunal<sup>54</sup> for Burundi. A first session of negotiations between the Governmental Delegation and a UN Delegation was held in March 2006.<sup>55</sup> No agreement was reached. A second

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<sup>50</sup> E. Ndikumana, “Burundi: la libération de détenus pourrait reviver les tensions ethniques”, *AFP*, 15 January 2006.

<sup>51</sup> Observatoire de l’Action Gouvernementale (OAG), FORSC (Forum pour le Renforcement de la Société Civile) and Ligue Iteka, *Communiqué de Presse* (Bujumbura, 9 March 2006)

<sup>52</sup> Individual persons and legal persons, such as the three associations, can only challenge the constitutionality of laws, not of presidential or ministerial decrees.

<sup>53</sup> See, i.a., the letter by Minister of Foreign Affairs Antoinette Batumubwira to the UN Assistant Secretary-General for Legal Affairs, Nicolas Michel (Bujumbura, 15 June 2006).

<sup>54</sup> During the negotiations process, the model of a Special Tribunal – similar to the one established for Sierra Leone – has gradually replaced the model of a Special Chamber that was initially proposed in the Kalomoh report. The proposed mixed composition (of foreign nationals and Burundian nationals) was maintained.

<sup>55</sup> This was done, i.a., on the basis of a memorandum that spelled out the Burundian government’s proposal. Two versions were prepared of the memorandum. We will here refer to

round<sup>56</sup> of negotiations was held in March 2007.<sup>57</sup> Again, talks ended unsuccessfully. In addition to several technical modalities that remain to be agreed upon, two major hurdles<sup>58</sup> remain to be taken on Burundi's long and winding road to transitional justice.

(1) The Memorandum of the Governmental Delegation stipulated that, amongst other things, the TRC should be mandated to “*determine those cases for which an amnesty law might be enacted*” (para. 27, (h)). Compared to the law of 27 December 2004, this provision was far less restrictive.<sup>59</sup> Indeed, the Memorandum did not explicitly rule out amnesty for international crimes, nor did it restrict the possibly proposed amnesty legislation to political crimes. This vision is furthermore confirmed by the provision laid down in paragraph 65: “*Aucun acte, aucun fait établi par la Commission n'est d'avance exclu du processus de réconciliation*”. During the first session of the negotiations, the UN Delegation confirmed the position of the UN - referring to its long-standing practice in a variety of countries - stating that amnesty needed to be unequivocally ruled out for genocide, crimes against humanity and war crimes in the legal documents on the establishment of the transitional justice mechanisms. While not explicitly differentiating between collective amnesty measures and possible individualized and conditional amnesty measures (possibly tailored after the South African model), the UN Delegation excluded “any kind of amnesty” (“*toute forme d'amnistie*”<sup>60</sup>).<sup>61</sup> In a letter by the Minister of Foreign Affairs to the

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the latest version. See République du Burundi, *Mémorandum de la délégation burundaise chargée de négocier avec les Nations Unies la mise en place d'une Commission de la Vérité et de la Réconciliation et d'un Tribunal Spécial au Burundi* (Bujumbura, 26 March 2006).

<sup>56</sup> In his report to the fourth session of the UN Human Rights Council, the Independent Expert on the situation of human rights in Burundi noted that a second round was initially planned for the end of 2006 (United Nations, Human Rights Council, *Interim report of the independent expert on the situation of human rights in Burundi*, Akich Okola, A/HRC/4/5, 26 February 2007, §16). The two main contentious issues he identified in his report were “*the principles of non-immunity or amnesty for genocide, war crimes and crimes against humanity as well as the neutrality and independence of these bodies*”.

<sup>57</sup> For this second round, a draft General Framework Agreement was prepared by the UN Delegation: *Accord-cadre général entre l'Organisation des Nations Unies et la République du Burundi relatif à la création d'une Commission Vérité et Réconciliation et d'un Tribunal Spécial au Burundi* (20 February 2007).

<sup>58</sup> A third stumbling block seems to have been overcome during the latest round of negotiations. The UN delegation strongly insisted on the organization of a broad and inclusive consultation process, in order to ensure a greater transparency and ownership of the transitional justice process by the Burundian people. An agreement seems to have been found with the Governmental Delegation. A national consultation process would be held countrywide and at all levels of society. The conclusions drawn from the consultation process should then logically be reflected in the mandate of the transitional justice mechanisms. This, in turn, raises the issue whether amnesty for crimes of international law could at all be the subject of the popular consultation. See also the document prepared by a number of civil society groups (both national and international, operating locally): Search For Common Ground et al., *Un premier défi pour le processus de justice transitionnelle. Les consultations populaires* (Bujumbura, February 2007) 2.

<sup>59</sup> Article 4, para. 2 of the law ruled out amnesty legislation for acts of genocide, crimes against humanity and war crimes.

<sup>60</sup> *Compte-rendu thématique des discussions et des négociations entre la Délégation burundaise chargée de négocier avec les Nations Unies la mise en place d'une Commission pour la Vérité et la Réconciliation et d'un Tribunal Spécial au Burundi et la Délégation des Nations Unies, réunies du 27 au 31 mars 2006 à Bujumbura*, attached to the letter of 19 May 2006 by the Assistant Secretary-General Nicolas Michel to Minister of Foreign Affairs Batumubwira, 4.

<sup>61</sup> It is worth referring to a paragraph that was added to the Thematic Report as some kind of footnote, but which possibly revealed dissenting opinions within the Burundian government. The paragraph noted that towards the end of the first session of the negotiations, the First Vice-President of the Republic, Martin Nduwimana, talked to the members of the UN Delegation

UN Assistant Secretary-General of Legal Affairs, the government's position was reaffirmed, namely that the TRC – composed of national and international members – should have the discretionary power to decide in which cases and under which conditions an amnesty could be granted. This in turn demonstrates the importance of the composition of the TRC and the procedure to appoint its members. In the case of a TRC composed of a majority of Burundian nationals<sup>62</sup>, appointed by the President, the issue of amnesty indirectly remains under the control of the government. During the second session of negotiations, the amnesty issue remained highly contentious. Towards the end of the session, a breakthrough seemed to have been reached. This was reflected in the first version of the draft Joint Press Communiqué of Friday 9 March 2007 which read:

*“Sur la question de l’amnistie, conformément à la politique et à la pratique des Nations Unies solidement établies, et tel que reflété dans la loi burundaise, le Gouvernement et les Nations Unies réaffirment que le crime de génocide, les crimes contre l’humanité et les crimes de guerre ne sont pas amnistiables. Le principe de non-amnistie pour ces trois crimes s’applique, même devant le Tribunal Spécial.”* (para. 4)

Some hours before releasing the Joint Communiqué, the Governmental Delegation presented a new version, from which the final sentence – which explicitly stated that amnesty was ruled out as a matter of principle also before the Special Tribunal – was taken out. The remaining part of the paragraph merely confirmed the general principle and did not signal that any progress had been reached during the session on this issue. The refusal by the UN Delegation to sign the second version of the draft Joint Communiqué was partly inspired by the new paragraph 4, though another contentious issue had been subject to even more far reaching last minute modifications by the Governmental Delegation, namely the relationship between the TRC and the Special Tribunal and the independence of the prosecutor of the Special Tribunal.

(2) The Memorandum of the Governmental Delegation left some room for interpretation<sup>63</sup> as to whether the Prosecutor of the ST would only investigate cases that were deferred to the ST by the TRC, or whether the Prosecutor would

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about the amnesty issue and stated that the Government of Burundi did not recognize amnesty legislation awarded for the crime of genocide, crimes against humanity and war crimes (para. 18). It should be recalled that both Nduwimana as well as his principal advisor – who was at the same time president of the Governmental Delegation – are Tutsi, members of Uprona.

<sup>62</sup> In the initial version of the Memorandum of the Governmental delegation, it had been proposed that the TRC be made up of five members: three Burundian nationals and two foreign nationals. At the explicit request of the government (see the *Communiqué du Gouvernement sur le Conseil des Ministres du 2 février 2006*), this was changed in the second version of the Memorandum. It is now proposed that the TRC be composed of seven members: four Burundian nationals and three foreign nationals. Even if the Burundian membership is – as can be expected – ethnically balanced, this does not necessarily guarantee their operational independence vis-à-vis the government.

<sup>63</sup> According to the memorandum, cases would be referred by the TRC to the Special Tribunal in those cases where the reconciliation procedure was unsuccessful. This was further specified as follows: (i) in case a suspect refuses to appear before the Commission, (ii) in case the person does not confess his responsibility for acts confirmed by the Commission, (iii) in case the person refuses to participate in the reconciliation procedure, (iv) in case the person refuses to implement the reconciliation measures decreed by the Commission (para. 71). It remained however unclear from the document whether these were the only situations in which prosecution before the Special Tribunal would be possible. Several other observers also regretted the ambiguity in the Memorandum. See, i.a., E. Nindorera, *Pas de réconciliation véritable sans justice*, Bujumbura, 30 March 2006, 19.

also be able to investigate cases *proprio motu*, for instance in cases where the reconciliation had been successfully completed but where the Prosecutor nevertheless considered prosecution to be necessary and in the interest of justice, or in cases that had not been brought to the attention of the TRC. During and after the first session of the negotiations, the UN Delegation had clearly insisted on the independence of the ST and its prosecutor (who, it was agreed, would be a foreign national).<sup>64</sup> Both as a matter of principle and in light of a long-standing practice, the prosecutor of the ST must, in the view of the UN Delegation, be independent, vis-à-vis the UN, the Burundian government or any other government, as well as vis-à-vis any other transitional justice mechanism. The UN Delegation stressed the need for the Prosecutor to be able to exercise his powers to investigate and prosecute at his own discretion. During the second session of the negotiations, this part of the draft GFA turned out to be the most contentious issue of the discussions. A comparison between the two versions of the draft Joint Press Communiqué clearly reveals the continuing divergence of opinions between the two delegations on this issue. The first version, of 9 March 2007, read as follows:

*“Elles ont en outre convenu que les deux mécanismes d’établissement des responsabilités seront indépendants. Ils exerceront leurs responsabilités dans un esprit de complémentarité et dans le respect de leur mandat, statut juridique, prérogatives et compétences respectifs.*

*Les Délégations ont conclu que le Procureur agira en toute indépendance dans l’instruction des dossiers et l’exercice des poursuites contre les auteurs du crime de génocide, des crimes contre l’humanité et des crimes de guerre. Elles ont convenu par ailleurs de poursuivre leurs discussions sur l’indépendance du Procureur par rapport aux travaux de la Commission Vérité et Réconciliation”.*

Drafted at the initiative of the Governmental Delegation, the second version, as of 10 March 2007, amended the latter paragraph as follows:

*“Les deux Délégations ont convenu par ailleurs de poursuivre leurs discussions sur les rapports entre la commission vérité et réconciliation et le Tribunal Spécial”.*

While the first version explicitly confirmed the independence of the prosecutor yet indicated that further negotiations were needed on how exactly this independence would relate to the operations of the TRC, the second version reiterated the *status quo*, namely that the issue of the mutual independence of the two bodies vis-à-vis each other remained subject to further negotiations.

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<sup>64</sup> In the note submitted to the UN Delegation on the occasion of the first session, Iteka, Forsc and OAG had expressed doubts about the Government’s readiness to accept a truly independent judicial mechanism: “Au moment où les Nations Unies et le Gouvernement du Burundi étaient déjà en concertation pour mettre en place les mécanismes de justice transitionnelle, les mesures d’élargissement massif des prisonniers qualifiés de politiques se comprennent difficilement. Egalement, de nouvelles nominations des magistrats à tous les niveaux ont été opérés montrant une volonté du gouvernement de maintenir un contrôle serré sur le système judiciaire. L’adoption de la loi organisant le Conseil supérieur de la magistrature et la nomination de ce dernier, avec une prépondérance de personnes nommées par l’exécutif n’augurent d’aucune volonté gouvernementale de favoriser la mise en place d’un système judiciaire réellement indépendant de l’exécutif” (Iteka, Forsc and OAG, *op. cit.*, para. 4).

The question whether or not the government is ready to accept the independence of the prosecutor of the Special Tribunal touches upon the very fundamentals of the Burundian transitional justice issue and even of Burundi's political transition itself. As long as the executive branch is reluctant to accept that the judicial branch (be it at the national level or at the level of a Special Tribunal) exercises its judicial powers in full independence, it seems reasonable to conclude that the political transition has simply not come to an end. Separation of powers, independence of the judiciary and rule of law are fundamentals of any successful political transition.<sup>65</sup> From that perspective, the way in which 'recent' human rights violations – i.e. those violations which are not part of the country's legacy of the past but were committed under the incumbent regime - are dealt with is extremely revealing. Without entering into detail on this issue, it is worth referring to a paragraph in the latest report of the UN Independent Expert on the situation of human rights in Burundi:

*“The independent expert noted a lack of institutional will to shed light on the circumstances surrounding the forced disappearance and execution of those 30 persons between May and August 2006 in Muyinga. Instead, there appears to be an attempt by the Government to wish away the truth. The prosecutor in charge of this case was transferred, and it is suspected that his transfer was the result of the Government displeasure with his role in the investigation. Some of the witnesses and families of the victims are reported to have been intimidated and threatened by local administration and soldiers of the fourth military region”<sup>66</sup>.*

## **6. BURUNDI'S TRADITIONAL DISPUTE SETTLEMENT MECHANISM: THE BASHINGANTAHE**

During the ongoing negotiations process about Burundi's transitional justice process, reference has sometimes been made to the possible use of the traditional dispute settlement mechanism (the Bashingantahe) as a transitional justice mechanism.<sup>67</sup> *“Regarded as the embodiment of universal values and personal integrity, the ‘wise men’ who made up the institution played many roles in the communities they were chosen but the most important was the peaceful resolution of conflicts.”<sup>68</sup>* There is little doubt that the use of modernized, formalized and institutionalised gacaca tribunals in Rwanda to prosecute genocide suspects and the donor money this has generated, may have offered inspiration to some people in neighbouring Burundi. While the Arusha Agreement referred in very general terms to the need to promote and revalorize the spirit of Ubushingantahe, the peace agreements do not provide for a specific role for the Bashingantahe in dealing with the past. Within the framework of this paper – and in the absence of further field research -, we will limit ourselves to formulating two remarks on the potential role that Bashingantahe could possibly

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<sup>65</sup> Here, I am using the term in its classical meaning under the transition paradigm (see footnote 3).

<sup>66</sup> United Nations, Human Rights Council, *Interim report of the independent expert on the situation of human rights in Burundi, Akich Okola, A/HRC/4/5*, 26 February 2007, §62.

<sup>67</sup> See, i.a., Conseil National des Bashingantahe, *Mise sur pied de la Commission ‘Vérité et Réconciliation’ et du Tribunal Spécial au Burundi. Propositions du Conseil National des Bashingantahe / Sages traditionnels* (Bujumbura 2006).

<sup>68</sup> T. Dexter and P. Ntahombaye, *The Role of Informal Justice Systems in Fostering the Rule of Law in Post-Conflict Situations. The Case of Burundi* (Centre for Humanitarian Dialogue, Geneva 2005) 6.

play in telling the truth, establishing accountability, offering reparation and promoting reconciliation.

First, it is very clear that the Bashingantahe-tradition has strongly suffered from the political context in which it was and is operating. In summary, we may state that as much as the Bashingantahe were increasingly instrumentalised under the one party-regime by the Uprona party, they are now politically sidelined and disliked by the regime dominated by the CNDD-FDD. In addition, the traditional authority of the Bashingantahe may well, at the local level, be increasingly contested by the community level authorities that were elected during the local elections in September 2005. The current political context is therefore certainly not conducive to introducing this alternative approach in the current debate.

Secondly, although there is quite some literature<sup>69</sup> about the role Bashingantahe traditionally (and ideally) played in settling disputes at community level, little anthropological research appears to have been done about the role they have actually been able to play in the aftermath of, e.g., the 1972 or the 1993 massacres. Where they a vehicle of truth telling, did they provide a forum to rebuild civic trust, did they mediate between victims and perpetrators as far as restitution or other forms of reparation was concerned, were they instrumental in reintegrating former child soldiers in the local community, et cetera? Or was the tradition itself among the victims of the armed conflict? Any discussion about the possible formal recognition<sup>70</sup> of the Bashingantahe as a transitional justice mechanism should be based on a careful evaluation of the role they have ‘spontaneously’ played in dealing with the past (as there is no reason why tradition would ‘wait’ for an agreement between the government and the UN to be signed before rendering justice – assuming that it still has the potential of doing so).

## **7. TENTATIVE CONCLUSIONS ABOUT AN UNCERTAIN DESTINATION<sup>71</sup>**

The Burundi case raises fundamental issues about how to deal with the past. Some of our tentative conclusions are situated at an empirical level. Other findings are related to strategy and policy. Finally, questions also arise about the need to normatively intervene and how to do so. Rather than formulating definitive answers, this concluding section will primarily highlight some of the problems and issues that stem from the Burundi case-study.

Burundi’s transitional justice practice was decisively determined by political parameters. Its stated transitional justice policy was the result of a lengthy negotiations process between various parties. The gap between stated policy and actual practice was also primarily due to the political context. There was no winner or loser to the military conflict. Political power was, over the past fourteen years, spread over a large group of political and military players. The

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<sup>69</sup> See, i.a., P. Ntahombaye, A. Ntabona et al. (eds.), *L’institution des Bashingantahe au Burundi. Etude pluridisciplinaire* (Bujumbura, 1999); Z. Manirakiza, “Modes traditionnels de règlement des conflits : l’Institution des Bashingantahe”, (2002) *Au Cœur de l’Afrique* 39-58.

<sup>70</sup> In addition, this obviously raises the question – as with any other kind of traditional justice mechanism – how much interference by external actors the Bashingantahe tradition can afford without being fundamentally altered.

<sup>71</sup> The title is a wink to G. O’Donnell and P. Schmitter, *Transition from Authoritarian Rule: Tentative Conclusions About Uncertain Democracies* (Johns Hopkins University Press, Baltimore 1986).

international community (successfully) tried to reach a compromise that would, in the first place, ensure political stability and peace. Transitional justice was not a priority concern. Compared to the situation in neighbouring Rwanda, the situation in Burundi was fundamentally different. After the Rwandan 1994 genocide, there was a clear winner and a new political regime dominated by the former rebellion that had won the war. In such a setting, it was much more 'easy' for the international community to establish an international criminal tribunal to prosecute those responsible. (Note however that, before the ICTR, only 'losers' – in the political and military meaning of the term – have so far been brought to justice.<sup>72</sup>) Today, Burundi is more stable and peaceful than ever before during the past fourteen years. Was 'not dealing with the past' an acceptable price to pay? Was it a necessary price to pay? Is it a price Burundi should continue to pay today and also tomorrow?

People on all sides have suffered losses, in many ways (lives, relatives, friends, limbs, houses, trust in their neighbours, earnings, hope, et cetera). Do we know what people want in terms of 'justice' and does it really matter? The issue of popular consultation about people's expectations and views on transitional justice has come up only very recently in the debate about Burundi's transitional justice mechanisms. Ownership and participation by victims, survivors, returnees, internally displaced people and the population in general has been almost non-existent in the discussions so far. If peoples' expectations and views do matter indeed - could we possibly conclude otherwise? - how then do we design a process that allows people to voice their concerns, in a country where there is no track record at all of people having a say in political decision making at the macro-level? And should we also accept the outcome of such a (supposedly genuine, inclusive and representative) consultative process, even if it turns out to be the case that, for now, a large majority favours peace, stability and a return to normalcy instead of establishing accountability mechanisms, prosecuting and punishing?

What measures can be taken during (possibly lengthy) periods of transition? If truth is ever to be told, harm ever to be repaired, perpetrators ever to be held responsible, which kind of interim measures need to be taken in order to safeguard essential information? And how should trials or reparation processes (e.g. related to restitution of land) that are organised by the outgoing regime or during the period of transition but which are considered to be grossly unfair by local and international observers be integrated in the transitional justice process?

The growth of international human rights norms and the increasing number of human rights bodies that deal with monitoring and/or enforcement of these norms, have an obvious impact on the possibilities for States and societies to design their own transitional justice approach. For instance, the use of blanket amnesty legislation is no longer acceptable as a way to deal with crimes of international law. However, the Burundi case-study demonstrates how creative decision-makers can find ways to – at least temporarily – circumvent or hijack the international amnesty prohibition, even while incorporating the international norms in national legislation. What constitutes an appropriate response to this finding? Should norms be elaborated much further, so as to restrict national

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<sup>72</sup> See, i.a., T. Cruvellier, *Le tribunal des vaincus* (Calmann-Lévy, Paris 2006) and L. Reydam, "The ICTR Ten Years On. Back to the Nuremberg paradigm?" (2005) 3 *Journal of International Criminal Justice*, 977-988.

escape lanes? Is there a need for more and stronger international bodies to enforce international norms (but then how should these relate to international mediators who may need temporary escape lanes as part of their peace negotiations agenda)? Or should international law during periods of political transition tolerate a certain degree of hijacking of international norms?

The Burundi case finally raises a fundamental question about the very essence of transitional justice. How much truth, accountability, reparation and reconciliation can one reasonably expect in situations where the political transition has not yet come to an end? In its early days, the very notion of transitional justice was defined on the basis of the experience of “emerging democratic societies”, undergoing a political transformation from authoritarian to more liberal rule.<sup>73</sup> When transplanting this transitional justice experience to states that undergo a different kind of transition, or societies that struggle with a particular stage in their transition, new difficulties inevitably arise, some of which may be temporarily insurmountable.

### **About the Contributor**

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<sup>73</sup> See, i.a., N. Kritz, *op. cit.* and R. Teitel, *Transitional Justice* (Oxford, Oxford University Press 2000).