



Transitional justice in Burundi: issues and challenges

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Since 1965, 3 years after its independence, Burundi has experienced a series of violent crises (1965-1969, 1972, 1988, 1991 and 1993 to date¹) arising from politico-ethnic conflicts. The deepest crisis degenerated in a particularly acute manner into the genocide, massacres and pillaging perpetrated on the night of 21 October 1993, following the assassination of the first democratically elected Hutu President, Melchior NDADAYE. Now as then, no precise figures can be established as to the number of human lives destroyed by this murderous madness;² and, now as then, it would be imprudent to believe that the crisis is coming to an end, especially since RWASA Agathon's rebel movement, FNL PALIPEHUTU, has not yet buried the hatchet and continues to carry out massive human rights violations to this day.

In recent years, members of the political class have launched a peace process through negotiations aimed at identifying the causes of the Burundian conflict and finding solutions to achieve sustainable peace and political stability. They have agreed that "The conflict is fundamentally political, with extremely important ethnic dimensions".³

Amongst the other deep-seated causes of the Burundian conflict, is the existence of a culture of impunity. Indeed, the conflicts are often generated by a feeling of frustration over unpunished crimes committed in the past. A climate of impunity has developed progressively, eventually leading to the banalisation of crime. The result has been a negation of the rule of law or a failure of the authority of the law; the public authorities have lost all credibility in the eyes of the people, and there has been a return to the law of the jungle, where the reign of the strongest is reinforced by the development of feelings of vengefulness and hatred.

Persuaded that the fight against impunity is a moral and patriotic duty and that abdicating to impunity is equally criminal because it means rooting evil in people's consciences and sacrificing future generations by bequeathing them a poisoned or thorny situation, Burundian political leaders, assisted and even pushed by the international community, have sat down together to try to find appropriate solutions to various problems.

The solutions advocated in the legal realm include judicial and non-judicial measures. However, before addressing these mechanisms, there is a need to provide a summary description of the phenomenon of impunity in Burundi.

1. The issue of impunity in Burundi.

According to a United Nations document, "Impunity' means the impossibility, *de jure* or *de facto*, of bringing the perpetrators of human rights violations to account — whether in criminal, civil, administrative or disciplinary proceedings — since they are not subject to any investigation that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims".⁴

With the assistance of this definition, we may distinguish, in Burundi, *de facto* impunity from *de jure* or legislative impunity. *De facto* impunity consists of the failure noted in the legal system taken as a whole to prevent and punish the wholesale massacres, political assassinations, pillaging and devastation already committed in Burundi.

¹ Arusha Peace and Reconciliation Agreement for Burundi, Protocol III, Chapter One, Article 3, d).

² Over 300,000 dead according to the magazine *Jeune Afrique*, hors-série, No. 12, p. 202.

³ Arusha Agreement, Protocol I, Chapter One, Article 4. a.

⁴ See the definition in a United Nations document on the following site:
<http://www.derechos.org/nizkor/impu/joinet2.html>

While it is true that certain operational elements have been subjected to criminal proceedings, the instigators, who are often described as the “big fish”, do not seem to be prosecuted. This is the famous double standard of justice. The instigators are even comforted by a sort of institutionalisation of the phenomenon of impunity, which is held up as the mode of management of the country. This institutionalisation consists notably of the legislative or regulatory adoption of measures of forgetfulness or amnesty, or other measures of clemency that prevent inquiries or investigations into charged or alleged offences, prosecution of criminals, their trial or the execution of the legal decisions pronounced.

Eloquent examples include the promulgation of a law providing temporary immunity⁵ for leaders returning from exile,⁶ and ministerial ordinances⁷ in execution of Decree No. 100/02 of 3 January 2006 providing temporary immunity for political prisoners. Article One of this decree stipulates that temporary immunity is granted to political prisoners as identified by the Commission established by Decree No. 100/92 of 7/11/2005 on the creation, organisation and running of a commission in charge of identifying political prisoners. The different ministerial ordinances for the execution of the decree indicate that 3,852 so-called “political” prisoners were freed. Most of them were being prosecuted or had already been convicted for serious crimes.

It should be recalled that a commission in charge of investigating and making recommendations including on the existence and liberation of all political prisoners had already been established under the Arusha Agreement.⁸ That commission has produced its report. Which demonstrates that Decree No. 100/92 of 7/11/2005 and the ministerial ordinances of execution were not in the framework of the Arusha Agreement.

The setting up and running of such ad hoc commissions in defiance of the rules of procedure and form that are held up as characteristic of proper administration of justice is therefore, in our opinion, proof of the deliberate will of the Burundian executive to interfere directly with the powers traditionally assigned to magistrates. This *modus operandi* is even in contravention of constitutional and legal provisions and the principles of law, particularly the principles of separation of powers and *res judicata*.

Under the terms of Article 209 of Act No. 1/010 of 18 March 2005 on the promulgation of the Constitution of the Republic of Burundi, the judiciary are independent from the legislature and executive. The same article adds that the President of the Republic, head of state, is the guarantor of the independence of the judiciary. Nevertheless, the President of the Republic of Burundi and his Minister of Justice have granted clemency to persons prosecuted or convicted of crimes outside the framework of the Constitution or the law, including the laws of amnesty voted by Parliament and the rules which provide for setting aside of convictions, pardon or release of prisoners on parole.

While it is true that acts of clemency are provided for under the Arusha Peace and Reconciliation Agreement for Burundi signed on 28 August 2000⁹ (the Arusha Agreement), the government should have submitted a bill to Parliament giving legal effect to these provisions. The Arusha Agreement

⁵ This temporary immunity may be transformed or even has already been transformed into total immunity. Indeed, at the time of its adoption, this the law granted temporary immunity for two years, but the electoral law of 20 April 2005 has extended this immunity, since according to that law, those benefiting from immunity may not be prosecuted before the establishment of a truth and reconciliation commission (CNVR) and an international judicial commission of inquiry (CEJI).

⁶ Under the terms of Article 2 of Act No. 1/022 of 21 November 2003 on the temporary immunity of leaders returning from exile, this the immunity covers politically motivated offences committed during the period running from 01 July 1962 up until the transition period as provided for under the Transitional Constitution.

⁷ Ministerial ordinances No. 550/18 of 9/1/2006, 550/116 of 10/2/2006, 550/246 of 14/3/2006, 550/330 of 20/4/2006 on the temporary release of political prisoners detained in prisons in the Republic of Burundi.

⁸ See the Arusha Agreement, Protocol II, Chapter II, Article 15, 20. a) iii) and Decree No. 100/28 of 30 November 2001 on the establishment of an independent commission in charge of issues dealing with political prisoners.

⁹ See the Arusha Agreement, Protocol I, Chapter II, Article 8. b).

provides for the adoption by Parliament of an instrument (in keeping with international legislation) granting temporary immunity from prosecution for politically motivated crimes committed before the signing of the Agreement.¹⁰ It should be recalled that in Burundi the determination of crimes and offences and criminal proceedings are a matter of law.¹¹

These acts of clemency cannot even be interpreted as legal measures of amnesty, pardon or release on parole. Indeed, no recent law of amnesty for prisoners has been discussed and debated in the Burundian parliament with a view to its promulgation. Furthermore, “pardons may only be granted on enforceable sentences resulting from a final judgement”.¹²

Release on parole, for its part, only applies to persons already convicted and sentenced who have already served one quarter of their sentence or over ten years if they have been sentenced to life imprisonment¹³. However, the so-called political prisoners who were freed included prisoners in detention pending trial.

In Burundi, the issue of political prisoners is a very sensitive matter. It has provoked a lot of written and verbal debate and is the focus of controversy and political struggle within Burundian public opinion. Political offences *per se* do not exist within the Burundian legal arsenal. In the absence of a universal and univocal definition, Amnesty International considers as political prisoners “Any prisoner whose case has a significant political element: whether the motivation of the prisoner’s acts, the acts themselves, or the motivation of the authorities”.¹⁴

Without commenting on that definition, it should be recalled that international legal standards have expressly de-linked the most serious crimes from the standpoint of morality and common law. It is inadmissible that the authors of crimes as serious as genocide, crimes against humanity and war crimes may be eligible for acts of clemency. It should also be recalled that, on this subject, a United Nations report established that acts of genocide were perpetrated against the Tutsi minority in Burundi in 1993.¹⁵ Even the signatories of the Arusha Agreement agreed on the fact that violence in Burundi was notably expressed in the form of genocide¹⁶. And yet, some 80% of the persons who benefited this year (2006) from government releases were convicted or accused of murder or similar crimes perpetrated since the crisis of 1993.¹⁷ This is the case even though the former Minister of Justice, Didace Kiganahe, sent a memo to the principal state prosecutors and public prosecutors stipulating that the perpetrators of murders and similar crimes whose files contained substantive proof establishing their responsibility as material perpetrators must be excluded from the category of beneficiaries of temporary release measures.¹⁸

From this government policy of deliberately releasing criminals we may therefore deduce, on the one hand, that the fight against impunity for murder and similar crimes is far from being a priority for the current Bujumbura regime, or for the previous governments; and, on the other, that the present government runs the risk of excelling in the violation of the Constitution and the laws of Burundi (particularly regarding the separation of powers) and in non-compliance with the international undertakings contained in the international legal instruments ratified by Burundi, and particularly the violation of victims’ rights.

¹⁰ See the Arusha Agreement, Protocol II, Chapter II, Article 22, 2.c).

¹¹ See Article 159, 3° of Act No. 1/010 of 18 March 2005 on the promulgation of the Constitution of the Republic of Burundi.

¹² Article 108 of Decree Law No. 1/6 of 4 April 1981 on the reform of the criminal code

¹³ Article 115 of the abovementioned Decree Law.

¹⁴ The definition is on the following site: http://news.bbc.co.uk/2/hi/special_report/46095.stm; see also Amnesty International Handbook, at <http://web.amnesty.org/library/index/ENGEORG200012002>.

¹⁵ See report S/1996/682, points 481, 483 and 496, see also the following site: <http://www.burundi-agnews.info/ceirpt.htm#genocide>

¹⁶ Arusha Agreement, Protocol III, Chapter One, Articles 4 and 5.a).

¹⁷ See the journal Net Press of 13 January 2006 (<http://www.netpress.bi>).

¹⁸ Memo to Principal State Prosecutors and Public Prosecutors on the instruction of the Minister regarding long-term prisoners, 27 March 2004.

In relation to victims' rights, no concrete measures have been taken to date to ensure the safety of the victims or their witnesses following the release of the criminals. In addition, no policy for compensation or the restitution of assets has been envisaged for the victims. It is even difficult to imagine that the current government might create a compensation trust, considering that even the Fonds national des sinistrés (national disaster victims' trust) created in 2004 is not funded.¹⁹

The scourge of impunity can only really be brought under control if concerted action is taken to remedy its causes. That is why the signatories of the Arusha Agreement imagined both legal and non-legal mechanisms with a view to establishing the truth, repressing serious crimes and obtaining definitive reconciliation between the various components of the Burundian nation.

2. Mechanisms provided for under the Arusha Agreement

The signatories of the Arusha Agreement wanted to try a truth-seeking mechanism in Burundi: a commission on truth. Truth commissions are a recent phenomenon. The first commissions of this kind were set up in Latin America, particularly with the Sabato Commission in Argentina. Today, commissions exist or provisions have been made for commissions in certain countries that in the past have experienced periods of troubles or political instability that have degenerated into serious human rights violations. The main mission of these commissions is to establish the truth and responsibilities regarding the various serious human rights violations committed in the past, and to propose modalities for the reparation of prejudices and a sustainable reconciliation process.

In the case of Burundi, the mechanism is a direct emanation of the Arusha Agreement on Peace and Reconciliation in Burundi signed on 28/8/2000. The signatories of the agreement agreed on the setting up of a Commission Nationale pour la Vérité et la Réconciliation (CNVR, or national truth and reconciliation commission) whose missions are as follows²⁰:

- a) Investigating, i.e. shedding light on and establishing the truth about, the serious acts of violence committed during the cyclical conflicts that have plunged Burundi into mourning from Independence (1 July 1962) to the date of the signing of the Arusha Peace Agreement (28/8/2000), and classifying the crimes and establishing responsibilities as well as the identities of the perpetrators and the victims.
- b) Arbitrating and reconciling, i.e. establishing measures to promote reconciliation and pardon or proposing them to competent institutions, deciding on restitution of dispossessed assets to assigns or establishing compensation in consequence, or proposing any political, social or other measures aimed at promoting reconciliation that it deems appropriate. In this respect, the Transition National Assembly may vote on one or more laws establishing a framework for the granting of amnesty, in keeping with international legislation, in the case of political crimes to which it or the CNVR deems amnesty is applicable.
- c) Clarifying history by going back as far as possible to enlighten the Burundian people about their past and enable them to have a shared interpretation thereof.

However, it should be noted that the Arusha Agreement does not specify the different phases of the overall reconciliation process.

In addition, in the spirit of the Arusha Agreement, the CNVR should have been set up at the latest six months after the entry into office of the Transition Government.²¹ However, even now, the CNVR has not yet been set up despite the establishment of the transition government, which dates back to 1 November 2001, and the promulgation of a law on the CNVR.²²

¹⁹ Decree No. 100/006 of 30 January 2004 on the creation and organisation of the Fonds national des sinistrés.

²⁰ For more details, see Arusha Agreement, Protocol I, Chapter Two, Article 8, 1.

²¹ See Arusha Agreement, Protocol V, Preamble, Article 5,4.

²² Act No. 1/018 of 27 December 2004 on the missions, composition, organisation and running of the Commission Nationale pour la Vérité et la Réconciliation (national truth and reconciliation commission).

Furthermore, the Arusha Agreement states that the mission of the CNVR of describing the crimes and establishing the responsibilities and identities of the perpetrators and victims overlaps with the mission of the CEJI. However, it should be noted that the CNVR would not be competent to classify acts of genocide, war crimes and crimes against humanity. Such classification is under the jurisdiction of the CEJI²³ which, in the event that the existence of such crimes is established, will enable the UN to vote on a resolution confirming the existence of genocide and, on the other hand, enable the government of Burundi to ask the UN Security Council to establish an international criminal court to try and punish the guilty parties²⁴. There is therefore reason to question the usefulness of the CNVR if it cannot investigate or classify such serious crimes, since the establishment of truth and reconciliation should focus more attention on these very serious violations.

From another standpoint, there is reason to wonder whether the Arusha Agreement does not establish the CNVR as a genuine criminal court with the competence of classifying crimes, since in addition to its mission of seeking the truth and reconciliation, it has been imparted with a legal mission to the extent that the Arusha Agreement provides that all remedy and appeals regarding political assassinations and trials should be brought before the CNVR. If such a jurisdiction is granted to the CNVR, there is a risk of rendering subject to limitations or amnesty crimes that the CEJI would classify as not being subject to limitations or amnesty. In sum, the boundaries of the classification of crimes are not clearly defined in the Arusha Agreement.

In addition, there is reason to fear that the CNVR deals with common law crimes such as assassinations or murders that have already been subjected to the statute of limitations or amnesty measures. This also means that certain decisions of the CNVR could be contrary to the social order already protected by rights and law, particularly the rights acquired through an amnesty measure or legal decision. However, by definition, the CNVR should not be granted legal missions.

In addition to these legal or jurisdictional problems, there is the fear that the CNVR, after it is established, will face difficulties linked to the socio-political and security environment, human, material and financial resources, and the interests of the victims or their assigns. In order to be fully effective, the CNVR must first have the support and cooperation of the political regime in place in Burundi, along with the support of the population and possibly the international community. In other terms, the effectiveness of the CNVR will depend on its institutional and individual independence and on the will of all Burundians to tell the truth and free themselves from the weight of their past. Several scenarios can be envisaged.

The *first* scenario, which would be the ideal and most useful, would be characterised by the setting up of a totally independent CNVR, and the will of all Burundians to speak and know the truth and free themselves from the weight of their past. This supposes first of all that the current government manages to set in place a commission that, we should recall, has not yet been created.

It also supposes that the commissioners appointed are recognised for their irreproachable moral integrity and have no responsibility in relation to the events that have plunged Burundi into mourning. Although such personalities are not lacking in Burundi, it is difficult to believe that those are the only criteria that will be taken into account by those in power in choosing commissioners. One often has the impression that, in Burundi, most appointments are made on the basis of ethnic passions and/or membership in political formations in the President's sphere of influence. The criteria of competence and moral integrity are far from being the preoccupations of most Burundian decision-makers. The major challenge here is thus to be able to appoint members who inspire confidence in both the victims and the perpetrators.

²³ See Arusha Agreement, Protocol I, Chapter II, Article 8, 1.a and article 33 of Act No. 1/004 of 8 May 2003 on the punishment of the crime of genocide, crimes against humanity and war crimes

²⁴ Article 33 of Act No. 1/004 of 8 May 2003 quoted above and Arusha Agreement, Protocol I, Chapter II, Article 6,10.b).

This independence also supposes a lack of interference by the political authorities in the running and work of the commission. This implies that no instructions are given to the commission about its work, particularly by those in power or their political organisations, and that the commission is supplied with sufficient human, material and financial resources.

Finally, this scenario supposes that all Burundians wish and accept to reveal the truth, i.e. to admit the crimes they have committed, faithfully describe the unrolling of the facts or events they have seen or experienced, publicly denounce the operators and instigators, and to reconcile with each other and mutually forgive each other. The question is therefore whether all Burundians, victims and perpetrators, are convinced that it is high time to rid themselves of their feelings of rancour, hatred, suspicion and vengeance. However, measures of massive release of the perpetrators by sticking the label “political prisoners” on them, with no clear and consistent compensation policy, are not of a nature to encourage victims to forgive. It is not even in the interest of the perpetrators comforted by these release measures to publicly apologise for their crimes or ask forgiveness.

The *second* scenario is characterised by the lack of independence of the CNVR, but with the will of Burundians to free themselves from the weight of their past. In such a case, there is no point in even setting up such a commission. Under this scenario, the truth will not be discovered. The work of the commission will probably be contested. In consequence, the conditions for pardon and reconciliation would be lacking.

The *third* scenario would be an independent CNVR, but without a will of the Burundian people to free themselves from their past. It would indeed be illusory to think that all Burundians have already been liberated from the ethnic ghetto, the ideology of genocide and feelings of hatred. Those who do not intend to forgive will be indifferent to, or will contest or boycott the work of the commission. The consequences are the same as those described under the second scenario.

The *fourth* scenario is characterised by the absence of an independent CVNR and the absence of will in the Burundian people. This would mean, on the one hand, an absence of will from the political authorities to promote the revelation of the truth; and, on the other, an absence of will from the Burundian people to reactivate feelings of animosity and relive the tragic past. We could only expect the disappearance of the Burundian nation.

The *fifth* and final scenario is the absence of the CNVR. The government and/or certain Burundians would say that there is no need to return to the past, that the past is past and might even defend amnesty measures. Should we forget? Such indifference is also dangerous, because a wound that is left open or covered without being properly cleaned risks being infected or reinfected. If the past is not revisited, so as to discover the whole truth and establish responsibilities, the risk is the development of frustrations in the hearts of the victims or their assigns and the rooting of feelings of vengeance, prejudice, hatred, mistrust, suspicion, fear and bipolarisation.

Others would say that it is absolutely vital for Burundian justice to prosecute and condemn all those directly or indirectly involved in the crimes committed in Burundi. In this case, even if Burundian justice were one of the most independent and impartial in the world, and sufficiently equipped with human, material and financial resources (which is presently far from the case), would it be easy to believe that it can bring together reliable proof, even for events that took place over four decades ago? It is still difficult to believe that this dispute can be resolved in less than a century in light of the overwhelming number of cases. In addition, in the present Burundian context, would it really be possible to pursue certain newly elected authorities if it turned out that they were involved in genocide and/or other serious crimes without running the risk of destroying gains in terms of stability and democracy? And we would still have to modify the Burundian criminal justice system to meet international standards in terms of the fight against impunity for serious crimes. However, to reform the law, a competent, well-advised legislature with good will is needed. What of the one recently



elected in Burundi? Is it aware of the need to standardise Burundian law to meet international standards on the fight against impunity, and does it have the necessary will and determination? Is it willing to hire experts to study the issues?

What would happen if the CNVR were set up in the absence of a legal mechanism for punishment? In other terms, can we opt for a commission to discover the truth without punishing anyone? What would motivate the perpetrators of heinous, repulsive and ignominious crimes to come and publicly confess their infamy and what would incite victims of human barbarity to come forward to testify before a commission that can neither punish the perpetrators nor award compensation to the victims?

Perhaps it was to answer those questions that the signatories of the Arusha Agreement agreed on the need to set up other, complementary mechanisms. They effectively agreed that the Transition Government should ask the United Nations Security Council to set up an international judicial commission of inquiry (Commission d'Enquête Judiciaire Internationale, or CEJI) to investigate, establish the facts, and classify the crimes of genocide, war crimes and crimes against humanity perpetrated during the period running from Independence (1 July 1962) to the date of the signing of the Agreement (28/8/2000), and establish responsibilities and submit a report to the UN Security Council.²⁵

The also agreed on “the request, by the Government of Burundi, for the establishment, by the United Nations Security Council, of an international criminal court in charge of trying and punishing the guilty parties, in the event that the report established the existence of acts of genocide, war crimes and other crimes against humanity”.²⁶

It should, however, be deplored that so far none of the mechanisms provided for since the signing of the Arusha Agreement has been set in place. At the time of the promulgation of Act No. 1/018 of 27 December 2004 on the missions, constitution, organisation and running of the Commission Nationale pour la Vérité et la Réconciliation, it was assumed that the government would soon appoint its members. It could be supposed that the government was afraid to set up a Commission that would soon be disparaged by both the national and international communities for the lack of guarantees of the independence of the Commission as a whole or of the individual integrity and competence of its individual members.

Until the point when the United Nations became involved, the government of Burundi had intended to act alone in setting up the CNVR. However, on 24 July 2002, the President of Burundi in office at the time, Pierre Buyoya, addressed a letter to the Secretary General asking the UN to form an international judicial commission of inquiry for Burundi, as provided for under the Arusha Agreement. In response to that request, on 26 January 2004 the president of the Security Council asked the UN secretary-general to send a review team to Burundi to assess the appropriateness and feasibility of setting up such a commission.²⁷

After travelling to Burundi on 16-24 May 2004, the UN review team led by Undersecretary General for Political Affairs Tuliameni Kalomoh produced its report, which was made public on 11 March 2005 by the Security Council²⁸, just a few months after the promulgation of Act No. 1/018 of 27 December 2004 on the missions, constitution, organisation and running of the CNVR.

²⁵ Arusha Agreement, Protocol I, Chapter II, Article 6.11.

²⁶ Arusha Agreement, Protocol I, Chapter II, Article 6.10).

²⁷ For more details on the mission mandate, see S/2004/72

²⁸ S/2005/158



3. Mechanism proposed by the UN

In its report, the UN team recommended “the creation of a two-fold mechanism: a non-judicial fact-finding mechanism, in the form of a truth commission, and a judicial mechanism for establishing responsibilities, in the form of a special chamber within the Burundian legal system”²⁹. According to the UN Secretary General, this twofold mechanism was justified by the need to “avoid setting up two practically identical commissions operating in parallel,”³⁰ referring to the CNVR and the CEJI.

In making this choice, the Review Team stated that it “took account of the Arusha Agreement, the needs and expectations of Burundians, national capacities for the administration of justice, the established principles and practices of the United Nations, as well as the concrete value and viability of any solution envisaged”³¹.

In keeping with its mandate of examining the possibility of restricting the *ratione temporis* jurisdiction of the truth commission, the review team was “convinced that, for the commission is to have added value, its *ratione temporis* jurisdiction must extend back before the events of 1993, all the way to Independence”³², i.e. to 1 July 1962, as provided under Article 2,a of the aforementioned Act of 27 December 2004.

This proposal regarding jurisdiction seems to us to be logical to the extent that it was only for the massacres of the Tutsis in 1993 that it was legally determined that a crime of genocide had been committed in Burundi³³ whereas the inquiry commission of 1995 was of the opinion that, if we chose on exercise an international jurisdiction due to the acts of genocide perpetrated in Burundi, the inquiry should extend to the acts perpetrated in the past, particularly those linked to the events that took place in 1972, “when it was generally agreed that a systematic effort had been undertaken to exterminate all educated Hutus”³⁴. The review team even noted that the added value of the future commission “should be examined in the light of the results obtained by previous commissions, their usefulness and their impact on Burundian society”³⁵.

Regarding the judicial mechanism, the review team opted for the creation of a special chamber integrated into the Burundian legal system. It was convinced that such a mechanism would make it possible to “reinforce the material and human resources of the system by providing it with a corps of qualified judges, prosecutors and defence counsels, as well as an experienced registry”³⁶.

According to the review team, the jurisdiction of the special chamber would be “to prosecute those responsible firsthand for the acts of genocide, crimes against humanity and war crimes committed in Burundi”.

Its *ratione temporis* jurisdiction, restricted to the phases of conflict, would include at least the period running from the beginning of 1972 to the end of 1993³⁷. The team was convinced that “a judicial mission of inquiry that would conduct in-depth criminal investigations on the individual criminal liability of the presumed perpetrators of the massacres committed since 1962 across the national territory, without a prosecution strategy capable of orienting investigations, would represent a lengthy and expensive undertaking and would be overwhelmed with work”³⁸.

²⁹ S/2005/158, Letter dated 11 March 2005, addressed to the President of the Security Council by the Secretary General.

³⁰ Ibid.

³¹ Ibid., § 53.

³² Ibid., § 23.

³³ S/1996/682, points 481, 483 and 496

³⁴ S/1996/682, § 498.

³⁵ S/2005/158, § 17

³⁶ S/2005/158, § 60.

³⁷ S/2005/158, § 61.

³⁸ S/2005/158, § 23.

The proposed twofold mechanism appears interesting to the extent that it seeks to reconcile the imperatives of uncovering the truth, reconciliation and fighting against impunity. However, certain aspects of this mechanism are delicate.

First of all, the formula seems to be imposed from the outside (Kalomoh Report) since there was no consultation or inquiry to discover the opinion of a broad section of the public on this mechanism. Will it win the confidence and support of Burundians?

Secondly, the formula does not at all correspond to what the Arusha negotiators agreed upon, since the judicial mechanism proposed by the United Nations mission report and endorsed by the Security Council rules out the idea of an international criminal court, which was provided for under the Arusha Agreement. Indeed, the special chamber would not be an international court, since it would be part of the Burundian legal system, although foreign judges are expected to sit in it.

The fact that the special chamber would be created within the Burundian legal system, and that it would therefore be restricted strictly to Burundian law despite its international component, does not reassure anyone with a thirst for independent, neutral, impartial and effective justice. We have already noted that in terms of appointments, criteria of competence and moral integrity are far from being the main concerns of most Burundian decision-makers. Instead, nominations tend to take account of ethnic origins and/or membership in political formations, particularly that of the President. Given this approach, there is no guarantee that the presumed guilty parties would not escape the special chamber due to the lack of effective cooperation by other national governments, at least regarding crimes of genocide, war crimes and crimes against humanity.

Finally, the review team has not provided convincing reasons for not going back to 1 July 1962, the date of the Independence of Burundi. In light of the non-applicability of statutory limitations to crimes under international law, the ideal would be not to restrict the jurisdiction of the twofold mechanism.

It is perhaps with a view to achieving a common vision and consensus on the legal outlines and the modalities of the creation and running of a viable, credible and effective twofold mechanism that the Security Council requested that the UN Secretary General send another team to conduct negotiations with the government of Burundi³⁹. Thus, a UN delegation led by Nicolas Michel, United Nations Deputy Secretary General, Legal Affairs and Legal Counsel, arrived in Bujumbura on 26 March 2006. The inaugural sitting of the negotiations between the government and the United Nations was opened in Bujumbura on 27 March 2006 by Martin Nduwimana, first vice-president of Burundi.

The Burundian government took advantage of the opportunity to present a memorandum prepared by the Burundian delegation appointed by the First Vice-President of the Republic of Burundi⁴⁰. The following point will deal with the difficult issues that received particular attention from the UN delegation.

4. Mechanism proposed by the Government of Burundi and reactions of the UN delegation.

The memorandum proposes that the non-judicial mechanism be called “Commission pour la Vérité et le Réconciliation au Burundi” (CVR, or Commission for Truth and Reconciliation in Burundi). The judicial mechanism would be named “Tribunal spécial au Burundi” (Special Court in Burundi)⁴¹ for which a prosecutor’s office would also be set in place.

Regarding the legal framework of the establishment of the twofold mechanism, the memorandum proposed that it be governed by a single national law and a single agreement between the UN and the government of Burundi. The Burundian delegation proposed in effect that this twofold mechanism be set in place by the President of the Republic of Burundi upon consultation with the Secretary General

³⁹ UNOB, press release, ONUB/PIO/PR/115/2006 of 27 March 2006.

⁴⁰ Order No. 120/VP1/01/05 of 26 October 2005 on the nomination of the members of the government delegation in charge of negotiating with the United Nations Organisation on the establishment of a truth and reconciliation commission.

⁴¹ Memorandum of the Burundian delegation in charge of negotiating with the United Nations on the establishment of a truth and reconciliation commission and a special court in Burundi, point 16.



of the United Nations⁴². The memorandum proposes a mandate of 2 years for the CVRB and 3 years renewable for the special court and the prosecutor's office⁴³.

The UN delegation favours two distinct national laws and two separate international agreements "in light of the fundamental differences that exist between these two mechanisms particularly in terms of their missions, particular specificities linked to their setting up procedure and distinct evolution over time".⁴⁴

While the Burundian delegation consciously omitted a broad popular consultation process with a view to setting up the CVR, the UN delegation felt that such a process "should aim not only at informing, raising awareness and creating familiarity, but especially promoting broad participation and reactions from all of the Burundian population to the preparation and setting up of the twofold mechanism"⁴⁵. The Burundian delegation eventually accepted the UN support for a prior process of broad popular consultation, whose details, however, are to be determined at a later date.⁴⁶

In terms of constitution, the memorandum proposes a membership of 7 for the CVR, including four Burundians and three foreign members⁴⁷, with a chair of Burundian nationality, a foreign deputy chair, a rapporteur of unspecified nationality and four commissioners.⁴⁸ The selection procedure would be entrusted to a selection committee set in place by the President of the Republic of Burundi upon consultation with the Secretary General of the United Nations.⁴⁹

The UN delegation felt that, given the imperious necessity for the CVR to be independent, credible and competent, the selection procedure proposed by the Burundian delegation was inappropriate. Thus, the two delegations agreed on the participation of the United Nations both in the selection procedure and the final decision.⁵⁰

The government delegation also spoke out on the *ratione loci* and *temporis* jurisdiction of the CVR. It will investigate, fact-find and classify crimes and offences linked to the different crises experienced by Burundi from the time of its Independence up until the date of the establishment of the commission⁵¹. In addition to fact-finding and classifying crimes and offences, the *ratione materiae* jurisdiction of the CVR will essentially focus on the identification of the presumed guilty parties and victims of acts classified as genocide, crimes against humanity and war crimes as well as other serious acts of violence.⁵²

Upon a proposal by the government delegation to grant full powers to the CVR to determine cases where a law of amnesty could be voted without first establishing a distinction between crimes and common-law or political offences and the crime of genocide, crimes against humanity and war crimes, the UN delegation pointed out that amnesty would be inadmissible for crimes to which statutory limitations are not applicable, not only under international law, but also under Burundian positive law, particularly Article 4, Paragraph 2 of the aforementioned Act No. 1/18 of 27 December 2004, which provides that crimes of genocide, crimes against humanity and war crimes may not be amnestied.⁵³

⁴² Ibid., points 24,30, 43 and 80

⁴³ Ibid., points 28 et 82

⁴⁴ Thematic report on the discussions and negotiations between the Burundian delegation in charge of negotiating with the United Nations on the establishment of a truth and reconciliation commission and a special court in Burundi and the United Nations Delegation, meeting 27-31 March 2006 in Bujumbura, Annex, Point 5

⁴⁵ Ibid. point 9

⁴⁶ Ibid. point 10

⁴⁷ Ibid. point 29

⁴⁸ Ibid. point 42

⁴⁹ Ibid. point 30

⁵⁰ Ibid., point 13

⁵¹ Thematic report, (ibid.), point 27 (a).

⁵² Ibid., point 27 (b) et 44

⁵³ Ibid, point 17.

Several questions are raised on the subject of the constitution and jurisdiction of the CVR. Indeed, how can we imagine that a restricted group of 7 people could cover the whole country in the space of two years and hear all Burundians able to bear witness regarding acts, crimes and even offences⁵⁴ dating back to the Independence of Burundi? It should be noted that the review team had even proposed a smaller number: only five members, including three internationals and two Burundians.

In terms of the judicial mechanism, the memorandum by the government delegation states that the Special Court would be presided by a non-national assisted by three Burundian deputy-presidents⁵⁵ and would include two chambers: a chamber of first instance created in each of the three courts of appeal, respectively in Bujumbura, Gitega and Ngozi and one chamber of appeal in Bujumbura covering the whole of the national territory. Each chamber would have a bench of 7 judges including 4 non-nationals and 3 Burundians⁵⁶. In terms of *ratione personnae, materiae, loci* and *temporis* jurisdictions, the special court would try the persons presumed responsible for the crimes and offences committed during the same period⁵⁷.

The Office of the Prosecutor would be led by a prosecutor-general of foreign nationality assisted by a Burundian deputy prosecutor and, for each chamber, at least three deputies of unspecified nationality.⁵⁸

It should also be pointed out that the Special Court and the Burundian courts would have competing jurisdiction, but that the special court would have priority over the Burundian courts.⁵⁹ Even the principle of “*non bis in idem*”⁶⁰ would be challenged to the extent that a person already tried could also be brought before the Special Court.⁶¹

On the subject of the judicial mechanism proposed by the Burundian delegation, the UN delegation reminded the former that in United Nations practice, a chamber of first instance, a chamber of appeal, a prosecutor and a registrar are required. In terms of constitution, the chamber of first instance would include three sitting judges whereas the appeal chamber would have five sitting judges.

Other points contained in the memorandum were discussed and the two delegations agreed to continue negotiations.

5. Conclusion

The Burundian and international communities and especially the victims and/or their loved ones need to hear the truth, and especially from the very people who have committed serious crimes. The victims and/or their loved ones also need to hear about one or more equally serious crimes that the victims may have committed in order to be “genocided”, massacred, assassinated and/or tortured. They also need to learn the truth about the fate or remains of missing persons in order to be able to finally exhume them and bury them with respect for human dignity, and organise a definitive funeral ceremony.

The victims or their loved ones also need the perpetrators or, failing that, the people close to them to accept responsibility for the suffering inflicted and publicly beg the pardon of the victims, who are the

⁵⁴ Under the terms of Article 6 of Decree Law No. 1/6 of 4 April 1981 on the reform of the criminal code, offences are violations subject to imprisonment of more than 2 months but no more than 5 years; beyond which, we refer to crimes.

⁵⁵ Thematic report of the discussions and negotiations between the Burundian delegation in charge of negotiating with the United Nations on the establishment of a truth and reconciliation commission and a special court in Burundi and the United Nations Delegation, meeting 27-31 March 2006 in Bujumbura, Annex, point 73

⁵⁶ Ibid. points 74, 76 and 77

⁵⁷ Point 98

⁵⁸ Point 85

⁵⁹ Points 100 and 101

⁶⁰ The principle according to which no one may be prosecuted or punished for an offence of which they have been previously acquitted or convicted in a final judgement in keeping with the law and the applicable criminal procedure.

⁶¹ Point 103



only ones with the right to grant pardon. Indeed, pardon and reconciliation cannot be dictated and cannot be general and anonymous. They also need to hear the government of Burundi and the international community officially recognise that the suffering inflicted on them constitutes acts of genocide, war crimes or crimes against humanity committed unjustly, with extreme brutality, on innocent persons.

Their thirst for justice may only be satisfied by the establishment of an independent and effective mechanism to seek the truth and bring to justice the people involved in serious crimes. Negotiations with a view to creating this mechanism are underway between the government of Burundi and the UN. In our opinion, the foremost challenge resides in choosing an appropriate mechanism for establishing responsibilities for the crimes of the past and the rehabilitation of the victims.

While both delegations already unanimously agree that the Burundian and international commissioners appointed must be people of high moral standing and integrity, with the necessary qualifications, having their own budget, who swear to exercise their functions in all independence and impartiality⁶² and “enjoy the privileges and immunities, exemptions and facilities granted to diplomatic agents under the Vienna Convention of 1961 on diplomatic relations”⁶³, the second major challenge remains that of reassuring the Burundian public that no favouritism – especially linked to clientelism, ethnic or regional origins or political affinities – is involved either in the process of appointing the members or in the truth seeking procedure itself. A poor choice of members would suffice to bring about the failure of the truth-seeking and reconciliation process.

The setting in place of the twofold mechanism is not enough. The effective cooperation of the witnesses, the victims and the perpetrators of the violations and crimes is also required. However, in the Burundian culture, sins are only confessed in secret, whispered in the ear of a priest. This culture is not of a nature to comfort public confessions of the serious crimes that have been committed, particularly since the perpetrators may have to answer for those crimes before the special court. Obtaining massive popular support for the truth-seeking and punishment process is, in our view, another sizeable challenge.

Such are, in short, the major issues and challenges to be faced by transitional justice in Burundi.

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⁶² Point 50

⁶³ Point 126