Does Peace Follow Justice or Vice Versa? Plans for Postconflict Justice in Burundi

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INTRODUCTION

In recent years, two forces have driven the spread of international accountability instruments in postconflict situations. First, foreign states and an emerging global civil society are lobbying for judicial accountability in order to foster peace by rendering justice to the victims and deterring potential wrongdoers. Second, the states concerned are developing an interest in postconflict justice. For these actors, the increased attention of worldwide media provides distinct benefits for victims by recognizing their suffering. Concrete advantages include easier access to donor money and the prospect of increased economic and infrastructure development.

The latest plans for postconflict justice concern Burundi. By its ratification of the Rome Statute of the International Criminal Court in 2004, Burundi has exhibited a positive approach toward postconflict justice. In June 2005, the United Nations Security Council gave the secretary-general a mandate to negotiate the establishment of revelant mechanisms with the Burundian authorities.[1] For a fragile state like Burundi, postconflict justice needs to foster peace, or, at the very least, not endanger it. After a brief overview of the Burundian conflict and a presentation of the current plans

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for postconflict justice, this paper will question whether the envisaged mechanisms meet the goal of promoting peace. To a large extent, the analysis of Burundi's case will be based on past experiences with postconflict justice mechanisms.

ANAMNESIS: BURUNDI AT THE CENTER OF A CRISIS-RIDDEN REGION

Burundi has much in common with its northern neighbor, Rwanda.[2] Both countries have pre-colonial histories as powerful kingdoms, followed by a period of German and, subsequently, Belgian colonial leadership, and a blood-soaked recent past. Today, both face massive problems of poverty, overpopulation, and threats emanating from groups operating in the territory of the neighboring Democratic Republic of the Congo. Both countries' populations are composed of a majority of Hutu (about 85 percent), a minority of Tutsi (15 percent), and a dwindling number of a pygmy people called Twa. Nevertheless, there are substantive differences between Rwanda and Burundi. In contrast to pre-colonial Rwanda, which had a strong army loyal to the Tutsi king, pre-colonial Burundi was characterized by conflicts between the king, known as the *Mwami*, and several competing royal princes, known as *Ganwa*, who were neither truly Tutsi nor Hutu. Each party to these struggles was constrained by necessity to mobilize all segments of the population under his control, without regard to their ethnicity.[3]

Ethnicity continues to dominate the debate over conflicts in Burundi and Rwanda. While media outlets worldwide usually explain the regular outbursts of violence as the result of ethnic differences, experts reject such a reading of the conflicts as overly simplified.[4] It has lately been suggested that discussion of ethnicity in Rwanda and Burundi is unproductive and should cease because combatants use talk of ethnicity only to disguise ulterior political ends.[5] And indeed, it is not so much ethnic hatred that is the basis of current conflicts as it is the desire of certain groups to stay in power. In countries with almost hopeless poverty, political power often appears to be the only way to accumulate wealth. In the struggle for power, ethnicity serves as a powerful factor for mobilizing one's supporters.[6]

It can be said with some certainty that colonialism increased ethnic awareness and exacerbated ethnic tensions.[7] The colonial powers did not remove the *Mwami*, but practiced an "indirect rule" over Rwanda-Urundi, as it was then called. The monarchy also survived Burundi's transition to

independence in 1962, as politics, thus far dominated by struggles between different royal lines, became more ethnicized. Those struggles eventually led to the elimination of the Hutu political elite in a massacre in 1965, effectively ending the political participation of the Hutus for some decades. In the following year, Burundi became a Tutsi-led republic with the Union for National Progress (UPRONA) as the single party.[8] At this point, political parallels with Rwanda, where the monarchy was overthrown by a Hutu rebellion in 1959, may seem to come to an end, but wrongly so; in fact, the relationship between the two countries resembles that of a photograph and its negative. In Burundi, Hutu fell victim to massacres just as the Tutsi would become the victims of genocide in Rwanda. The Burundian pogroms occurred in large-scale waves. One of the most deadly pogroms took place in 1972 as a reaction to a Hutu upheaval. The Hutu intelligentsia were the main target, and 100,000 to 200,000 people were killed. No one was ever held accountable.

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Outbreaks of violence in Rwanda and Burundi were often interrelated. Violence against an ethnic group in one country gave the leaders (or rebels) that identified with the targeted group in the other country a pretext to respond with violence against members of the other ethnic group in their own land. In the mid-1970s, the pressure on Hutus in Burundi decreased after Jean Baptiste Bagaza took power in a military coup d'état in 1976. Bagaza's regime grew increasingly autocratic and was brought to an end in 1987 by a military putsch led by Major Pierre Buyoya. Severe ethnic tensions ensued. A desperate situation at home and pressure from abroad eventually prompted Buyoya to initiate reforms, and multiparty democracy was introduced in 1992.

Presidential and parliamentary elections in 1993 resulted in a win for the opposition, and the leader of the Front Démocratique du Burundi (FRODEBU), Melchior Ndadaye, became president. Although neither Ndadaye's FRODEBU nor UPRONA were exclusively Hutu or Tutsi in composition, the former was perceived as predominantly Hutu and the latter as Tutsi, a fact which did little to attenuate growing ethnic tensions. In October 1993, Ndadaye was killed in a plot devised and executed by the Tutsi-dominated army. An uncontrolled outbreak of violence through-

out the entire country followed, costing the lives of an estimated 50,000 people, more or less equally dispersed among Hutu and Tutsi, and displacing thousands of others.

These events exacerbated animosities against Tutsi in Rwanda. The 1994 Rwandan genocide occurred only six months later, killing an estimated 1 million people. Again, a single event affected both Burundi and Rwanda, when Burundian interim President Cyprien Ntaryamira and Rwandan President Juvénal Habyarimana died together in a missile attack against the Rwandan president's plane. Burundi sank into a civil war, pitting the army and Tutsi militias against "established" Hutu rebel groups like Palipehutu Forces for National Liberation (PALIPEHUTU-FNL) as well as new ones, such as the Conseil National pour la Défense de la Démocratie (CNDD) and its armed wing, the Forces pour la Défense de la Démocratie (FDD).

As civilian power faded, another military coup was inevitable. It occurred in July 1996 and restored Buyoya to power. Confronted with worldwide condemnation and embargoes imposed by neighboring countries,[9] Buyoya agreed to hold peace talks in 1998. The vigorous intervention of Nelson Mandela was necessary to conclude a peace agreement, the so-called Arusha Accords of August 2000.[10] The predominantly "Tutsi" parties,[11] however, signed with reluctance, wary of ceding power. Pursuant to the Arusha Accords, a transitional period of three years began in November 2001, based on an interim constitution. During this period, UPRONA leader Buyoya at first continued to hold office as president, with FRODEBU leader Domitien Ndayizeye, a Hutu, as vice-president, before the two switched positions after 18 months. Thus, Ndayizeye became president in 2003.

Negotiations over a post-transitional constitution were stalled by outbreaks of violence and disagreement over the future partitioning of power. Some parties represented in the transitional institutions felt little desire to bring about a new constitution which would expose them to elections; that is, to the risk of losing influence, posts, and privileges. But pressure from the former rebel group CNDD-FDD, which had become part of the transitional system only in November 2003,[12] eventually drove the process forward. In August 2004, a formula for power sharing under the post-transitional constitution was stipulated in the Pretoria Agreement,[13] according to which 40 percent of the seats of the national assembly and of the cabinet should be reserved for ethnic Tutsi, irrespective of their party affiliation. The second chamber of parliament, the senate, would be evenly

divided among Tutsi and Hutu. Provision was also made for the representation of both groups in the administration and the security forces. Most "Tutsi" parties, however, subsequently opposed this compromise, claiming that instead of ethnicity, affiliation to a certain "ethnic" party should be the relevant criterion for the establishment of quotas. The driving force behind this tactic was the desire to retain power, rather than true concerns about the security of the Tutsi minority. On November 1, 2004, the transitional constitution expired and the new constitution entered into force on a provisional basis. Slowly, opposition to the new constitution dissipated as the ethnic repartition stipulated in the new constitution became a *fait accompli*. The constitution was eventually adopted in a referendum in February 2005.

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After a delay of some months, elections were carried out first on the communal and subsequently on the national level. Yet the campaigns were not free from violence, nor the elections from irregularities. The CNDD-FDD won landslide victories,[14] and its leader, Pierre Nkurunziza, was consequently elected president on August 19, 2005.[15] It is still too early to assess whether Burundi will become more peaceful and stable following these changes to the political landscape. In addition to pressing economic and social problems, the last remaining rebel group, the PALIPEHUTU-FNL, has not disarmed or been integrated into the new system. This constitutes a major potential for instability, which the new government must deal with urgently.

THERAPY: BURUNDIAN PLANS FOR POSTCONFLICT JUSTICE AND THE RECOMMENDATIONS OF THE UNITED NATIONS

The rise in prominence of postconflict justice since the beginning of the 1990s and, in particular, since the example set by Burundi's neighbor, Rwanda, made it impossible to exclude the issue of postconflict justice from the negotiations of the Arusha Accords. Remarkably, parties to the Arusha Accords recognized that genocide, war crimes, and "other" crimes against

humanity had been committed against both ethnic groups since independence and stipulated the fight against impunity as a political principle for the future.[16] However, this did not require a sacrifice from any of the parties to the agreement because questions of individual accountability were left unresolved at the time.

Negotiators agreed that the task should be endowed to an International Judicial Commission of Inquiry and, should the commission find that such crimes were committed, to an International Criminal Tribunal. Both institutions would be established by the UN Security Council.[17] In addition, a National Truth and Reconciliation Commission (NTRC) would be launched to investigate and classify crimes, identify perpetrators and victims, promote reconciliation, and clarify the national history. To avoid overlaps with the proposed International Judicial Commission of Inquiry, genocide, crimes against humanity and war crimes would be excluded from its competence.[18] In December 2004, without much debate, a law on the implementation of the National Truth and Reconciliation Commission was adopted. The commission would be composed of 25 Burundians of high moral regard. Procedures before the commission would be of a quasi-judicial, adversarial nature and would include the examination of witnesses.[19] As of this writing, the law has yet to be implemented.

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The Arusha Accords raise the question of whether a National Truth and Reconciliation Commission that is not responsible for genocide, crimes against humanity, and war crimes can be effective. Also, an International Judicial Commission of Inquiry is an institution without precedent, whose mandate would need further clarification. To explore these and other questions, the secretary-general dispatched an assessment mission after the government of Burundi requested the establishment of an International Judicial Commission of Inquiry.[20] The assessment mission conducted its field research in May 2004, but its report was not released until March 2005, roughly two weeks after the post-transitional constitution was adopted by referendum.[21] Undoubtedly, the secretary-general chose this timing to avoid upsetting progress during the sensitive phase preceding the referendum on the new constitution.

In its report, the assessment mission advised against the establishment

of an International Judicial Commission of Inquiry in addition to a National Truth and Reconciliation Commission. The report argued that the added value of such a Commission of Inquiry would be minuscule because its mandate to investigate incidents of individual criminal responsibility in the time since Burundi's independence might prove to be a never-ending endeavor. Moreover, there would be no guarantee that the findings of the commission would not be rejected by a subsequently established court.[22] Instead the report recommended the establishment of a single NTRC of mixed composition, similar to the commissions for Sierra Leone or East Timor. The NTRC would be established by a national law in furtherance of an international agreement to be concluded between the United Nations and Burundi. It would be composed of two national and three international members, the latter prevailing in number in order to guarantee independence, while the participation of the former should ensure a sense of national ownership of the commission. The commission's mandate would exceed mere fact-finding and would include the determination of the causes and the nature of the conflict, the classification of crimes committed since 1962, and the identification of those responsible for crimes violating international law throughout the conflict. Technical support for the NTRC would be provided by investigative and research units, both composed of national and international experts. The UN Mission in Burundi would be charged with providing security.

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The assessment mission emphasized that four past commissions of inquiry in Burundi had all been ineffective, not least because their repeated recommendations to end the culture of impunity had never been implemented.[23] At the same time, the international community was certainly not prepared to shoulder the financial burden of a third *ad hoc* tribunal. The financial and operational difficulties of the Special Court for Sierra Leone also made this type of tribunal seem an unattractive alternative. As a result, the assessment mission recommended the establishment of a Special Chamber within the national judiciary, comparable to the War Crimes Chamber within the court of Bosnia and Herzegovina. Like the NTRC, the

Special Chamber would form part of the national legal order, established pursuant to an agreement between Burundi and the UN. The Special Chamber would have jurisdiction to try those bearing the greatest responsibility for genocide, crimes against humanity, and war crimes, with its temporal jurisdiction limited to specific periods, including at a minimum the events between 1972 and 1993. Amnesties would be invalid before the Special Chamber,[24] which would consist of trial and appellate panels with three and five judges, respectively. The majority of the judges, as well as the prosecutor and registrar, would be international. The office of the prosecutor and the supporting staff of the judges would also include international personnel. Compared to the envisaged NTRC, the personal and temporal jurisdiction of the Special Chamber would be much more limited. As a criminal tribunal, it would focus on the acts of specific persons during specific events with greater intensity than the NTRC's resources would allow. At the same time, it would be unable to consider the entirety of the conflict, including its causes and course. Each institution would therefore cast a different light on Burundi's history, though both would overlap in as far as they would be mandated to make pronouncements on the criminal responsibility of individuals.

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The UN Security Council adopted the recommendations of the assessment mission and requested the secretary-general to enter into negotiations with the Burundian authorities to bring about their implementation.[25]

LEARNING LESSONS FROM PAST EXPERIENCE

It was certainly not the purpose of the assessment mission to produce a draft of postconflict mechanisms for Burundi that would be ready for signature. But in light of the upcoming negotiations, some remarks on the proposal seem appropriate, addressing three points of concern that are to a large extent based on past experiences and debates about the parallel operation of judicial and non-judicial accountability mechanisms.

Information Sharing and the Rights of the Accused

The report of the assessment mission recommends that the NTRC

and the Special Chamber share information and evidentiary material and that cases be referred from the commission to the Special Chamber when appropriate. This recommendation might have been made in light of the negative experiences of the Sierra Leone case. The relationship between the Sierra Leonean Truth and Reconciliation Commission (TRC) and the Special Court for Sierra Leone proved to be cumbersome. In two cases, the Special Court for Sierra Leone refused to authorize an accused to testify before the TRC for Sierra Leone. While in one case it was not convinced that the accused had voluntarily agreed to testify, in the other case the Special Court feared the testimony would end up as a "spectacle" that might compromise the case against the accused.[26] With the envisaged institutions for Burundi, such a problem could be overcome by better timing. If the NTRC finishes its work before the Special Chamber begins, the operation of one institution would not interfere with that of the other.

Such timing, however, raises concerns regarding the right of the accused to refrain from self-incrimination, a right that forms part of major human rights instruments and is considered customary international law.[27] Individuals called before the NTRC to give testimony on their own activities, and who are later accused before the Special Chamber, must be protected against the use of self-incriminating material from NTRC proceedings by the Special Chamber. There are several ways out of this dilemma. The simplest solution would be for the Special Chamber to categorically refrain from using self-incriminating testimony from the NTRC. This might cause certain accused who admitted crimes before the NTRC to be fully or partially acquitted by the Special Chamber for lack of evidence. It is doubtful whether the general public in Burundi will understand such a maneuver, and so this solution risks undermining public confidence in the Special Chamber.

Alternatively, persons indicted by the prosecutor of the Special Chamber could be exempted from testimony before the NTRC. This solution, however, seems largely theoretical. Not only would it be impossible for the NTRC to predict who will eventually be accused by the prosecutor, but such an approach would deprive the NTRC of many of its most prominent witnesses. Predictably, the leaders of the main rebel groups will be among the principal addressees of the Special Court. Not hearing their testimony would be at odds with the envisaged mandate of the NTRC to establish the truth independently and in an unbiased way, and reconciliation by truth-telling would be significantly hindered.

One can argue that no one should be prevented from incriminating himself if he wishes to do so. Nevertheless, if a potential accused volunteers to testify before the NTRC, he might be reluctant to reveal the full truth and create the sort of "spectacle" that the Special Court for Sierra Leone feared. In addition, even if he testifies before the NTRC in a spirit of true remorse and cooperation, he might be deprived of the option to decide whether he wants to incriminate himself even before he is notified of charges brought against him by the Special Chamber's prosecutor. For all these reasons, it seems advisable that persons who might later be indicted before the Special Chamber should only be examined by the NTRC in confidential hearings. The NTRC should not share this information with the Special Chamber, and it should ensure that its reports do not allow the identification of self-incriminating information received in such hearings. As an additional safeguard, such testimony should occur on a voluntary basis.

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There are certain pitfalls with this solution. In Sierra Leone, for example, public hearings and, in particular, ceremonies of reconciliation that went along with the hearings were among the most powerful means of the TRC to foster peace.[28] With respect to those potentially accused, such means of reconciliation would not be available to the NTRC. This solution also requires a careful guess of the NTRC as to who might be indicted, unless the Prosecutor's Office of the Special Chamber is established at a very early point, ideally before the NTRC commences its operation, and decides as soon as possible who will be indicted. Even though it would raise practical difficulties, this proposal seems the least problematic of the available options. In the laws setting up the NTRC and the Special Chamber, provision should therefore be made for confidential hearings of potential accused on a voluntary basis and early determination of the accused by the prosecutor.

The National Truth and Reconciliation Commission: Reconciliation by Truth-Telling?

As the name "National Truth and Reconciliation Commission" sug-

gests, it is intended that the establishment of facts and responsibilities by the commission promotes national reconciliation. The conditions for a full determination of truth in the NTRC seem promising: the Arusha Accords are quite straightforward regarding the nature and causes of the conflict and do not shy away from explicitly saying that it "stems from a struggle by the political class to accede to and/or remain in power."[29] It should, however, be carefully considered that any truth-telling mechanism bears certain risks for victims. If perpetrators do not fully and voluntarily avow their crimes, the fate of victims is denied, and they run the risk of being victimized a second time.[30] The experience of the Commission for Sierra Leone and other truth commissions shows that a full and voluntary revelation of the truth cannot be taken for granted.[31] However, if the perpetrators face enough pressure to tell the truth—in the form of being exposed to the threat of criminal prosecution and sanction if the commission has doubts about the sincerity of their confessions—they are far more inclined to comply with the process of truth-telling.

Certainly, criminal sanctions are, in principle, always available from the Special Chamber, but the Special Chamber normally tries only those most responsible. At present, the vast majority of perpetrators who might be called before the NTRC do not need to fear criminal sanctions for not telling the truth before the NTRC. Some thought must therefore be given to preparing for criminal procedures or alternative sanctioning mechanisms against individuals who do not reveal the full truth as determined by the NTRC. The report of the assessment mission is quite frank on the inability of the Burundian legal system to cope with a large number of criminal cases. But the involvement of a traditional institution of dispute settlement, called *ubushingantahe*, as an alternative was not even considered. This is a shortcoming of the report, in light of the fact that in Rwanda, traditional *gacaca* courts are used for perpetrators involved in the 1994 genocide. Though they are not satisfactory in all respects, *gacaca* courts do systematically encourage perpetrators to reveal the truth: confessors can expect a significant reduction of their sentences.[32]

Unlike the Rwandan *gacaca* courts, colonialism and the postcolonial state somewhat superseded the *ubushingantahe*, although it did not fall into complete disuse. *Ubushingantahe* consisted of panels on various levels, composed of respected men of the community *(bashingantahe)*, both Hutu and Tutsi, who obtained this status after a long learning and initiation procedure. The panels were responsible for all sorts of dispute settlement.[33] The

transitional constitution and Burundi's current constitution envisage the revitalization of the *ubushingantahe* as an instrument of peace and social cohesion, and the Arusha Accords recognized the *bashingantahe* as a factor in promoting cohesion.[34] If reactivated, the *ubushingantahe* may be well placed to function in complementarity to the NTRC, sanctioning low-level perpetrators unwilling to come clean.

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The Arusha Accords foresaw that the NTRC should be competent to implement measures likely to promote reconciliation or to recommend such measures to the government.[35] This provision recalls the case of Sierra Leone, where the TRC had the ability to make recommendations that the government was legally obliged to consider, as well as to hold reconciliatory ceremonies. With some hindsight, both are ranked among the major assets of that commission's legal framework.[36] The report of the assessment mission for Burundi, however, is silent on these aspects of the Arusha Accords. One must hope that this issue will be addressed during the drafting of the new law on the NTRC.[37]

The Temporal Jurisdiction of the Envisaged Institutions

Some remarks on the temporal jurisdiction of the envisaged institutions will conclude these observations. First, the future accountability mechanisms need to take into account crimes that continue to be committed. For example, the victims of the Gatumba massacre of August 2004, where about 150 Banyamulenge (Tutsi) refugees were killed by the FNL and like-minded actors,[38] are still waiting for a judicial investigation, in spite of the Security Council's call to bring those responsible to justice.[39] The report reveals that Burundian interlocutors preferred that the temporal jurisdiction of the NTRC and the Special Chamber be extended to give it authority to hear cases for events occurring after the year 2000. Otherwise, the institutions could be charged with bias, because limiting their jurisdiction to narrow periods of time might result in a one-sided perception of the entire conflict.

On the other hand, if the Special Chamber investigates crimes

dating back as far as independence, the principle *nulla poena sine lege praevia* (no punishment without previous law), a customary human right,[40] requires a careful examination of whether the crimes under the jurisdiction of the Special Chamber were actually punishable at the time of their commission. Burundian law provides no basis in most cases because genocide, war crimes, and crimes against humanity were inserted into the national legislation only in 2003.[41] The question is therefore whether and since when the crimes under the jurisdiction of the Special Chamber are or have been part of customary international law. The answer should be uncontroversial for genocide. Crimes against humanity were already prosecuted under the statute of the Nuremberg International Military Tribunal, which was endorsed by the UN General Assembly.[42]

Doubts arise, however, as to whether and to what extent acts committed in a noninternational conflict were punishable under customary international law in 1962 and beyond. Two conditions need to be met for this. First, there must be a customary rule prohibiting such behavior, and second, any serious breach of the rule needs to entail criminal punishment. Although Common Article 3 to the 1949 Geneva Conventions stipulates some rules applying to this type of conflict that are held to be declaratory of customary international law, the conventions do not require the criminalization of acts falling under the article. The 1977 Second Additional Protocol to the Geneva Conventions, which regulates noninternational warfare, does not oblige states to punish violations of its provisions. The Statute of the International Criminal Tribunal for Rwanda (ICTR) was the first international instrument to criminalize "serious violations" of Common Article 3 to the Geneva Conventions,[43] at the time a controversial provision.[44] The subsequent jurisprudence of the ICTR and the Special Court for Sierra Leone on war crimes in internal conflicts makes it safe to say that today these crimes have crystallized in customary international law.[45] However, this is a relatively new rule of customary international law that did not exist before approximately 1990. Unless the temporal jurisdiction of the Special Chamber with respect to war crimes is limited to facts that occurred after about 1990, the Special Chamber's statute will be at odds with the interdiction of retroactive criminal sanctions.

CONCLUSION

One cannot fend off the impression that the recommendations of the assessment mission were drafted with little care for the small print,

issues that might seriously impede the operation of the institutions envisaged and limit their positive effects. It is understandable that, in preparing a report for the Security Council that suggests the establishment of yet another costly venture in the field of postconflict justice, the assessment mission was careful not to blur their proposal by touching upon too many intricate details. But only a thoroughly prepared plan is worthy of the international community's investment. Those negotiating the agreements between the UN and Burundi would be well advised to devote their attention to the most intricate details. Appropriate solutions need to be found for information-sharing between the proposed institutions and the determination of their temporal jurisdiction. Auxiliary judicial accountability mechanisms for low-level perpetrators as well as additional competencies of the NTRC intended to foster reconciliation should also be considered.

Negotiations might be complicated by the fact that the government of Burundi has changed since the release of the report. The political group now in power, the CNDD-FDD, was once allied with the FDD, a rebel movement that may be charged with numerous atrocities. The government's long-term position regarding postconflict justice therefore needs to be clarified.[46] Peace in Burundi remains fragile. Efforts to set up postconflict justice mechanisms in Burundi are conditioned by an increase in stability in the country and the prognosis that their operation will not endanger stability. Taking the observations made here seriously might improve this prognosis. ■

ENDNOTES

1 United Nations, Security Council, *Resolution 1606 (2005)*, S/RES/1606 (2005), June 20, 2005.

2 Burundi's history is much more complex than this brief account reveals. For detailed descriptions see R. Lemarchand, *Burundi: Ethnocide as Discourse and Practice* (Washington: Woodrow Wilson Center Press and Cambridge: Cambridge University Press, 1994), 34–57; J.-P. Chrétien, trans. Scott Straus, *The Great Lakes of Africa: Two Thousand Years of History* (New York: Zone Books, 2003), 309–357; and C. P. Scherrer, *Genocide and Crisis in Central Africa* (Westport: Praeger, 2002), 219–250.

3 Lemarchand, 37.

4 Ibid., 17.

5 See in particular Scherrer, 225 (in particular note 24).

6 F. Reyntjens, *Burundi: Prospects for Peace* (Minority Rights Group, 2000), 5, 7–18.

7 Ibid., 43.

8 UPRONA stands for Union Pour le Progrès National.

9 Cf. United Nations, Security Council, *Resolution 1072 (1996)*, S/RES/1072 (1996), August 30, 1996.

10 *Arusha Peace and Reconciliation Agreement for Burundi*, August 28, 2000, <www.usip.org/library/pa/burundi/pa_burundi_08282000_toc.html> (accessed September 14, 2005).

11 The terms "Hutu" party and "Tutsi" party are kept in quotes because membership in these parties is not formally limited to a certain ethnic group and, indeed, they are often of mixed composition.

12 See *The Pretoria Protocol on Political, Defence, and Security Power Sharing in Burundi,* October 8, 2003, <www.usip.org/library/pa/burundi/burundi_10082003.html> (accessed September 14, 2005).

13 See *Accord de Partage du Pouvoir au Burundi,* August 6, 2004, <www.arib.info/Accord_Pretoria_06082004.htm> (accessed on November 8, 2005).

14 For reports of the elections see International Crisis Group, *Elections au Burundi: Reconfiguration Radicale du Paysage Politique,* Briefing Afrique N°31, August 25, 2005; V. Thorin, "La Paix par les Urnes," *Jeune Afrique/L'Intelligent* 2322 (July 10-16, 2005): 76.

15 According to Article 20(10) of Protocol II of the Arusha Accords (see above note 10), the first president of the post-transitional period was to be elected by a joint session of the national assembly and the senate. Subsequent presidents will be elected by direct suffrage.

16 Arusha Accord, see above note 10, Protocol I, Articles 3(4) and 7(1-8).

17 Arusha Accord, see above note 10, Protocol I, Article 6(10 and 11).

18 Ibid., Article 8.

19 *Loi n°1/018 du 27 Décembre 2004 Portant Missions, Composition, Organisation et Fonctionnement de la Commission Nationale pour la Vérité et la Réconciliation,* <www.arib.info/Decret_Creation_Comission_Verite_Recociliation_27122004.htm> (accessed September 28, 2005).

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

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

22 Ibid., para. 23.

23 Ibid., para. 19.

24 The Special Chamber should not encounter difficulties with amnesties or immunities because amnesties or immunities granted during the transitional period were limited in time and do not cover genocide, war crimes, and crimes against humanity. See United Nations, Security Council, *Letter dated 11 March 2005 from the Secretary-General addressed to the President of the Security Council,* S/2005/158, March 11, 2005, paras 32 through 37.

25 United Nations, Security Council, *Resolution 1606* (2005), S/RES/1606 (2005), June 20, 2005.

26 Special Court for Sierra Leone, *Decision on the Request by the Truth and Reconciliation Commission of Sierra Leone to Conduct a Public Hearing with the Accused,* Case No. SCSL-2003-09-PT (Prosecutor v. Gbao), November 3, 2003; idem, *Decision on Appeal by the Truth and Reconciliation Commission for Sierra Leone ("TRC" or "The Commission") and Chief Samuel Hinga Norman JP Against the Decision of His Lordship, Mr Justice Bankole Thompson Delivered on 30 October 2003 to Deny the TRC's Request to Hold a Public Hearing With Chief Samuel Hinga Norman JP,* Case No. SCSL-2003-08-PT (Prosecutor v. Norman, November 28, 2003). On the relationship between the Sierra Leonean TRC and the Special Court for Sierra Leone see W. Schabas, "The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone," *Human Rights Quarterly* 25 (2003): 1035; and M. Goldmann, "Sierra Leone: African Solutions to African Problems?" *Max Planck Yearbook of United Nations Law* 9 (2005): 457–516, at 510.

27 Article 14(3)(g) International Convenant on Civil and Political Rights; Article 6(2)(f) Second Additional Protocol to the Geneva Conventions; Article 8(2)(g) and (3) American Convention on Human Rights. M. Nowak, *CCPR Commentary* (Kehl: Engel, 2005), Art. 14 CCPR, marginal note 75, considers this right as essential for a fair trial.

28 Cf. the impressive account of such a ceremony by T. Kelsall, "Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone," *Human Rights Quarterly* 27 (2005): 361–391, at 378.

29 Arusha Accords, see above note 10, Protocol I, Article 4.

30 On this in the context of the Holocaust, see J. M. Chaumont, *La Concurrence des Victimes: Genocide, Identite, Reconnaissance* (Paris: Edition La Découverte, 1997), 241–248.

31 For Sierra Leone see Kelsall, see above note 28, at 376; see also K. Leitenberger, "Frieden durch Wahrheit," 18 *Vierteljahresschrift für Sicherheit und Frieden* (2000): 43–53, at 50–51.

32 *Loi Organique N° 16/2004 du 19/6/2004 Portant Organisation, Compétence et Fonctionnement des Juridictions Gacaca Chargées des Poursuites et du Jugement des Infractions Constitutives du Crime de Genocide et d'autres Crimes contre l'Humanité commis entre le 1er Octobre 1990 et le 31 Decembre 1994,* <www.inkiko-gacaca.gov.rw/Fr/TexteLegaux.htm> (accessed September 30, 2005), Articles 72 and 73.

33 An extensive description of the *ubushingantahe* is provided by T. Laely, *Autorität und Staat in Burundi* (Berlin: Dietrich Reimer Verlag, 1995), 141–177, 327–333, 466–472. For the current situation of the *ubushingantahe* see T. Nahimana, "Modernizing and Integrating Traditional Judicial Systems: The Case of the Burundian Bashingantahe Institution", *East African Journal of Peace & Human Rights* 8 (2002): 111-120.

34 Acte Constitutionnel de Transition (2001), Article 150, <http://droit.francophonie.org/doc/html/bi/con/fr/1998/1998dfbicofr1.html> (accessed October 1, 2005); Constitution de la République de Burundi (2005), Article 269 (on file with the author); and Arusha Accords, see above note 10, Protocol I, Article 1(2).

35 Arusha Accord, see above note 10, Protocol I, Article 8(1)(b). The law on the NTRC of December 2004 (see above note 19) implemented this in Article 2(b).

36 Goldmann, above Note 26, 490–494 with further references.

37 This was also criticized by the representative of Burundi at the Security Council; see United Nations, Security Council, *5203rd meeting*, S/PV.5203, June 15, 2005, 6.

38 Joint Report of UNOB, MONUC and UNHCHR regarding the events at Gatumba of August 13, 2004, available in United Nations, Security Council, *Letter dated 15 October 2004 from the Secretary-General addressed to the President of the Security Council*, S/2004/821, annex. para. 86, October 18, 2004

39 United Nations, Security Council, *Resolution 1602 (2005)*, S/RES/1602 (2005), May 31, 2005, fourteenth recital of the preamble.

40 See Article 15(1) International Convenant on Civil and Political Rights; Article 7(2) African Charter on Human and Peoples' Rights; and Article 7(1) (European) Convention for the Protection of Human Rights and Fundamental Freedoms.

41 *Loi N° 1/004 du 8 Mai 2003 Portant Répression du Crime de Génocide, des Crimes contre l'Humanité et des Crimes de Guerre,* <www.cicr.ch/ihl-nat.nsf/6fa4d35e5e3025394125673e00508143/7cbad250d785314dc125707300366c6b/$FILE/Genocide%20Repression%20Burundi%20-%20FR.pdf> (accessed October 1, 2005).

42 United Nations, General Assembly, *Resolution 95 (I), Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal,* December 11, 1946. Note however that the definition of crimes against humanity was changed in subsequent documents.

43 *Statute of the International Criminal Tribunal for Rwanda*, Annex to UN Security Council Resolution 955 (1994), November 8, 1994, Article 4.

44 Cf. ICTY, *Decision on Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1 (Prosecutor v. Tadiã), October 2, 1995, paras. 128–136.

45 C. Tomuschat, "Universal Jurisdiction With Respect to the Crime of Genocide, Crimes Against Humanity and War Crimes", 71 *Yearbook of the Institute of International Law* (Paris: Pedone, 2005), 215-258, at 252. With respect to case law see ICTR, *Judgement* (Trial Chamber), Case No. ICTR-96-4-T (Prosecutor v. Akayesu), September 2, 1998, paras. 611–617; and Special Court for Sierra Leone, *Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)*, Case No. SCSL-04-14-PT (Prosecutor v. Norman), May 31, 2004, para. 25 et seq.