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## RETHINKING VIOLENCE, RECONCILIATION AND RECONSTRUCTION IN BURUNDI\*

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### 1 Introduction

Human insecurity due to armed violence particularly in the African continent is among the main obstacles preventing the attainment of sustainable economic development. Armed violence in the form of an intentional and unlawful use of force against unarmed individuals includes a wide range of crimes such as murder, assault, rape, genocide, politically-motivated killings, war crimes and crimes against humanity, as confirmed in the case of *Democratic Republic of the Congo v Burundi, Rwanda and Uganda (Armed Activities case)*.<sup>1</sup>

The UN Security Council is entrusted with the primary responsibility of maintaining international peace and human security in line with the objectives stipulated under the *UN Charter*.<sup>2</sup> However, very little has been done to maintain peace and human security in Burundi.

It is common cause that Burundi has experienced gross violations of human rights since independence in 1962. Even the post-transition arrangements which were designed to consolidate the rule of law and good governance have failed to deal with these violations in a comprehensive manner. Today, ten years after the adoption of the *Post-Transitional Constitution* of 2005 (hereinafter *Post-conflict Constitution*) sexual violence against women, arbitrary detentions and extra-judicial killings, torture

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<sup>1</sup> *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* 2004 AHRLR 19 (ACHPR 2003). See also the Pre-Trial Chamber decision in the case of *Prosecutor v Lubanga* ICC-01/04-01/06 of 29 January, 2007 para 220; *Prosecutor v Katanga* ICC-01/04-01/07 of 30 September, 2008 para 240; and *Ngirincuti v Secretary of State for the Home Department* 2008 EWHC 1952 (Admin).

<sup>2</sup> See ch VI, VII and VIII of the *Charter of the United Nations* (1945) (the *UN Charter*).

and the ill-treatment of minorities continue unabated.<sup>3</sup> The UN Mission in Burundi has systematically documented cases of gross violations of human rights and has urged the government of Burundi to end these practices.<sup>4</sup> The Human Rights Watch, for instance, has reported that throughout the 2010 elections in Burundi, political parties resorted to intimidation, including politically-motivated violence, which in turn resulted in mass killings such as the Gatumba massacre of 18 September 2011.<sup>5</sup>

The controversial debate relating to the interpretation of the *Post-conflict Constitution*<sup>6</sup> in relation to the presidential mandate shows how Burundi's national reconciliation is still uncertain.<sup>7</sup> It has been contended that the election of President Nkurunziza in 2005 by the National Assembly and Senate was not in line with the universal suffrage norms in terms of Article 96 of the *Post-conflict Constitution*.<sup>8</sup> The Constitutional Court of Burundi, while interpreting Articles 96 and 302 of the *Post-conflict Constitution*, affirmed that President Pierre Nkurunziza, who has served two terms since 2005, has the constitutional right to stand as a presidential candidate for a third term.<sup>9</sup>

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<sup>3</sup> See OHCHR 2015 <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15909&LangID=E>; Chi *et al* 2015 *BMC Int Health Hum Rights* 3; UN Security Council 2009 [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2009/270](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2009/270); Human Rights Watch 2011 <https://www.hrw.org/news/2011/08/11/burundi-stop-harassing-lawyers-and-journalists>; Amnesty International 2006 <https://www.amnesty.org/download/Documents/68000/afr160012006en.pdf>; and *Public Prosecutor v Minani* 2002 AHRLR 67 (BuCA 1998).

<sup>4</sup> Human Rights Watch 2011 <http://www.hrw.org/en/world-report-2011/burundi>.

<sup>5</sup> Human Rights Watch 2011 <http://www.hrw.org/news/2011/09/20/burundi-investigate-deadly-bar-shooting>; VOA 2011 <http://www.voanews.com/content/gunmen-kill-36-in-burundi-bar-attack-130121023/145429.html>.

<sup>6</sup> Article 96 of the *Burundi Post-Transitional Constitution*, 2005 (hereinafter *Post-conflict Constitution*) provides that: "... the President of the Republic is elected by universal direct suffrage for a mandate of five years renewable one time". Article 302 stipulates further that: "Exceptionally, the first President of the Republic of the post-transition period is elected by the National Assembly and the elected Senate meeting in Congress, with a majority of two-thirds of the members. If this majority is not obtained on the first two ballots, it immediately proceeds to other ballots until a candidate obtains the suffrage equal to two-thirds of the members of the Parliament. In the case of vacancy of the first President of the Republic of the post-transition period, his successor is elected according to the same modalities."

<sup>7</sup> Hengari 2015 <http://www.saiia.org.za/opinion-analysis/discussing-constitutional-amendments-vital-for-the-african-union-2015-sandton-summit>.

<sup>8</sup> Joselow 2015 <http://www.voanews.com/content/concerns-of-violence-as-burundi-president-weighs-third-term/2702617.html>.

<sup>9</sup> BBC News 2015 <http://www.bbc.com/news/world-africa-32588658>.

The recent attempted coup of 13 May, 2015 in response to the Constitutional Court's judgment is compelling evidence of the fact that past issues are unresolved.<sup>10</sup> For example, there has been a lack of the political will to confront the granting of impunity for the crimes committed under the previous military regimes, which has resulted in the resumption of the cycle of armed violence and the gross violation of human rights.<sup>11</sup>

The on-going armed violence in Burundi remains among the obstacles against national reconciliation, healing and reconstruction. It must be emphasised that the lack of an effective transitional justice model in Burundi has perpetuated a culture of impunity, allowing gross human rights violations to flourish. The failure of the post-conflict government of Burundi to protect and promote basic human rights such as the right to life and to human security marks its failure to uphold its obligations under international human rights law.<sup>12</sup>

This article interrogates the tragic case of Burundi, a tiny state in Eastern-Central Africa, to illustrate the failure of the international community to deal decisively with the root causes of the perpetual conflicts and gross human rights violations since the country gained independence from Belgium in 1962. The article also highlights the issues of selective morality and double standards in that, while the international community responded with the necessary resolve in the Rwandese genocide of 1994,<sup>13</sup> the sordid case of Burundi in the post-colonial era remains a major challenge to the conscience of the international community. Finally, it argues that the post-conflict government in Burundi has failed to achieve national healing and reconciliation, to

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<sup>10</sup> See Daily Nation 2015 <http://www.nation.co.ke/news/africa/UN-condemns-Burundi-coup-attempt/-/1066/2716956/-/gc9npp/-/index.html>.

<sup>11</sup> CNN News 2015 <http://edition.cnn.com/2015/05/15/africa/burundi-coup-leaders-arrested/>.

<sup>12</sup> Amnesty International 2015 <https://www.amnesty.org/en/articles/news/2015/04/burundi-brutal-clampdown-on-human-rights-in-run-up-to-the-elections/>.

<sup>13</sup> *Statute of the International Criminal Tribunal for Rwanda* (1994): to prosecute persons responsible for genocide and other serious violations of International Humanitarian Law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other violations committed in the territory of neighbouring states, between 1 January 1994 and 31 December 1994; *UN Security Council Resolution Establishing the International Criminal Tribunal for Rwanda* UN Doc S/RES/955 (1994) (as amended by Resolutions 1165 of 30 April 1998, 1329 of 30 November 2000, 1411/2002 of 17 May 2002, 1431 of 14 August 2002).

establish accountability and responsibility for the grave human rights violations of the past, and to end the culture of impunity.

As the famous Chilean writer, Ariel Dorfman, succinctly reminds us:

Enemies remember the past differently and until they agree in some way on the past and are able to forge a memory common to both sides, their rivalry will refuse to varnish. That is why Truth and Reconciliation Commissions, with all their flaws and concessions, all the pain they do not expose and all the crimes that may remain unpunished, are indispensable steps in a transition to democracy after a period of systematic violence.<sup>14</sup>

Another important aspect in national healing and reconciliation which is missing in the case of Burundi is that of truth-telling. This is an important process in which the survivors and the dependents of the tortured, the wounded, the maimed and the dead unburden their grief in order to receive the collective recognition of the "new" nation that they were wronged.<sup>15</sup> The necessity to reveal and preserve the truth so that past violations of human rights may never happen again, has been underscored by the Nobel Peace Laurette, Archbishop Emeritus, Desmond Tutu, in these ringing words:

However painful the experience the wounds of the past must not be allowed to fester. They must be opened. They must be cleansed. And balm must be poured on them so that they can heal. This is not to be obsessed with the past. It is to take care that the past is properly dealt with for the sake of the future.<sup>16</sup>

The main thrust of this article is that although human rights are enshrined in the *Post-conflict Constitution* and various peace agreements aimed at national reconciliation and democratic governance have been adopted,<sup>17</sup> grave human rights violations continue unabated and in some cases have taken a turn for the worse.<sup>18</sup> Included in

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<sup>14</sup> Dorfman "Whose Memory?" 5-6; Sachs *Strange Alchemy* 70-71.

<sup>15</sup> *Azapo v President of the Republic of South Africa* 1996 ZACC paras 16- 17.

<sup>16</sup> See TRCSA 2008 <http://www.justice.gov.za/trc/report/finalreport/volume%201.pdf>; Cameron J in *The Citizen 1978 (Pty) Ltd v Roberts McBride* 2011 ZACC 11 paras 50-51; and Langa CJ (as he then was) in *Du Toit V Minister for Safety and Security* 2007 ZACC 22.

<sup>17</sup> See the *Arusha Peace and Reconciliation Agreement* (2000); the *Pretoria Protocol on Political, Defence, Security and Power-Sharing in Burundi* (2003) (the *Pretoria Protocol*); and the *Dar es-Salaam Comprehensive Ceasefire and Peace Agreement* (2006); *Magaliesburg Agreement* (2008); and *Bujumbura Agreement* (2009). Security Council Report 2015 <http://www.securitycouncilreport.org/chronology/burundi.php?page=3>. Vandeginste "Transitional Justice for Burundi" 11.

<sup>18</sup> OHCHR 2015 <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15909&LangID=E#>.

this coinage of human misery are extra-judicial killings, arbitrary detentions without trial, torture, rape and other forms of sexual violence, the ill-treatment of minorities such as Burundians belonging to the Twa ethnic grouping and people with Albinism, returnees from exile who are categorized as "foreigners" and gender-based violence.<sup>19</sup> These and other related challenges will be elucidated hereunder.

## 2 The roots of the conflict

It is common cause that Burundi's post-colonial history is littered with gross human rights violations, mainly at the hands of the Tutsi-led military and other insurgents or armed bands.<sup>20</sup> The core facts common to various accounts can be summarised in the incidents of systematic mass killings of Hutu and Twa ethnic groups in the 1960s, 1972, 1988, and 1993 mass killings, and the reprisals and counter-reprisals that continued after 1993.<sup>21</sup> The estimated numbers of these killings are supplied hereunder in section 2.2 of this article.

Some scholars have suggested that the current government of Burundi has made significant achievements in terms of judicial reform, reconstruction initiatives, and social services.<sup>22</sup> Others, to the contrary, assert that claims of gross violation of human rights have not been dealt with the necessary rigour, and that a culture of impunity has been established as a result.

As Lemarchand has poignantly observed, "nowhere else in Africa have human rights been violated on such a massive scale and with such brutal consistency as in Burundi".<sup>23</sup> In order to fully comprehend the contemporary situation in the context of national healing, reconciliation and reconstruction, it is imperative to situate the discourse within a given historical specificity. What follows below is a brief discussion

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<sup>19</sup> Fransen and Kuschminder *Back to the Land* 3.

<sup>20</sup> See BBC News 2015 <http://www.bbc.com/news/world-africa-32730682>; Ndarubagiye *Origin of the Hutu-Tutsi Conflict*; and Gahutu *Persecution of the Hutu of Burundi*.

<sup>21</sup> Krueger and Krueger *From Bloodshed to Hope* 41.

<sup>22</sup> BBC News 2005 <http://www.bbc.com/news/world-africa-32730682>; International Crisis Group Report 2011; and Office of High Commissioner for Human Rights in Burundi 2010-2011 <http://www.ohchr.org/EN/Countries/AfricaRegion/Pages/BISummary20102011.aspx>.

<sup>23</sup> Lemarchand *Burundi: Ethnic Conflict* 34-41.

of Burundi's colonial legacy and its enduring influence on Burundian polity and human rights.

## 2.1 The colonial legacy

Burundi is a relatively small, land-locked country with an area of 27,830 square kilometers in the Great Lakes Region of Eastern-Central Africa.<sup>24</sup> Before the scramble for Africa, it was part of the Rwanda-Urundi Kingdom. After the infamous Berlin Conference of 1884-1885, Burundi became part of German East Africa or *Deutsche Ostafrika*. The roots of the current conflicts were planted during this period of German suzerainty. The German Protectorate system was based on indirect rule through Tutsi kings, chiefs and sub-chiefs who dominated the other two ethnic groupings, namely the Hutus and the Twas.

For the sake of completeness, it is important to point out that the Twas or "pygmies" are generally believed to be the original inhabitants of what is now Burundi and Rwanda.<sup>25</sup> The Hutus are descendants of Bantu-people who had lived in the area since time immemorial, while the Tutsis are Nilotic people from East Africa who invaded and conquered the Twas and Hutus around the fourteenth century and established a feudal system of government. Under that feudal system, while the Tutsi minority constituted the political elite, the Hutus and Twas, who were the majority, were reduced to feudal serfs and became a source of cheap labour.<sup>26</sup>

Following the defeat of Germany in the First World War, Burundi was entrusted to Belgium under the mandate system of the League of Nations, and later it became a trust territory under the *UN Charter*.<sup>27</sup> Under the trusteeship system, Belgium was supposed "to prepare" the people of the trust territory of Burundi for self-rule and eventual independence, but very little was done in that regard. Instead the pre-colonial system of kinship was ossified or reinforced into a neo-feudal order founded on a rigid dichotomy between the Tutsi overlords and the Hutu serfs.<sup>28</sup> That

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<sup>24</sup> Ndarubagiye *Origin of the Hutu-Tutsi Conflict* 22.

<sup>25</sup> See Ndarubagiye *Origin of the Hutu-Tutsi Conflict* 17-21; Gahutu *Persecution of the Hutu of Burundi* 1-7.

<sup>26</sup> Krueger and Krueger *From Bloodshed to Hope* 26.

<sup>27</sup> Article 22 of the *Covenant of the League of Nations* (1919); and ch XIII of the *UN Charter*.

<sup>28</sup> Krueger and Krueger *From Bloodshed to Hope* 26.

arrangement led, in turn, to stereo-typing behaviours and the legitimation of the imaginary divide between the so-called superior race of immigrants, the "Hamites" or Tutsis, and the so-called "primitive", indigenous negroes," the Hutus and the Twas. For instance, in this system the owner of land or a cow would be allowed to call his "subjects" by certain offensive names such as "*umuhutu wanje*", literally meaning "my slave", in the indigenous Kirundi language, where a "Hutu" simply means a slave.<sup>29</sup>

A Hutu was seen as subordinate to or a follower of a more powerful person, a Tutsi. Consequently, in Burundi today to call someone "a Hutu" may be thought to be inappropriate, if not offensive. In that social milieu, the cattle-owning and landed-gentry Tutsis were perceived as Belgium's "noble savages", in sharp contrast with the Hutus, who were frowned upon and despised as peasants, and were willing to toil for low wages on their masters' farms. For the purposes of this article, we submit that this systemic social inequality provided the genesis or roots of to-day's deep-seated ethnic hatred and rivalry between the Tutsi minority on the one hand and the Hutu majority on the other, which continues to scar the country's psyche.<sup>30</sup>

As a matter of fact, the killings of Hutu political leaders such as Presidents Melchoir Ndadaye (1993) and Cyprien Ntaryamira (1994), Prime Ministers Joseph Cimpaye (1965), Pierre Ngendandumwe (1965), Joseph Bamina (1965), Deputy Speaker of Parliament, Paul Mirerekano (1965) and many others are directly traceable to this institutionalized ethnic pathology. It is our submission that no national healing and reconciliation in Burundi will be complete without addressing this question of ethnicity and its associated class cleavages and hegemony. The divisive character of the colonial legacy, notably the social inequalities, has engendered the political turbulence and ethnic strife associated with the gross violations of human rights.<sup>31</sup>

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<sup>29</sup> See Ndimurwimo *Human Rights Violations* 53; Heleta 2006 [http://genocideinvestigation.weebly.com/uploads/5/1/1/6/5116764/leaving\\_rwandans\\_to\\_die\\_-\\_savo\\_heleta\\_-\\_2006.pdf](http://genocideinvestigation.weebly.com/uploads/5/1/1/6/5116764/leaving_rwandans_to_die_-_savo_heleta_-_2006.pdf); Krueger and Krueger *From Bloodshed to Hope* 24; Ndarubagiye *Origin of the Hutu-Tutsi Conflict* 20; and Gahutu *Persecution of the Hutu of Burundi* 4.

<sup>30</sup> Lemarchand *Burundi: Ethnic Conflict* 34-41.

<sup>31</sup> See Jeng *Peace Building* 208-209.



## 2.2 The military in Burundi politics and human rights violations

It is common cause that the military, in particular the Tutsi-led army, has dominated Burundi's political landscape since independence in 1962. Except for a very short interlude between 1993 and 1996, successive military regimes have ruled Burundi under the barrel of the gun as follows:

- Michel Micombero, 1966-1976. Micombero's first act of infamy was to orchestrate the execution of Hutu political leaders like Gervais Nyangoma, speaker of parliament; Joseph Bamina, vice-speaker of Parliament, and Paul Mirerekano, together with several other Hutu Ministers and officials.<sup>32</sup>
- Jean-Baptiste Bagaza, 1976-1987.
- Pierre Buyoya, 1987-1993 and 1996-2003.

It is instructive to point out here that the three military rulers referred to above were all Tutsi military officers, all hailing from one Tutsi clan, the Hima, and all from one Province in Burundi, Bururi. Apart from this unholy concentration of power in one clan and mono-ethnic domination, it is axiomatic that the most egregious or odious human rights violations took place a few years before but mostly under these regimes. The most appalling of the political assassinations and mass killings include:

- The execution of Jean Nduwabike and three other trade union leaders in Kamenge Bujumbura on 19 January 1961.
- The assassination of Pierre Ngendandumwe, a Hutu Prime Minister elected in 1963, dismissed by King Mwambutsa IV (a Tutsi) in 1964; re-appointed in 1965 and assassinated on 15 January 1965. His assassination plunged the country into political chaos, resulting in the dissolution of Parliament and the restoration of absolute monarchy.
- The politically motivated murders of Paul Mirerekano, President of a leading party, the National Unity and Progress Party, or UPRONA, and of the Vice-Speaker of Parliament, together with many other Hutu leaders like Gervais

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<sup>32</sup> Ndarubagiye *Origin of the Hutu-Tutsi Conflict* 10, 32-33.

Nyangoma, Paul Nibirantiza, Pierre Burarame and Leonard Ncahoruri in 1965, with approximately 14000 Hutu civilians, at Muramvya.

- The 1972 massacre of 300 000 Hutu civilians across the country.
- The 1988 Ntega and Marangara massacre where the Tutsi-led army killed more than 50 000 Hutu civilians.
- The massacre of 20 000 Hutus in Cibitoke in 1991.
- The thousands of Hutu civilians killed immediately after the assassination of the first democratically elected Hutu President, Melchior Ndadaye, in 1993.<sup>33</sup>

These figures do not tell the whole story of the summary or extra-judicial executions, forced disappearances and other human rights violations in that wretched country.

It is important to point out that writers on the human rights situation in Burundi are not *ad idem* as to whether in law these killings and associated gross human rights violations and outrages on the dignity of the civilian populace do in fact amount to genocide, an international crime.<sup>34</sup> For example, Jean-Pierre Chretien refers to those killings in terms of "selective genocide" or a "veritable genocide of the Hutu elites".<sup>35</sup> Another troubling aspect of the gross human rights violations in Burundi, whether termed "particular or selective genocide", or "selective massacre", is that such characterisation generally refer to the mass killings of Hutus by Tutsis. This approach glosses over the outrages perpetrated by "rebels or insurgents" in their wars of insurgency against the Tutsi-dominated military establishment and political landscape. It is respectfully submitted that since genocide is an international crime, the

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<sup>33</sup> For more details about these killings, see for example Ndarubagiye *Origin of the Hutu-Tutsi Conflict* 27-33; Gahutu *Persecution of the Hutu of Burundi* 28, 17- 56; Krueger and Krueger *From Bloodshed to Hope* 28-29; Bentley and Southall *African Peace Process* 43; and Daley *Gender and Genocide* 69.

<sup>34</sup> Article II of the *Convention on the Prevention and Punishment of Genocide* (1948) (*Genocide Convention*) defines genocide to mean any of the following acts committed with the intent to destroy, in whole, or in part, a national, ethnic, racial or region groups, such as:

- a) killing members of the group;
- b) causing serious bodily harm or mental harm to members of the group;
- c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) imposing measures intended to prevent births within the group; and
- e) forcibly transferring children of the group to another group.

<sup>35</sup> Chrétien *Great Lakes of Africa*; see also Melady *Burundi: The Tragic Years*. Thomas Patrick Melady was a former American Ambassador to Burundi in 1969-1972.

perpetrators of these killings should have been apprehended and brought to justice under the Genocide and Torture Conventions.<sup>36</sup>

Gahutu has elaborated on the persecution and elimination of Hutus and moderate Tutsis akin to genocide in 1961-1965 and during the military regimes from 1966-1993.<sup>37</sup> Although Bentley and Southall were unclear as to whether those killings amounted to genocide, yet they have asserted that Burundi had endured mass killings bordering on genocide that have gone unpunished.<sup>38</sup> Krueger and Krueger have stressed that Burundi has had a history of torture and an unhappy legacy of assassinations of leaders and civilians by the Tutsi-led army.<sup>39</sup> Ndagijimana, a Rwandese lawyer who witnessed Hutu students' mass killings at the University of Burundi premises in 1972 has argued that "a person does not need to be a criminal law expert to understand the genocide in Burundi".<sup>40</sup> That author recalls how government, police and army officials drew up a list of persons belonging to the Hutu ethnic group and concludes that this act culminated in the deaths of thousands of civilians, including 700 university students who were murdered within a period of three months in 1972.<sup>41</sup>

At the international level, as demonstrated in the Ruhashyankiko Report<sup>42</sup> and the Whitaker Report,<sup>43</sup> there is no agreed definition of the term "genocide". This underscores the dilemma in dealing with cases of mass killings which may constitute the crime of genocide, if the case of Burundi can be used an example.<sup>44</sup> The UN

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<sup>36</sup> Articles I, II- VI of the *Convention on the Prevention and Punishment of Genocide* (1948); aa 4-16 of the *Convention against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment* (1984); and aa 5 and 8 of the *Rome Statute of the International Criminal Court* (ICC) (1998), which entered into force in 2002.

<sup>37</sup> Gahutu *Persecution of the Hutu of Burundi* 17-56.

<sup>38</sup> Bentley and Southall *African Peace Process* 31.

<sup>39</sup> Krueger and Krueger *From Bloodshed to Hope* 24.

<sup>40</sup> Ndagijimana *Bujumbura Mon Amour* 62-66.

<sup>41</sup> Ndagijimana *Bujumbura Mon Amour* 62-66.

<sup>42</sup> *Report to the UN Sub-Commission on Prevention of Discrimination and Protection of National Minorities: Study of the Question of the Prevention and Punishment of the Crime of Genocide* E/CN.4/Sub.2/416 (4 July 1978) (Ruhashyankiko Report).

<sup>43</sup> *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide* E/CN.4/Sub.2/1985/6 (2 July 1985) (Whitaker Report).

<sup>44</sup> The Ruhashyankiko Report of 1978 and the Whitaker Report of 1985 have been viewed as the UN Commission on Human Rights' major documents on genocide. Both reports focus on studies of genocide from the viewpoint of the Sub-Commission on Promotion and Protection of Human Rights and Prevention of Discrimination and Protection of Minorities. The Whitaker Report was intended

Commission of Inquiry Report 1993 on Burundi referred to the "genocide" of Tutsi civilians<sup>45</sup> but failed to acknowledge the genocide of Hutus in 1972 as described in the Ruhashyankiko Report.

In the light of Stanton's eight stages of genocide,<sup>46</sup> it is evident that what happened in Burundi in fact and in law amounts to genocide, as follows:

- The classification or division of the population into categories, in this case into Burundi-Tutsis, Hutus and Twas. Such classification deepens ethnic division between "us and them" and prepares the stage for the extermination of "our" enemies, in whole or in part.
- The assigning of symbols or stereotypes to other ethnic groups so as to reinforce ethnic hatred and prejudice. In the case of Burundi, it was common to label people as "northerners" or "southerners", or "Bahima" and "Banyaruguru", or "SP", which is a French acronym for "*Sang Pur*" or "Pure Blood". In this social milieu, Tutsis were seen as inherently "superiors" and Hutus and Twas as "inferiors". Intense exclusionary measures were practiced in Burundi in the pre-peace agreement era, especially in the fields of education and employment. Tutsis were identified by the "i" symbol whereas Hutus would be identified by the "u" symbol in order to strengthen the ethnic inequalities. In the post-conflict era, the assigning of hateful symbols has continued with references being made to "refugees", "returnees", "foreigners" and "*abasangwa*"<sup>47</sup> in order to foment ethnic divisions and hatred.
- Dehumanisation, which involves the denial of the humanity of other groups. This gives rise to hate speech and the propagation of violence against the victim groups. The bodies of victims are often mutilated to express the denial of their very humanity. For example, "Plan Simbananiye", which was issued by the Micombero regime on 28 April 1972 to "deal with the Hutus once and for all",

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to correct the Ruhashyankiko Report. The Ruhashyankiko Report was constrained under political pressure to omit the Armenian genocide, but the later Whitaker Report confirmed that the Armenian massacres amounted to genocide.

<sup>45</sup> Ndikumana *International Commission of Inquiry for Burundi* paras 496-498.

<sup>46</sup> Stanton 1998 <http://www.genocidewatch.org/aboutgenocide/8stagesofgenocide.html>.

<sup>47</sup> Fransen and Kuschminder *Back to the Land* 14-15.

called for the Tutsis to deal with the "*abamenja*" or "traitors", and Colonel Sylvestre Ndirwimo who came with a new *Hutu* extermination plan of 1993 known as "Alliance Sining" or an agreement made to eliminate *Hutus* that led to the assassination of President Ndadaye and other Hutu leaders and civilians.

- Organisation, in terms of which the state and its agents or hate groups are trained and organised to carry out mass killing of their enemies, real or perceived. Examples in Burundi were the 1960s, 1972, 1988 and 1993 mass killings orchestrated by the state but carried out by irregular bands so as to deny state responsibility.
- Polarisation. In this case Tutsi moderates were targeted and silenced for fear that they could stop the mass killings. For example, Prince Rwagasore, Ntare V, Gilles Bimazubute and other Tutsi moderates were assassinated in 1961-1993.
- Preparation involving the identification of victims by specific external markings or cards, the expropriation of property and the concentration of the victims in such structures as extermination or concentration camps. In Burundi this involved the creation of internally displaced people and the influx of Hutu refugees into other countries, especially in 1972 and 1993. In particular, in the concentration camps of 1993 the Tutsi-led army was responsible for the sexual enslavement, starvation, persecution and murder of a significant number of Hutu and Twa civilians.
- Extermination, including the killing of the victims, the mutilation of their bodies, and burying them in mass graves. This stage is sometimes accompanied by mutual revenge killings, thus creating a downward cycle of bilateral genocides. In Burundi, the systematic mass killings of Hutus in the 1960s to the 1990s at the hands of the Tutsi-led army resulted in the killings of Tutsi civilians in revenge by Hutu insurgents. This was particularly the case after the assassination of the Hutu President, Ndadaye, in 1993.
- Denial, which involves the dismissal of reports of genocide as "propaganda" or "unconfirmed". The number of the victims is also minimised or down-played so as not to fit into the conventional definition of genocide. The perpetrators of genocide dig up mass graves, burn the bodies, try to conceal the evidence and

intimidate witnesses, and blame is shifted onto the victims. In the case of Burundi, there has been a persistent denial of genocide. Ndarubagiye claims that Buyoya's second coup *d'état* in 1996 was in fact aimed at preventing future investigations into mass killing and other atrocities under his regimes.<sup>48</sup>

It is therefore submitted that the massive human rights violations under successive Tutsi-led military regimes amount to genocide, if the conventional definition of that term is used purposively and generously, so as to show the resolve of the international community that "never again" will such atrocities be tolerated and that there is no room for impunity under the contemporary international legal order. As elaborated in the *Eichmann case*,<sup>49</sup> the *Genocide Convention* can be applied retroactively. The Court referred to the *Reservations to the Convention on Prevention and Punishment*<sup>50</sup> and confirmed that the Convention serves as an international declaration that genocide is an international crime and States Parties are under an obligation to prevent its recurrence.<sup>51</sup>

As Chapman and Ball have rightly affirmed, Burundi's ethnic cleansing is an example of genocide, where the collective brutalities of successive authoritarian regimes, including disappearances and the inflicting of torture on a very large number of Hutu civilians during the almost constant armed conflicts are recalled.<sup>52</sup> Although the Whitaker Report suggests that there is the possibility of broadening the *Genocide Convention's* definition of genocide, which has to be endorsed in judicial decisions,<sup>53</sup>

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<sup>48</sup> Ndarubagiye *Origin of the Hutu-Tutsi Conflict* 89.

<sup>49</sup> *Attorney-General of Israel v Eichmann* 1962 36 ILR 5 (*Eichmann Judgement*) 22-23.

<sup>50</sup> *Reservations to the Convention on Prevention and Punishment* (Advisory Opinion) ICJ Reports (1951) 15.

<sup>51</sup> See a V of the *Genocide Convention* which provides that State Parties to the Convention must undertake measures to enact in their respective Constitutions, the necessary legislation to give effect to the provisions of the Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts listed under article 3.

<sup>52</sup> Chapman and Ball 2001 *Hum Rts Q* 1.

<sup>53</sup> The Whitaker Report elaborates further that Nazi ethnic cleansing has not been the only case of genocide in the twentieth century. There are other examples which can be cited as amounting to genocide. For instance, the German massacre of Hereros in 1904, the Ottoman massacre of Armenians in 1915-1916, the Ukrainian extermination of Jews in 1919, the *Tutsi* army massacre of *Hutus* in Burundi in 1965, 1972, 1988 and 1993, the Paraguayan massacre of Ache Indians prior to 1974, the Khmer Rouge massacre in Kampuchea between 1975 and 1978, and the contemporary Iranian killings of Baha'is. UN SubCommission on Prevention of Discrimination and Protection of Minorities 1985 [http://www.teachgenocide.org/files/DocsMaps/UN%20Report%20on%20Genocide%20\(excerpts\).pdf](http://www.teachgenocide.org/files/DocsMaps/UN%20Report%20on%20Genocide%20(excerpts).pdf).

there is uncertainty about this in case law, as found in the decisions of the International Court of Justice (ICJ), the International Criminal Court (ICC) and International Tribunals.<sup>54</sup> In the case of *Bosnia and Herzegovina v Serbia*,<sup>55</sup> the ICJ emphasized the specific nature of the crime of genocide or specific intent (*dolus specialis*) that targets and destroys an identifiable group in whole or in part. This requirement distinguishes genocide from other violations under international human rights and humanitarian laws and places a heavy burden of proof on the party alleging the commission of the crime of genocide. The courts and tribunals have used different tests such as the "effective control test"<sup>56</sup> and the "overall control test".<sup>57</sup> These different approaches tend to give rise to contradictory judicial verdicts.<sup>58</sup>

Given the brutal nature of the crime, genocide must not be limited to a numerically substantial portion of the victims when interpreting the destruction of a group "in whole" or "in part". Rather, it may extend to the extermination of the targeted groups' intellectual, political or religious and cultural leadership, as in the case of Burundi.

In the section that follows, we discuss attempts at national healing and reconciliation.

### **3 National healing and reconciliation from 2003 to the present**

The attempt to bring about transitional justice in Burundi is still among the most contentious of its issues. Like most contemporary democratic transitions in the world, Burundi's peace and reconciliation agreements were aimed at addressing the main

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<sup>54</sup> Cassesse 2007 *EJIL*.

<sup>55</sup> See Gill 2007 *HJJ* 45.

<sup>56</sup> *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits) ICJ Judgment of 27 June 1986.

<sup>57</sup> ICTY in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))* (Reports of Judgments, Advisory Opinions and Orders) ICJ Judgment of 26 February 2007. Yugoslavia's responsibility was limited to its failure to try to prevent the massacre but the tribunal did not include direct responsibility for either the commission of genocide or complicity in the commission of genocide. The ICJ's "effective control" test in relation to the imputation of state responsibility for acts carried out by armed forces and groups extends to a government which assists and supports such forces, but does not exercise operational control over them, and thus differs from the ICTY's "overall control test" in relation to the imputation of criminal responsibility, which the ICTY applied in the case of *Prosecutor v Dusko Tadic* Case No IT-94-1-A of 15 July 1999 (ICTY Appeals Chamber).

<sup>58</sup> Gill 2007 *HJJ* 45.

question of how to deal with the legacy of human rights violations and atrocities committed by the Tutsi-led army and insurgent groups.

### **3.1 Transitional justice in Burundi**

It must be acknowledged that there have been attempts at rethinking violence, reconciliation and reconstruction in Burundi since 2000. For example, the peace accords and ceasefire agreements<sup>59</sup> such as the *Arusha Peace and Reconciliation Agreement (APRA)*,<sup>60</sup> the *Pretoria Global Ceasefire Agreement (PGCA)*,<sup>61</sup> the *Dar es-Salaam Comprehensive Ceasefire Agreement (DCCA)*,<sup>62</sup> the *Magaliesburg Agreement (MA)*<sup>63</sup> of 2008 and the *Bujumbura Agreement (BA)* of 2009<sup>64</sup> all contain provisions that deal with transitional justice. However, this article notes discrepancies in terms of their application and implementation.

The APRA was considered as a legal basis for Burundi victims' right to reparations, but this right was somehow disregarded by the parties, because the central focus was on stopping the political and military killings and bringing about Hutu-Tutsi co-existence rather than on making reparations to victims. Accordingly, the APRA and the subsequent peace and ceasefire agreements focused mostly on power-sharing with no provision for accountability in terms of prosecutions for mass and politically motivated killings.

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<sup>59</sup> See ISS Africa Date Unknown <http://www.issafrica.org/cdburundipeaceagreements/CDcontents.pdf>.

<sup>60</sup> The *Arusha Peace and Reconciliation Agreement* (2000) was signed on 28 August 2000 between the military-led government of President Pierre Buyoya, the National Assembly and 17 political parties without two main Hutu liberation movements of CNND-FDD and Palipehutu-FNL.

<sup>61</sup> The *Pretoria Protocol on Political, Defence, Security and Power-Sharing in Burundi* (2003) was signed on 16 September 2003 between the transitional government of President Domitien Ndayizeye and CNND-FDD of Pierre Nkurunziza, when it was still a liberation movement. The integral parts of the PGCA were a ceasefire agreement, protocols on political, defence and security power sharing, a protocol on outstanding issues such as granting immunity for crimes committed.

<sup>62</sup> The *Dar es-Salaam Comprehensive Ceasefire and Peace Agreement* (2006) was signed on 7 September 2006 between the post-transition government of Pierre Nkurunziza and *Palipehutu-FNL* of Agathon Rwasa. The DCCA dealt with the agreement of the principles on working towards lasting peace, security and stability.

<sup>63</sup> The *Magaliesburg Agreement* (2008), a declaration on the Burundi Peace Process between the post-transition government and the *Palipehutu-FNL* of Agathon Rwasa, 10 June 2008.

<sup>64</sup> The *Bujumbura Agreement* (2009): the declaration of the political directorate of the Burundi Peace Process on the implementation of the joint decisions, pursuant to the Declaration of the Summit of the Heads of State and Government of the Great Lakes Region on the Burundi Peace Process.



Article 8 of Protocol I to the APRA emphasised the establishment of a Truth and Reconciliation Commission (BTRC) with the mandate of investigation, reconciliation, arbitration and clarification of the root cause of the Burundi conflicts. The proposed BTRC and the Special Criminal Tribunal which should have been established pursuant to the APRA and UN Security Council Resolution 1606 of 2005 was established in 2014, fourteen years after the signing of APRA and nine years after the adoption of UN Security Council Resolution. Ironically, the required Special Tribunal has not been established, while the effectiveness of the BTRC has been criticised due to executive interference in its proceedings.<sup>65</sup> Similarly, the power-sharing deals agreed to in the PGCA, DDA, MA and BA have been unfruitful because of on-going armed violence.

Consequently, there has been no mechanism to secure truth and accountability and to ensure that those responsible for the crimes committed during the country's turbulent history are prosecuted. Although the Military Court of Burundi was established under the 1992 Constitution to deal with military officers involved in criminal activities, that Court failed to prosecute government and army officials, "the big fish" accused of killing President Ndadaye and many civilians in 1993, in the process reinforcing the culture of impunity.<sup>66</sup>

The proposed Commission's mandate was to investigate and reveal the truth relating to the grave and systematic violations of human rights committed from 1 July 1962 until 28 August 2000. The APRA stipulated that the Commission had to categorise the crimes, identify the perpetrators and victims and establish criminal and civil responsibilities. However, the proposed Commission had limitations in some aspects: it had no jurisdiction to classify acts of genocide, crimes against humanity and war crimes.<sup>67</sup> Furthermore, the Commission had no power to grant amnesties, although the Transitional National Assembly was responsible to grant amnesties for politically

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<sup>65</sup> See Mail Online 2014 <http://www.dailymail.co.uk/wires/afp/article-2860084/Burundi-appoints-controversial-truth-commission-members.html>.

<sup>66</sup> *Ngirincuti v Secretary of State for the Home Department* 2008 EWHC 1952 (Admin); and Ndarubagiye *Origin of the Hutu-Tutsi Conflict* 89.

<sup>67</sup> Article 8 para 1(a) of Protocol I of the APRA.

motivated crimes, had the Commission found it appropriate to recommend that it do so.<sup>68</sup>

The granting of "provisional immunity" or "temporary immunity" in respect of "politically motivated crimes" committed during the period of 1 July 1962-28 August 2000 and excluding the crimes of genocide, war crimes and crimes against humanity did not advance the cause of those calling for the investigation, prosecution and punishment of the perpetrators of gross human rights violations.<sup>69</sup> Furthermore, the participation of suspected perpetrators of human rights violations in these agreements has had the unintended consequence of shielding them from prosecution, thereby perpetuating the culture of impunity.

As agreed in peace and ceasefire agreements, legislation was passed to integrate the crimes of genocide, crimes against humanity and war crimes in Burundi's criminal law<sup>70</sup> with specific reference to the *ICC Rome Statute*<sup>71</sup> and other international human rights conventions and treaties to which Burundi is a State Party. However, the law was not intended to operate retrospectively in order to deal with past human rights violations, but was created to prosecute international law crimes which might be committed after its promulgation. With reference to transitional justice, Vandeginste points out that there is a remarkable discrepancy between Burundi's policies and practice.<sup>72</sup> Although the *Pretoria Agreement* of 2003 led to the holding of elections under the 2005 *Post-transitional Constitution* and a civilian government under Pierre Nkurunziza,

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<sup>68</sup> Article 8 para 1(b) of the Protocol I of the APRA.

<sup>69</sup> In 2003 when CNDD-FDD was still a rebel movement, it entered into an agreement with the government providing that both CNDD-FDD combatants and members of the state security forces would have temporary immunity from prosecution in respect of politically-motivated crimes. The out-going President Buyoya personally made the passing of the genocide law a condition of his handing over of power to the then transitional President Ndayizeye on 1 May 2003. See Further Protocol 11 to the APRA. Burundi's *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001) (the *Draft Law on Genocide*) defines intentional attacks against civilians who are not taking a direct part in hostilities as constituting a war crime in both international and non-international armed conflicts. The *Draft Law on Genocide* provides further that rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilisation or any other form of sexual violence constitute grave breaches of the *Geneva Conventions* (1949).

<sup>70</sup> *Loi N°1/004 du 8 mai 2003 portant répression du crime de génocide, des crimes contre l'humanité et des crimes de guerre* (*Genocide Law* of 2003) defines international crimes as criminal offences under Burundi criminal law. It provides for the sentences applicable to those found guilty in terms of aa 2-4, 8-18.

<sup>71</sup> Burundi ratified the *ICC Rome Statute* on 21 September 2004.

<sup>72</sup> Vandeginste "Transitional Justice for Burundi" 20.

constitutional democracy and the rule of law remain fragile, a situation which is accentuated by incessant struggles for political and economic power among Burundi's fractious political elites, corruption, and on-going conflicts among Burundi's neighbours in Rwanda, Democratic Republic of Congo (DRC) and Uganda.<sup>73</sup>

### **3.2 The impact of political instability in the Great Lakes Region**

Political instability and gross violations of human rights in the Great Lakes Region of Africa rank alongside the extermination of the Jews in Nazi Germany as one of the worst human rights outrages of the last century. It is quite remarkable that while the international community, through the United Nations, responded with the necessary resolve to address gross human rights violations in Rwanda in 1994, the same has not been the case with Burundi.

Genocide, war crimes and crimes against humanity in the contemporary world, the Great Lakes Region of Africa in particular, are viewed as autonomous and self-sustained categories of crime that are often linked with armed violence. Mass killings, deportations and influxes of refugees resulting from gross violations of human rights against civilians are clear examples of the connection and overlap between war crimes and crimes against humanity. Hence, the intention to commit these crimes must be considered in terms of investigations, prosecutions and punishment. For example, using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population is one of the recognisable international crimes as elaborated in the *Armed Activities* case.<sup>74</sup>

It is our argument that the on-going armed violence in the Great Lakes Region of Africa has not been dealt with the necessary rigour. Daley has clarified that sexual violence against women has become pervasive and a dominated culture of impunity

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<sup>73</sup> See *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* 2004 AHRLR 19 (ACHPR 2003) 94; *Armed Activities on the Territory of the DRC* Order of 21 October 1999, ICJ Reports 1999 101.

<sup>74</sup> *Armed Activities on the Territory of the DRC* Order of 21 October 1999, ICJ Reports 1999 101 para 94.

that devalue lives across the region.<sup>75</sup> It must be stressed that there will be no peace or stability in Burundi if the region remains unstable.<sup>76</sup> For example, the perpetuation of sexual and domestic violence where the perpetrators of these crimes get away with whatever they do, as in the case of *Ngirincuti v Secretary of State for the Home Department*, cannot be condoned. Clearly, gender violence such as rape and other sex-related crimes has been perpetrated with complete impunity in Burundi's armed conflicts.<sup>77</sup> As recently noted, armed violence has had a negative impact not only on Burundians but also on non-Burundians. For example, three Italian nuns, Lucia Pulici, Olga Raschietti and Bernadetta Boggian, were raped and brutally murdered on 7 September, 2014 in the Catholic Church in the parish of Kamenge in Bujumbura.<sup>78</sup> Such acts of sexual violence against vulnerable groups such as women and children raise legitimate concerns.

Bentley and Southall<sup>79</sup> have pointed out that children's rights in Burundi have been violated because they are forced directly or indirectly to become child combatants. The Burundian army, for instance, has acknowledged that hundreds of minors, known as *doriya*, were used to gather information or to serve as guides, and were recruited by the government to join paramilitary forces without pay.<sup>80</sup> This is contrary to Article 39 of the *Convention on the Rights of the Child* (1989) (CRC),<sup>81</sup> which provides that

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<sup>75</sup> Daley *Gender and Genocide* 67.

<sup>76</sup> *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* 2004 AHRLR 19 (ACHPR 2003).

<sup>77</sup> See *Ngirincuti v Secretary of State for the Home Department* 2008 EWHC 1952 (Admin); *OHCHR 2008* <http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/acatomctburundi.pdf> 3-4; Rwamo Date Unknown <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SHS/pdf/Role-Graduate-Women.pdf>.

<sup>78</sup> See ARIB News 2014 [http://www.arib.info/index.php?option=com\\_content&task=view&id=9964&Itemid](http://www.arib.info/index.php?option=com_content&task=view&id=9964&Itemid).

<sup>79</sup> Bentley and Southall *African Peace Process* 26.

<sup>80</sup> Bentley and Southall *African Peace Process* 26.

<sup>81</sup> Adopted and opened for signature, ratification and accession by GA Resolution 44/25 of 20 November 1989, which entered into force on 2 September 1990. Prior to the adoption of the CRC in 1989 both the League of Nations in 1924 and the United Nations in 1959 adopted declarations on the rights of the child. These declarations called on states to recognise certain principles regarding children's rights by taking legislative and other measures to enforce these rights. Initially the declarations were not legally binding as they were constituted as statements of general application. In the late 1970s Poland and its allies began to advocate for the creation of a new instrument on children's rights that would not only set guiding principles but also be binding on the State Parties under international law. In 1978 during its 34th session the UN Commission on Human Rights raised its concern that children continue to suffer around the world under colonial rule and Apartheid regimes as well as through racism, war, and other forms of aggression, and agreed to strengthen international instruments for protecting the rights of children. In 1978, to

State Parties must take appropriate measures to promote the physical and psychological recovery of their citizenry, including the social reintegration of child victims of any form of neglect, exploitation, abuse, torture or any other forms of cruelty, inhuman, degrading treatment or punishment. Such recovery and reintegration must take place in an environment which fosters the health, self-respect and dignity of the child.<sup>82</sup>

Article 38 of the CRC obliges State Parties to:

- ensure respect for the rules of international humanitarian law applicable to them in armed conflicts,<sup>83</sup>
- take all reasonable measures to ensure that children under the age of fifteen years do not take direct part in hostilities,<sup>84</sup>
- refrain from recruiting any person who has not attained the age of fifteen years into the armed forces,<sup>85</sup> and
- take all reasonable measures to ensure the protection and care of children who are affected by armed conflicts.<sup>86</sup>

In comparing South Africa and Burundi, Bentley and Southall assert that for a long time Burundi has been characterised by minority rule supported by a powerful suppressive security apparatus that has been able to operate with virtual impunity and is regularly accused of violating the human rights of political opponents.<sup>87</sup> They go on to say that political tensions fuelled by deep divisions along ethnic lines, the unequal distribution of wealth and job and education reservation for the ruling Tutsi minority have contributed in a great measure to the violations of human rights and genocide

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commemorate the 20th anniversary of the *Declaration on the Rights of the Child* (1959), the UN General Assembly declared 1979 as the International Year of the Child and the UN Commission on Human Rights established a working group to draft a convention on children's rights. Also see Vandenhoele "Convention on the Rights of the Child" 451-472.

<sup>82</sup> Also see the *Optional Protocol to the Convention on the Rights of the Child* (2000) on the prohibition of the use of children as combatants, adopted by the UN General Assembly on 25 May, 2000. After receiving the first 10 ratifications needed for its entry into force, the Optional Protocol became legally binding on 12 February 2002.

<sup>83</sup> Article 38(1) of the CRC.

<sup>84</sup> Article 38(2) of the CRC.

<sup>85</sup> Article 38(3) of the CRC.

<sup>86</sup> Article 38(4) of the CRC.

<sup>87</sup> See Bentley and Southall *African Peace Process* xiv.

in Burundi. This article adds that there are other challenges such as a lack of national unity and democratic participation, corruption, unfair discrimination including the absence of appropriate mechanisms to investigate and prosecute elites who abuse power and perpetrate acts of violence and terror for their political gains.

In the UN Security Council Resolution 2090 of 2013 Burundi's government was reminded again to establish an effective BTRC in accordance with the APRA, UN Security Council Resolution 1606, 2005, the National Consultations Report, 2010 and the findings of the UN Technical Committee of 2011 on the establishment of the BTRC, including amendments to the BTRC law of 2004.<sup>88</sup> Although the BTRC legislation was revised in 2011 and amended in December 2012, and the proposed BTRC was established recently (in November 2014), the critical issues of accountability and reparation to the victims remain unaddressed.<sup>89</sup>

In other countries such as the Republic of South Africa, Chile, Argentina, Guatemala, Cambodia and Sierra Leone prosecution was preferred in some cases and indemnity granted in others in exchange for the telling of the truth and in the hope of promoting national healing. It is our submission that although there have been efforts towards national reconciliation, reconstruction and healing, what is missing in Burundi in the post-conflict era is among other things, the failure to establish an effective BTRC, an independent judiciary, an ombudsman, a free press, mechanisms to combat corruption, the protection of refugees, IDPs, children and minorities, and an effective means of addressing the land question.

The apparent differences between what has been written by the relevant authors (see above) and the reality of the mass killings in Burundi can be explained in a number of ways:

- most of the research done on Burundi has focused on peace negotiations and building while ignoring the fundamental issue of the granting of impunity for past mass killings;

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<sup>88</sup> See Vandeginste 2012 *IJTJ* 355-365.

<sup>89</sup> See BNUB 2013 <http://bnub.unmissions.org/Default.aspx?ctl=Details&tabid=2961&mid=5312&ItemID=918203>. The BNUB has suggested that the Burundi government must ensure that it establishes a BTRC that conforms to national and international standards in terms of its independence, legitimacy and credibility. See generally Rubli 2013 *Africa Spectrum*, 3-24.

- the lack of national and international monitoring systems;
- the lack of judicial, legislative and executive transformation strategies.

A study was undertaken in 2010 and 2011 in response to the on-going systematic armed violence and mass killings in Burundi.<sup>90</sup> The following section deals with some of the findings of that study.

## **4 Survey**

### **4.1 Interviews**

Most interviews were conducted in the local languages of Kirundi and Kiswahili, with translation into English. Other interviews were conducted in English, as some Burundians are fluent in English. The research findings were analysed and interpreted, using a qualitative methodology.<sup>91</sup>

Both the interviews and the results emanating from the literature survey confirmed that mass killings had taken place in Burundi in 1961-1965, 1968-1969, 1972, 1988 and 1993, that they were politically motivated, and that they took place before and during the post-peace and ceasefire agreements. These facts were well documented and were common knowledge. For example, during the research places such as the Rusizi River near Gatumba, Gitaza, and Mugara in Rumonge were visited. These are among the places where most land disputes are still not resolved. The interviewees viewed the Rusizi River and Lake Tanganyika as mass graves for the victims of mass killings, and testified that corpses had been thrown into pits in order to conceal evidence.<sup>92</sup>

Of the 113 Burundians interviewed inside and outside Burundi, 80 (70.8%) had fled their country and were living in exile as refugees. The remaining 33 respondents who participated in this study were refugees born in exile after their parents had fled Burundi, or had been internally displaced during the wars in Burundi. The majority of

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<sup>90</sup> See Ndimurwimo *Human Rights Violations* 26.

<sup>91</sup> Ndimurwimo *Human Rights Violations* 170-172.

<sup>92</sup> Focus group interviews in Bujumbura, Gatumba, Gitaza and Rumonge of 2010 and 2011 available in Ndimurwimo *Human Rights Violations* and Krueger and Krueger *From Bloodshed to Hope* xiii.

the refugees who fled Burundi did so during 1970-74 as well as in 1990-1994, although a few others had also fled during other periods. Of those who fled in the 1970-74 period, more than 95% fled in 1972 following the killing of Hutus by the mono-ethnic Tutsi army under the rule of Michel Micombero. During the 1990-94 period, the majority (62.5%) fled in 1993 following the killing of the Hutu President, Melchior Ndadaye, by the same army. The refugees had fled Burundi to the DRC, Rwanda, Tanzania and South Africa. The majority of these refugees had fled to Tanzania (67.5%) and to the DRC (22.5%).

In addition, in-depth semi-structured interviews were conducted among politicians, MPs, senators, local administrators, technical officers and land officials inside Burundi. The responses relating to mass killings or "genocide" in Burundi were far-reaching. The majority of the respondents were of the opinion that refugee-related problems are associated with the impunity granted for the commission of genocide, war crimes, and crimes against humanity.<sup>93</sup> The interviewees largely recalled a chronology of events or phases of mass killings which, in their opinions, suggested that if it were not dealt with properly, neither stability nor durable solutions to refugee and internal displacement problems would be realised in Burundi.

## **4.2 Findings**

This article considers selected examples of the armed violence and emphasises that memories of the mass killings or "genocide"<sup>94</sup> are still fresh among Burundians survivors' minds. The following are transcripts of selected statements made during the in-depth interviews by Burundian respondents from CNND-FDD, UPRONA, land commissioners, local administrators and civilians in general, including respondents from political parties like FRODEBU and PALIPEHUTU.

A politician from CNND-FDD ruling party reported that:

I recall the genocide incidents since 1972; there was massacre of civilians in the southern parts of Burundi because of the Hutu extermination plan which was to be executed by Tutsis in April 1972. Michel Micombero regime came up with execution

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<sup>93</sup> Focus group interviews in 2010 and 2011 in Bujumbura, Gatumba, Gitaza and Rumonge. Ndimurwimo *Human Rights Violations* 233-234.

<sup>94</sup> Ndikumana *International Commission of Inquiry for Burundi*.



of an extermination plan of killing people especially from the Hutu ethnic group. They killed Hutu women, children and elderly people. In other parts like northern, eastern and western parts of Burundi where people were not aware of what was going on in the southern parts, Hutus found themselves being victims because influential Hutus such as students, businessmen, teachers, church leaders were being summoned by the government officials to go to prove their innocence. It is sad, they never came back! After 3 weeks almost 10 percent of the entire population was brutally killed and buried in mass graves. That was "a pure genocide" because the then government planned and executed this plan of killing civilians from Hutu ethnic group and 30 per cent in 1972 fled the country.

In 1993 when the wind of democracy started under the vision of Melchior Ndadaye, people were tired of discrimination and killings; they welcomed Ndadaye's democratic initiatives and were fully mobilized. Buyoya the then President, allowed the democratic elections to take place. However, during the 1993 election campaigns, for example, Buyoya's UPRONA Party used statements and slogans like "whoever wants to be an orphan or a refugee must choose Ndadaye". When election results were announced, there was a first attempt of a coup three days after Ndadaye's winning the presidential elections on 03/06/1993, another second coup took place on 03/07/1993 as planned by Buyoya's chief of cabinet, Colonel Sylvestre Ntingaba who came with a new Hutu extermination plan known as "Alliance Sining" or an agreement made to eliminate Hutus. Buyoya played a game of imprisoning Sylvestre Ntingaba and other military officials like Bernard Busokoza and others in Mpimba and Rumonge prisons but after one week they were all released.

A consensus was reached to allow Ndadaye to rule on 10/07/1993. But on 21 October 1993 he was brutally killed by the same Tutsi military officials. There was an immediate mass reaction as a response towards Ndadaye assassination and some civilians from Tutsi ethnic group were killed....<sup>95</sup>

Other respondents, too, described the incidents of "genocide" since independence in the 1960s and on-going politically motivated killings in post-conflict Burundi.

A politician from the UPRONA opposition party stated:

Although I belong to the opposition party, I have witnessed mass killings in Burundi equal to the genocide of Rwanda especially in 1960s, 1972, 1988 and 1993. This will not stop unless the current ruling party agrees to sit together with opposition parties in order to have a comprehensive political dialogue so that we can resolve our conflicts and bring the national unity and ultimately national healing.<sup>96</sup>

A land commissioner recalled that:

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<sup>95</sup> An interview with a politician from CNDD-FDD on 29/12/2010. Also see the Ndikumana *International Commission of Inquiry Report for Burundi*, paras 115-204.

<sup>96</sup> The memories of the genocide, recounted by a politician from the UPRONA party, as reported in the interview on 22/12/2010.

It is not easy to deal with land disputes especially the ones relating to refugees who fled the country in 1972. Sometimes when I am conciliating land disputes, I recall the genocide of 1972 when my father was killed.<sup>97</sup>

A local administrator in Rumonge reported that:

I was born in Rumonge Mugara; although I am 47 years old I still remember what happened in 1972. For example how we used to hide in the bushes and many Hutu people who were killed in the church, this was genocide because the targets by the Tutsi-led army were Hutus ...<sup>98</sup>

These statements are clear indications that the mass murders and other heinous crimes which were committed in Burundi harmed the victims not only physically but also socially, economically and psychologically. One respondent, however, did not understand the meaning of the word "genocide" and stated that: "I personally don't understand the concept of genocide in Burundi."

Krueger and Krueger argue that some lawyers and government officials deny that "genocide" was committed in Burundi, either a creeping genocide or a swift catastrophe.<sup>99</sup> But they contend that it is incontrovertible that in 1972 the Tutsi-dominated army was the perpetrator of systematic mass killings targeting other ethnic groups, the Hutus and the Twas, and their political elites in particular, and that the resulting massacre qualifies as genocide in terms of the definition in the *Genocide Convention* and is punishable under international law.<sup>100</sup>

It is submitted that a proper investigation of the systematic and politically motivated mass killings of Hutus in 1972 in Burundi and the necessary truth-telling would have determined whether or not these killings amounted to genocide. The efforts of scholars to make sense of the appalling, deliberate and violent destruction of human lives associated with such grave human rights violations in Burundi have been hampered by two main difficulties. First, there is a practical matter: data relating to the origin of the "Simbananiye and Sining Plans"<sup>101</sup> have been obscured by the

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<sup>97</sup> An interview with a land commissioner in Rumonge on 25/12/2010. Ndimurwimo *Human Rights Violations* 234.

<sup>98</sup> An interview with a local administrator in Mugara on 26/12/2010. Ndimurwimo *Human Rights Violations* 234.

<sup>99</sup> Krueger and Krueger *From Bloodshed to Hope* xii.

<sup>100</sup> Schabas *Genocide in International Law* 6.

<sup>101</sup> The directives of Arthémon Simbananiye.

destruction of the documentary evidence. Secondly, there is a more abstract matter: in an historical analysis of the Burundi genocide, scholars are confronted with the question not only of how they can provide a rational explanation or validation of what took place, but also ask if such a rational explanation can possibly exist. These difficulties have led to a diversity of conflicting interpretations of the genocide in Burundi.

### **4.3 Respondents' recommendations**

Of the 113 respondents interviewed 17 (15%)<sup>102</sup> called for an investigation of past human rights abuses, to be followed by prosecution and punishment, as a way of preventing their recurrence. Selected respondents proposed the following:

To prosecute those who committed genocide by the ICC. Courts must do their jobs properly.

*Watu waliohusika na mauaji ya kuangamiza wafikishwe mahakamani na kuadhibiwa.*  
(People who are responsible for genocide must be taken to court and be punished.)

Genocide cases should be dealt with thoroughly including those dating back to the 1960s and 1970s.

Stricter laws should be enforced.

To deal with impunity, perpetrators should be punished without discrimination based on ethnicity, political parties' affiliation etc.

Arrest, prosecute and convict all perpetrators of genocide. Learn something like principles used by other countries which experienced genocide. Strive for national unity and eliminate all forms of unfair discrimination.

Although prosecution was not favoured by the majority of respondents, Burundi is under an obligation to investigate and prosecute crimes of genocide and other serious crimes under national and international criminal laws, as will be explained hereunder.

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<sup>102</sup> Interviews with respondents.

## 5 The social integration of Burundian refugees and IDPs

The international community is confronted with the duty of protecting enormous number of persons forcibly displaced from their homes because of armed violence, gross violations of human rights and other traumatic events.<sup>103</sup>

According to Kugelmann,<sup>104</sup> the interpretation of refugee law must take into account all relevant risks which refugees may encounter and aim to grant them effective protection. The human rights dimension of refugee law, for example, must be regarded as a guiding principle when integrating refugees locally or repatriating them to their countries of origin in order to sanctify the international protection of refugees.<sup>105</sup>

The dilemma of asylum seekers and refugees who are forced from their habitual places of residence and to seek refuge elsewhere must not be taken lightly. The human condition of being a refugee or an internally displaced person is a social pathology resulting from man-made tragedies such as armed conflicts or other political and social upheavals, and must be considered and dealt with profoundly through exploring all legal and non-legal avenues. And the response must be guided by international human rights and humanitarian norms. It must be pointed out further that the plight of IDPs and refugees in Burundi in particular and Africa in general must be understood in socio-economic, political and legal contexts.

The repatriation of refugees has been regarded as a voluntary process that must consider the refugees' safety and dignity, as required by international law. However, there are factors such as pressure from both the countries of asylum and the countries of origin which have contributed towards violations of refugee's rights. Fransen and Kuschminder refer to the repatriation and reintegration of Burundian refugees from Tanzania in 2012 and point out that competition for resources, social services,

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<sup>103</sup> Deng 2003 <http://www.ifrc.org/Docs/idrl/I266EN.pdf>.

<sup>104</sup> Kugelmann 2014 <http://www.mpepil.com/home>.

<sup>105</sup> Deng 2003 <http://www.ifrc.org/Docs/idrl/I266EN.pdf>.

employment and educational opportunities between returnees and local residents is among the most pressing challenges which returnees are still facing.<sup>106</sup>

This article notes that human rights violations are taking place in association with the reintegration of refugees. These are challenges such as the lack of institutional policies and the capacity to integrate returnees at local and national levels, land disputes, insecurity, the stereotypes attached to the refugees by the local communities, who marginalise them as "foreigners", and even language barriers. Consequently, the repatriation of Burundians refugees has become a complex process and is perceived as a "starting over for returnees, contrary to what it has been depicted as a returning to a previous home and life".<sup>107</sup> The current turn of speech in Burundi is that returnees are "*rapatriés*" (repatriates) or returning migrants (*aba-UM*)<sup>108</sup> and locals are referred to as "*residents*" or "*stayees*". In this context "repatriates" are regarded as not being local residents, and the assumption is that their legal rights are also not similar to those of "residents".

The returnees' children are stuck at the crossroads. For example, refugee children who were in exile in Tanzania used to go to schools where English and/or Kiswahili were used as the languages of teaching and learning. In Burundi it has been difficult to integrate returnee children, because Burundian curricula use French and Kirundi as media of teaching and learning. Because of the language barriers faced by returnees' children who cannot speak and write French and Kirundi, Foaleng and Lari, for example, have noted that Burundi is facing enormous challenges of reintegrating thousands of refugees who spent decades in exile.<sup>109</sup>

Similarly, as Birkeland has contended, IDPs on the other hand are often caught in situations which prevent them from the enjoyment of rights and threaten their immediate safety or deny them equal access to basic human rights.<sup>110</sup> For example,

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<sup>106</sup> Fransen and Kuschminder *Back to the Land* 10.

<sup>107</sup> Interviews with returnees in Mugara and Busebwa in Rumonge. See generally Fransen and Kuschminder *Back to the Land* 3.

<sup>108</sup> Interviews with returnees in Mugara and Busebwa in Rumonge. See Ndimurwimo *Human Rights Violations*.

<sup>109</sup> Foaleng and Lari 2008 <http://www.refintl.org/policy/field-report/burundistability-depends-successful-reintegration-returnees>.

<sup>110</sup> Birkeland 2009 *IRRC* 498.

most of the IDPs' children in the Bujumbura hinterland like Muhuta and other places in the southern parts of Burundi where there have been on-going armed conflicts between the ruling party, CNDD-FDD, and opposition parties like PALIPE-HUTU, have been denied their right to education, because there is a substantial number of IDPs' children who cannot go to school.

It has been revealed that the social upheaval and poverty caused by the hostilities between the warring parties in Burundi have made the children vulnerable to recruitment as child soldiers, and some have been separated from their families.<sup>111</sup> The UN Guiding Principles on Internal Displacement re-iterate the CRC and the provisions of its Additional Protocols by emphasising that "children and unaccompanied minors shall be entitled to the protection and assistance required by their condition and to treatment which takes into account their special needs".<sup>112</sup> However, the CRC provisions are constantly being violated because of the protracted armed violence in Burundi.

## **5.1 Minority rights**

### *5.1.1 The Batwa Ethnic Group*

As stated in the introduction, the Batwa ethnic group, which forms one per cent of Burundi's population, has been subjected to discrimination for a long time. For example, it was difficult for this minority group to own land under customary law during the time of the pre-colonial monarchy, which was legitimised during the colonial era. According to the Minority Rights Group Report (MRG) of 2007,<sup>113</sup> the Batwa community faces constant challenges relating to land rights due to the lack of title deeds, discriminatory practices in land allocation, and the government's failure to recognise Batwa's historic land ownership claims.

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<sup>111</sup> Focus group interviews in Gitaza, Muhuta, Kanyosha, Kabezi, Rutumo, Magara and Rumonge in January 2011 (Ndimurwimo *Human Rights Violations*).

<sup>112</sup> See Guiding Principle 4(2) of the *UN Guiding Principles on Internal Displacement* (1998).

<sup>113</sup> Minority Rights Group International (date unknown) <http://minorityrights.org/minorities/twa/>.

In terms of formulating power-sharing agreements and the *Constitution* of 2005 ethnic quotas were provided for in order to have ethnic representation, particularly of the Batwa ethnic group, in government, administration and the military. Although Libérate Nicayenzi<sup>114</sup> committed to the raising of awareness of the rights of the Batwa community, such as having a right to social integration and to progress like the Hutus and Tutsis, the gap is still evident, because to date Batwa community rights are still not fully protected and realised.<sup>115</sup>

For example, during the conflicts of 1988 and the 1990s the Batwa ethnic group was caught in the middle between the Hutu and Tutsi militants, both of which groups accused them of loyalty to the other side. Hence during the armed conflicts between Tutsis and Hutus, Batwas were killed in large numbers.<sup>116</sup> According to the interviewees, the Batwa community was not spared during the time of the politically motivated killings that happened before, during and after the 2010 local, communal, legislative and presidential elections.<sup>117</sup> Furthermore, there is continuing systematic discrimination against the Batwa ethnic group. In October 2011 the UN Committee on the Rights of the Child urged the government of Burundi to come up with a plan of action to protect the rights of Batwa children, particularly girls. The report indicated that children from other ethnic groups (Hutu and Tutsi) have better opportunities to go to school than children from the Batwa ethnic group. The drop-out rates for Batwa girls are higher than for Batwa boys. The factors contributing to Batwa girls' lack of access to education include poverty, the attitude of Batwa parents towards the education of girls, and early marriages.<sup>118</sup>

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<sup>114</sup> The first woman from the Batwa community to serve as a Member of Parliament.

<sup>115</sup> OHCHR 2009 <http://www.ohchr.org/EN/NewsEvents/Pages/BatwaDiscriminated.aspx>; OHCHR 2010 <http://www.ohchr.org/EN/NewsEvents/Pages/CampaigningBatwapeopleofBurundi.aspx>.

<sup>116</sup> Interviews conducted with the Batwa community in Gitaza in 2011.

<sup>117</sup> Human Rights Watch 2011 <http://www.hrw.org/en/world-report-2011/burundi>.

<sup>118</sup> UNHCR 2011 <http://www.unhcr.org/refworld/country,,MRGI,,BDI,,4e16d37bc,0.html>. Also see Minority Rights Group International 2011 <http://reliefweb.int/sites/reliefweb.int/files/resources/MRG%20SWM%202011-%20FULL%20TEXT.pdf> 66.

### 5.1.2 People with albinism

Violence and discrimination against albinos, one of the minority groups, also continues to be a matter of serious concern.<sup>119</sup> The killings of albinos have aggravated the proliferation of grave violations of human rights. People with albinism<sup>120</sup> are targets of killing in Burundi and other countries. During the survey and focus group interviews in 2010 and 2011, it was revealed that the killings of albinos are associated with the false belief that possession of the body parts of albinos can enrich a person or make him/her attain or remain in a higher leadership position.<sup>121</sup> The motivation for killing them, according to the IRIN Report of 2011, is the false belief that their body parts have a special power when included in concoctions used in witchcraft. This is a gross violation of human rights, especially of the right to life as provided for under human rights laws. Between 2007 and 2009 at least 10,000 people with albinism in Tanzania, Kenya and Burundi abandoned their homes and hid themselves.<sup>122</sup> It must be pointed out that many attacks, killings and other acts of discrimination against albinos in Burundi and Africa generally are not documented or reported. The persecution of people with albinism raises human rights concerns that need joint efforts at both national and international levels to combat it. People with albinism are killed and discriminated against because they are presumed to be cursed and bring bad luck.<sup>123</sup> These practices negate any attempt to uphold human rights in post-conflict Burundi.

## 6 Obligations under international law

Burundi has been a State Party to a number of conventions and treaties, notably the *Torture Convention*<sup>124</sup> and the *Rome Statute* since 2004, and has thereby assumed an obligation to combat any sense of there being impunity for crimes against humanity,

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<sup>119</sup> Telegraph 2010 [www.telegraph.co.uk](http://www.telegraph.co.uk).

<sup>120</sup> People with a genetically inherited condition caused by the body's inability to produce melanin pigment that helps the skin to protect itself from the sun's damaging ultraviolet rays.

<sup>121</sup> Focus group interviews in Bujumbura and Rumonge in 2011.

<sup>122</sup> IFRCRS 2011 <http://reliefweb.int/node/388422>.

<sup>123</sup> See BBC News 2008 <http://news.bbc.co.uk/2/hi/africa/7327989.stm>.

<sup>124</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984).



war crimes etc., but little has been done in this regard.<sup>125</sup> Impunity continues to be a serious concern in Burundi because of the ineffectiveness of the judiciary, legislature and executive.<sup>126</sup> This is contrary to the statutory assurance that the *Rome Statute* will be treated as complementary to Burundi's criminal law. The *Constitution* of 2005 penalises international crimes, and the *Penal Code* of Burundi<sup>127</sup> criminalises genocide, war crimes, crimes against humanity, torture and other cruel, inhuman and degrading treatment, and prescribes severe punishment for rape and other forms of sexual violence.<sup>128</sup> To date no perpetrators of genocide have been prosecuted while reparation for the victims of international crimes has been hampered due the lack of effective transitional justice mechanisms.<sup>129</sup> Clearly, the substantive aspect of genocide in Burundi has been prevented by the denial that genocide took place, at both national and international levels.

This article submits further that proper investigation of the Burundi genocide is required. In addition, violence against vulnerable groups like women and minorities during and after armed conflicts, as stated earlier, has been committed in Burundi with complete impunity.<sup>130</sup> International criminal law requires the specification of the elements of a crime that must be proven - in other words, the material (*actus reus*) and mental (*mens rea*) elements.<sup>131</sup> In the case of *Bosnia and Herzegovina v Serbia*,<sup>132</sup> the ICJ emphasised the specific nature of the crime of genocide or the specific intent

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<sup>125</sup> UN News Report 2012 [http://www.un.org/apps/news/story.asp?NewsID=41912&Cr=Burundi&Cr1](http://www.un.org/apps/news/story.asp?NewsID=41912&Cr=Burundi&Cr1;); Amnesty International Report 2013 <http://www.amnestyusa.org/research/reports/annual-report-burundi-2013>. The Amnesty International Report, 2013 refers to a number of extra-judicial execution cases in 2010 and 2011 and confirms that impunity for gross violations of human rights continues. For example, a Commission of Inquiry was established to investigate allegations of crimes committed by police and army officers, local administrator and several *Imbonerakure* (youth members affiliated to the ruling party CNDD-FDD), yet no trials have taken place and the majority of the perpetrators have not been held to account.

<sup>126</sup> Mudge and Tertsakian 2012 *You Will Not Have Peace*.

<sup>127</sup> See Title XII of the *Post-conflict Constitution* and *Loi N°1/05 du 22 avril 2009 portant revision du code penal* (Revised *Penal Code* of Burundi of 2009) was signed by the President on 22 April 2009.

<sup>128</sup> See aa 274-276 of the *Post-conflict Constitution* and a 8 of the Revised *Penal Code* of 2009.

<sup>129</sup> Amnesty International 2013 <http://www.amnesty.org/en/library/asset/AFR16/003/2012/en/804f68bd-2e0e-487d-b782-d0d2c9fd1e4e/afr160032012en.pdf>.

<sup>130</sup> Focus group interviews in Gatumba, Bujumbura and Rumonge of 2010 and 2011.

<sup>131</sup> As Triffterer has clearly articulated, subjective elements are required to establish criminal responsibility for genocide: the *mens rea* as the pendant to the *actus reus* and the "intent to destroy". See Triffterer 2001 *LJIL* 400.

<sup>132</sup> Gill 2007 *HJJ* 45.

(*dolus specialis*) to target and destroy an identifiable group in whole or in part as being among the elements of the crime of genocide.

Under customary international law, for example, rape and other forms of sexual violence are prohibited in both international and non-international armed conflicts. The prohibition of rape under international humanitarian law can be traced far back to the *Lieber Code*.<sup>133</sup> While common Article 3 of the *Geneva Conventions* does not explicitly mention rape or other forms of sexual violence, it prohibits violence to life and person including cruel treatment, torture and outrages upon personal dignity, which impliedly includes rape.<sup>134</sup> The *Third Geneva Convention* provides that prisoners of war are in all circumstances entitled to respect for their honour and dignity.<sup>135</sup> The prohibition of crimes against personal dignity is acknowledged in the *Additional Protocols I* and *II* as a fundamental guarantee for civilians and persons *hors de combat*.<sup>136</sup>

The crimes listed under the *Rome Statute* have been confirmed by international tribunals with specific reference to rape as a crime against humanity, and under the International Criminal Tribunal for former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) has been interpreted broadly to mean genocide.<sup>137</sup> The *Rome Statute* obliges the ICC Prosecutor to investigate allegations of genocide if it is clear that the crime was either committed by a national of a State

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<sup>133</sup> See ICRC 2015 [http://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter32\\_rule93](http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule93). *Instructions for the Government of Armies of the United States in the Field* (1863) (*Lieber Code*) as prepared during the American Civil War by Professor Francis Lieber and revised and promulgated by President Lincoln. Although they were binding only on the forces of the United States, they correspond to a great extent to the laws and customs of war existing at that time. The *Lieber Code* has influenced the codification of the laws of war and the adoption of similar regulations by other states. They formed the origin of the project of an international convention on the laws of war presented to the *Brussels Conference* in 1874 and stimulated the adoption of the *Hague Conventions* on land warfare of 1899 and 1907, which later influenced the adoption of the *Geneva Conventions* (1949). See Schindler and Toman *Laws of Armed Conflict* 2-23.

<sup>134</sup> Common a 3 *Geneva Conventions* (1949).

<sup>135</sup> Article 14(1) of the *Third Geneva Convention* (1949).

<sup>136</sup> Article 75(2) of *Additional Protocol I* and a 4(2) of *Additional Protocol II to the Geneva Conventions* (1977).

<sup>137</sup> Article 5(g) of the *Statute of the International Criminal Tribunal for the former Yugoslavia* (1993) (*ICTY Statute*); a 3(g) of the *Statute of the International Criminal Tribunal for Rwanda* (1994) (*ICTR Statute*). Also see the ICTR judgment in the *Prosecutor v Akayesu* Case No ICTR 96-4-T, Judgment 732 of 2 September 1998 (ICTR Judgment).

Party or on the territory of a State Party.<sup>138</sup> Articles 12 and 13 of the *Rome Statute* refer to the conditions relating to the ICC's jurisdiction to deal with genocide cases, including referrals of one State Party against another State Party. As demonstrated in the UN Report of 2010 commonly known as "the UN Report on the Second Rwanda Genocide",<sup>139</sup> there is an indication that gross human rights violations may no longer be concealed.

Global trends have shown that the perpetrators of genocide and other serious international crimes can be prosecuted at the international level if there is unwillingness or a lack of capacity to prosecute perpetrators at national level. Thus, the "universal jurisdiction" can be invoked, as demonstrated in the cases such as *Pinochet*<sup>140</sup> and *Eichmann*,<sup>141</sup> or the ICC's "complementary principle" can be applied, as shown in the *Taylor*,<sup>142</sup> *Kenyatta*,<sup>143</sup> *Ruto*,<sup>144</sup> *Barasa*<sup>145</sup> and *Gaddafi*<sup>146</sup> cases.

There are three approaches by which an investigation of any possible crime under the jurisdiction of the ICC may be initiated:

- the UN Security Council 's referrals to the Prosecutor of the ICC;<sup>147</sup>
- the State's referrals to the Prosecutor of the ICC;<sup>148</sup> and
- the Prosecutor's *proprio motu* power to investigate complaints.<sup>149</sup>

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<sup>138</sup> Article 13(a) and (c) of the *Rome Statute*.

<sup>139</sup> Fisher 2010 <http://www.theatlanticwire.com/global/2010/08/un-report-on-rwanda-genocide-shakes-africa/23224/>. Also see Human Rights Watch 2010 <http://www.hrw.org/news/2010/10/01/dr-congo-un-report-exposes-grave-crimes>. *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* 2004 AHRLR 19 (ACHPR 2003) para 94; *Armed Activities on the Territory of the DRC* Order of 21 October 1999, ICJ Reports 1999 101. See further BBC News 2014 <http://www.vigile.net/La-BBC-confirme-la-macabre>.

<sup>140</sup> *R v Bow Street Metropolitan Stipendiary Magistrates and Others, Ex Parte Pinochet Ugarte (No 3)* 2000 1 AC 147 u.

<sup>141</sup> *Attorney-General of Israel v Eichmann* 1962 36 ILR 5.

<sup>142</sup> See *Prosecutor v Charles Ghankay Taylor* Case No SCSL-03-01-A.

<sup>143</sup> See *Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta to Trial Chamber V* Case No ICC-01/09-02/11-414 of 29 March 2012.

<sup>144</sup> See *Prosecutor v William Samoei Ruto and Joshua Arap Sang* Case No ICC-01/09-01/11 of 29 March 2012.

<sup>145</sup> See *Prosecutor v Walter Osapiri Barasa* Case No ICC-01/09-01/13 of 18 September 2015.

<sup>146</sup> See Leanos 2012 *Fordham L Rev* 2296-2298.

<sup>147</sup> Article 13(b) of the *Rome Statute*.

<sup>148</sup> Article 13(a) of the *Rome Statute*.

<sup>149</sup> Article 13(c) of the *Rome Statute*. Refer to the Kenyan and Libyan cases.

Accountability and responsibility for genocide and other serious international crimes have been demonstrated in cases such as the Nuremberg and Tokyo trials, Yugoslavia, Rwanda, Chile, Guatemala, Sierra Leone, Cambodia, Kenya and Libya. Burundi can benefit from these laudable lessons.

## **7 Conclusions and recommendations**

In re-thinking violence, reconciliation and reconstruction in Burundi, this article has underscored the roles of successive Tutsi-led military regimes and insurgent groups in the commission of genocide and other serious crimes. It points out the failure of the post-conflict government to cement national reconciliation and healing, establish accountability and responsibility for the past wrongs and to end the culture of impunity. It must be emphasised that this article is only one among the many contributions to the on-going search for responsibility and accountability for grave human rights violations. It stresses that the development of a comprehensive transitional justice model in contemporary Burundi based on the rule of law and constitutionalism is essential. As emphasised by Justice Albie Sachs,<sup>150</sup> a new constitutional order that values participatory democracy, equality and truth-telling as means of dealing with the crimes of the past so that they may not be repeated is required in Burundi.

This contribution has considered the question of whether or not Article 2 of the *Genocide Convention* can be interpreted broadly to accommodate systematic Hutu and politically motivated mass killings of people in Burundi. In the light of the primary data and literature survey, this article refers to the systematic mass killings of Hutus and asserts that these killings were planned and executed in terms of policies such as the "Simbananiye and Alliance Sining Plans," whose intention was to destroy the Hutus as ethnic group in whole or in part, as the *Genocide Convention* suggests. Therefore, it can be deduced that "genocide" indeed took place in Burundi.

We advocate that to complement an independent judiciary with a legal system based on respect for the rule of law, Burundi needs strong, independent and impartial

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<sup>150</sup> Sachs *Strange Alchemy* 70-71.

prosecutors. As asserted by the Office of the High Commissioner for Human Rights and the International Bar Association, the willingness to investigate and prosecute suspected crimes committed against human beings, even if these crimes have been committed by persons acting in an official capacity, can prevent their recurrence.<sup>151</sup> This means that unless prosecutors, judges and lawyers are able to exercise their professional duties freely, independently and impartially, the rule of law will slowly and gradually be eroded, while the effective protection of the human rights of individuals will be adversely affected and the prevention of genocide and armed violence will remain theoretical in Burundi.

This article recommends the following measures:

- the transformation of the judiciary and law reforms;
- the introduction of a justice system that may combine litigation, legal advocacy, technical assistance and human rights education, to strengthen areas such as combating corruption, equality and citizenship education, freedom of movement and expression;
- the establishment of a Truth and Reconciliation Commission whose findings may be used for further criminal investigation and prosecution under Burundi's criminal law or international law;
- reparations for the victims of armed violence and genocide, including governments' public apology and the establishment of national heritage sites. This might include the construction of a permanent exhibition showing photos, documents and other displays of survivors' experiences, the establishment of a public holiday of remembrance, the provision of an opportunity for civil society members to address their psychological suffering through "testimonial therapy," and rehabilitation programmes;
- the introduction of community outreach projects or capacity building or empowerment programmes especially for the young and for women. This could include job creation strategies through educational reforms.

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<sup>151</sup> OHCHR and IBA *Human Rights in the Administration of Justice* 116.

This article makes a modest contribution to the on-going search for durable solutions to the endemic violence in post-conflict Burundi, to national reconciliation, to healing and to reconstruction in this troubled land.

The establishment of a comprehensive transitional justice mechanism model in Burundi could bring about national reconciliation, healing and reconstruction, and reparation for the victims, and prevent further recurrences of gross violations of human rights. Given the significance of respecting political and civil rights, Burundi's government has an obligation to enhance the diversity of political participation, including the appointment of a new Independent National Electoral Commission (CENI), to ensure that all political parties participate in the upcoming elections of 2015 in order to avoid the outrages of the 2010 local and presidential elections.<sup>152</sup>

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<sup>152</sup> The *UN Security Council Resolution on Burundi* UN Doc S/RES/2090 (2013); the UN Secretary-General Ban Ki-moon statement at the Geneva Conference of Development Partners held in October 2012 on a call to present a "new Burundi" that protects its freedom of expression, association and political participation which are foundations of true democracy. It was emphasized that without justice and robust political will to end impunity, reconciliation alone will not resolve the profound divisions that have pulled apart Burundian society in the past. Thus, transparency and promotion of peace should be regarded as basis for national reconciliation and reconstruction.

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**LIST OF ABBREVIATIONS**

APRA	Arusha Peace and Reconciliation Agreement
BA	Bujumbura Agreement
BMC Int Health Hum Rights	BMC International Health and Human Rights
BNUB	United Nations Office in Burundi
BTRC	Burundi's Truth and Reconciliation Commission
CENI	Independent National Electoral Commission
CRC	Convention on the Rights of the Child
DCCA	Dar es-Salaam Comprehensive Ceasefire Agreement
DRC	Democratic Republic of Congo
EJIL	European Journal of International Law
Fordham L Rev	Fordham Law Review
HJJ	Hague Justice Journal
Hum Rts Q	Human Rights Quarterly
IBA	International Bar Association
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IFRCRS	International Federation for the Red Cross and Red Crescent Societies
IJTJ	International Journal of Transitional Justice
IRRC	International Review of the Red Cross
LJIL	Leiden Journal of International Law
MA	Magaliesburg Agreement
MRG	Minority Rights Group Report
OCHA	Office of Co-ordination of Humanitarian Affairs

OHCHR	<i>United Nations Office of the High Commissioner for Human Rights</i>
PGCA	Pretoria Global Ceasefire Agreement
TRCSA	Truth and Reconciliation Commission of South Africa
UN	United Nations
<i>UNHCR</i>	United Nations High Commission for Refugees
<i>VOA</i>	Voice of America

## **RETHINKING VIOLENCE, RECONCILIATION AND RECONSTRUCTION IN BURUNDI\***

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### **SUMMARY**

Armed violence and genocide are among the on-going problems that are still facing contemporary Africa and the world. In the aftermath of the outrages, devastation and appalling carnage of the Second World War, member states of the United Nations (UN) undertook radical steps, *inter alia*, "to save succeeding generations from the scourge of war and to reaffirm faith in fundamental human rights". Subsequently, the International Bill of Human Rights was proclaimed in order to lay down international human rights norms and standards of conduct and to prevent the recurrence of mass killings. Although Burundi is a State Party to the UN and African Union and is a signatory to a number of international and regional human rights treaties, the post-colonial history of Burundi is an epic tale of indescribable human suffering and misery as a result of systematic mass killings. At least every family or household in Burundi has been negatively affected by the mass killings of the 1960s, 1972, 1988 and 1990s, which have created a significant number of refugees and internally displaced persons (IDPs). This article traces the root causes of Burundi's systemic armed violence and argues that despite several UN Security Council Resolutions and peace agreements aimed at national reconciliation and reconstruction, mass killings and other heinous crimes remain unaddressed. The article recommends that a comprehensive transitional justice model is required in post-conflict Burundi in order to bring about national reconciliation, healing and reconstruction.

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**KEYWORDS:** Armed violence; human rights violations; reconciliation and reconstruction; post-conflict Burundi.