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# report

# The Role of Informal Justice Systems in Fostering the Rule of Law in Post-Conflict Situations

## The Case of Burundi

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The Centre for Humanitarian Dialogue is an independent and impartial organisation, based in Geneva, Switzerland, dedicated to the promotion of humanitarian principles, the prevention of conflict and the alleviation of its effects through dialogue.

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# Acronyms

| | |
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| ACCORD | African Centre for the Constructive Resolution of Disputes |
| ACTS: | African Centre for Technology Studies |
| APRA: | Arusha Peace and Reconciliation Agreement |
| ASF: | Avocats sans frontières |
| CNDD: | Conseil National pour la Défense de la Démocratie |
| CRID: | Centre de Recherche pour l'Inculturation et le Développement |
| FDD: | Forces de Défense de la Démocratie |
| FNL | Forces Nationales pour la libération |
| FRODEBU | Front por la Démocratie au Burundi |
| GTZ: | Gesellschaft für Technische Zusammenarbeit |
| ICG: | International Crisis Group |
| ICRC: | International Committee of the Red Cross |
| NCRWV: | National Committee for the Rehabilitation of War Victims |
| NCTR: | National Commission for Truth and Reconciliation |
| NGO: | non-governmental organisation |
| PREBU | Programme de Rehabilitation du Burundi |
| RCN: | Réseau des Citoyens pour la Justice et la Démocratie |
| UNDP: | United Nations Development Programme |
| UNHCHR: | United Nations High Commissioner for Human Rights |
| UNOB: | United Nations Operations in Burundi |

# Summary and Recommendations

Burundi, a tiny country in Central Africa, is slowly emerging from more than forty years of cyclical violence. The worst episodes, widely recognised as genocide, took place in 1972 with the massacre of tens of thousands of the Hutu ethnic group by the Tutsi-dominated regime, and in 1993 with tens of thousands of Tutsi wiped out by certain Hutu who were motivated by an ideology of extermination. The 1993 episode was followed by civil war between Hutu rebels and the Tutsi-dominated army. In August 2000, after years of negotiation and intensive diplomatic efforts, the Arusha Peace and Reconciliation Agreement (APRA) was signed by 19 political parties and the Burundi government. Major Hutu armed rebel groups had not participated in the peace process and did not lay down their arms at that time. An accord was reached with the largest group, CNDD-FDD in November 2003, which led to a comprehensive ceasefire and power-sharing agreement.[1] The FNL remains the only rebel group outside the peace process.

1 Protocol on Political, Defense, Security and Power-Sharing Issues in Burundi, 9 October 2003; a following Protocol based on outstanding issues on 2 November 2003; and the ceasefire agreement on 16 November 2003.

Though Burundi's formal justice system and structures have survived, justice has been deeply affected by the massacres, reprisals and civil war. The regeneration of the country, and restoring justice and the rule of law, is now a serious challenge. The questions for which it is necessary to find solutions in order to restore the rule of law include impunity for crimes, the corruption of the judicial apparatus and other public services, the propensity to resort to vigilantism, reconciliation, the problems relating to land and the resettlement of returning refugees and people displaced by the war.

This study, which includes data gathered from the field as well as documentary data, examines the possibilities of a closer collaboration between the two legal systems which coexist in Burundi: the formal system, that of the courts and tribunals, as well as all of the legal institutions; and the informal[2] system represented mainly by the *bashingantahe* institution, to prevent and resolve conflicts. The study also provides a picture of the interventions already undertaken by the international community and the local civil society and finally proposes how the international community can support the two systems to contribute to the restoration of the rule of law.

2 The term 'informal' is used in this study as the contrast of 'formal'; however, the *bashingantahe* institution that is the central focus of this discussion of the informal system is not informal, as such, but a veritable institution. Were it being discussed alone, we would call it traditional.

The formal system is well organised and has continued to function through periods of civil strife and increasing poverty, but it is very weak. It has never responded adequately to the serious crimes that were committed from independence in 1962 to the present day, including genocide, and the public is extremely disillusioned with the system. The resources for the sector have become almost negligible in relation to the job it has to do, and so those who work within the system are also extremely disillusioned.

Some of the inefficiency of the system is clearly related to a lack of funding to accomplish key tasks and to allow the personnel to earn a living. Neither the police nor the magistrates have transportation to carry out their investigations or execute judgments; many different government services share the same premises, which are often in disrepair.

Traditionally, the *bashingantahe* institution was the traditional legal system in Burundi. Regarded as the embodiment of universal values and personal integrity, the 'wise men' who made up the institution played many roles in the community in which they were chosen but the most important was the peaceful resolution of conflicts. The *bashingantahe* played a considerable role in the maintenance of cohesion or the restoration of peace on their collines[3] (the smallest administrative units) where 90 per cent of the population still live and work.

More specifically, according to tradition, in addition to their judicial role, they would reconcile individuals and families; authenticate contracts (inheritance, marriage, sale of cattle, etc.); ensure the security of life and property; provide guidance to politicians in the exercise of their mandates; promote respect for human rights and the common good.[4]

The institution was weakened during the colonial era, beginning in the 1920s. First, the justice rendered by the *bashingantahe* became 'informal' justice with the establishment of the Belgian system of positive law. At the same time, many *bashingantahe* were co-opted by the colonial and then the post-colonial regimes, thus changing the independent and neutral nature of the *bashingantahe*. Nonetheless, even if its former status was diminished, the *bashingantahe* institution remained at the same time a symbol of justice and, in many cases, the instrument of its achievement.

Today, the *bashingantahe* are still consulted, particularly on the *collines*. They are active in resolving the crucial problems of the day such as disputes over land and the resettlement of refugees and displaced persons. However, the public criticises the fact that they have become less and less representative of traditional values of integrity and impartiality, mainly because they have often been chosen by political authorities and instead of being chosen individually after scrutiny by their peers. Because the public has been distanced from the selection process that was the basis of its confidence, the *bashingantahe* tend to be viewed by some as representing one political tendency or ethnic group, though the institution has remained representative of both ethnic groups. Many are seen as corrupt, asking for fees, contrary to tradition. The same criticisms are directed at the formal system as well. Political groups, including the CNDD and certain members of Frodebu,[5] both predominantly Hutu, question the relevance of the *bashingantahe*, particularly in light of the alleged political manipulation of the institution from the colonial period to recent days, and are debating their role in the modern system.

There are distinct opportunities for the two systems to collaborate better in order to foster the rule of law. There are many magistrates, particularly at the grassroots level, who not only benefit from but depend upon the evidence-gathering and conciliatory approach of the system to facilitate their work. They join many members of the public in saying that their workloads would be much heavier if the *bashingantahe* did not function. However, the decisions of the *bashingantahe* have no force of law and the legal requirement for parties to have taken their civil matters to the *bashingantahe* before being heard by the communal tribunal has recently been eliminated. Furthermore, there is a common confusion of roles and powers, particularly among the grassroots authorities.

Legal aid clinics have been established and are becoming a widespread mechanism in the informal justice sector. Another, unfortunate, element of

3 *Colline* means hill but the administrative term usually refers to a group of hills and can in some way be compared to a village or a neighbourhood. The *bashingantahe* are chosen and act within this geographic circumscription.

4 Nindorera, L.M., 'Keepers of Peace: Reviving the Tradition of *Bashingantahe* in Burundi', *Online Journal of Peace and Conflict Resolution* 4(1), 1998, www.trinstitute.org/ojpcr, citing Ntabona, A) 'Suggestions to Escape from Ethnic Totalitarianism', *Au Coeur de l'Afrique* No. 1, 1995.

5 FRODEBU is the Front for Democracy in Burundi, a predominantly Hutu political party.

informal justice is carried out by armed groups. Acts of vigilantism are not yet systematised but are becoming more common.

The international community has been working with the Burundian justice system over the last several years, specifically for the restoration of the rule of law. The current interventions are based on the common approach of implementing the reforms envisaged in the APRA[6]. However, there are significant gaps in important areas of intervention such as the fight against impunity and the land issue, and, on the other hand, there are duplications of efforts in other areas resulting in the dispersion of resources. A focused and strategic approach for international assistance to justice is essential. The financial investment in this sector remains insufficient, considering the importance of justice in the restoration and maintenance of peace and stable institutions. The lack of coordinated action by the international community is likely to undermine the achievements of the peace process that it has patiently and generously supported.

The following are the main recommendations which focus on the actions required to strengthen the two systems, with particular emphasis on the informal system, particularly with regard to transitional justice. Some of the recommendations are not inventions or innovations; they include approaches or activities that are being undertaken but are not standardised in content or geographical coverage. Other recommendations include actions of strategic coordination that have not yet been undertaken.

6 Prot. I, chap. II, art. 5: 'The promotion of gender and ethnic balances in the Burundian judicial sector shall be undertaken, *inter alia* through recruitment and appointment, to correct the ethnic and gender imbalances in the Burundian judicial sector during and after the transition period, training colleges for employees of the judicial system shall be created, accelerated training shall be promoted, and the status and the internal promotion of magistrates shall be improved; existing legislation relating to the organisation of the Judiciary, the codes of criminal and civil procedure and the map of judicial jurisdiction shall be reviewed; all legislation shall be made available in Kirundi; respect for the law shall be promoted; steps shall be taken to discourage corruption, to denounce officials guilty of corruption, to enforce all legislation related to corruption, to establish effective oversight bodies, to improve working conditions in the judicial sector and to take necessary measures to require civil servants to report instances of corruption; the necessary measures shall be taken, including those specified in Protocol I to the Agreement, to deal with the problem of impunity and take any other steps required to ensure that any travesties of justice are dealt with or re-opened; the judicial sector shall be given the necessary resources so as to discharge its responsibilities impartially and independently.'

# Recommendations

## Capacity-building

In order for the public to be properly served and to perceive that those dispensing justice have the knowledge of the law and the orientation to apply it equitably there is need for the following:

- A uniform training for the *bashingantahe* on the written law regarding land, inheritance and family law, and international human rights standards. The training on the land law should be intensive.
- A uniform training for the magistrates through the Magistrate's Training Centre, an institute that establishes an *esprit de corps* and instils the ethics of the institution as well as much- needed technical knowledge.
- A uniform training at the commune level and then the colline level, given jointly for the grassroots authorities on the delimitation of their powers, and on key modern laws.
- A corpus of written law translated into Kirundi and then disseminated among all the actors in the formal justice system, the administration and the representatives of the *bashingantahe*.

## Cooperation between the two systems

In order for the grassroots authorities to enhance their collaboration in the resolution of disputes there is need for:

- a framework for permanent dialogue between the magistrates, the *bashingantahe* and the administration so that each of those parties remains well aware of its role and takes care not to interfere in other parties' roles and better understands the various means of collaboration;
- a framework of collaboration for transitional justice so that the *bashingantahe* can facilitate the work on the ground for the National Commission for Truth and Reconciliation, as well for the judicial transitional mechanism.

## Material and logistical support

In order to facilitate the formal system to bring to justice, render or execute justice, there is a need to provide:

- means of transportation for police and magistrates, basic office materials, some building repair and reconstruction;
- possibilities for better remuneration for actors in the formal system, especially magistrates.

## Specific recommendations on the bashingantahe

In order to restore the confidence of the community in the qualities and commitment of the *bashingantahe*, there is a need to:

- reinstitute the traditional element of observation by the local community on the colline, or in the quartier in urban areas, before investing *bashingantahe* – without exception;
- review and reform the practice of receiving payment for services in light of tradition which prohibits it and the conditions of widespread poverty within a modern economy which may require it.
- pursue options for the investiture of women which will be a visible sign of the recognition of gender equality and a powerful example in the community.

## Specific recommendations to the international community

In order to make the interventions of the international community more effective, it is necessary to:

- create an independent and multi-sectoral technical commission, under the responsibility of the Ministry of Justice, to coordinate the planning, dialogue and synergy with the international organisations on the actions to be undertaken in order to support the formal and informal systems;
- evaluate the interventions in the justice sector to determine the best means of restoring the rule of law in Burundi.

# 1 Historical Overview

Burundi has been an independent country since 1962. It was led by a monarchical dynasty for centuries, before being colonised initially by Germany (1896–1918), then by Belgium (1918–1962). It is a tiny country, land-locked between Rwanda in the north, the Democratic Republic of Congo and Lake Tanganyika in the west, and Tanzania in the south and the east, and it is also one of the most densely populated countries in Africa. With 90 per cent of a growing population depending on agriculture, and arable land becoming scarce, it has serious problems of development. According to the UNDP Human Development Report 2004, Burundi ranks among the five least advanced countries in the world. The population is made up of four (*ubwoko*)[7] or ethnic groups: the Baganwa, the Bahutu, the Batutsi and the Batwa. These 'ethnic' components speak the same language and share the same culture, history and territory.

The serious ethnic and political conflicts that Burundi has experienced since independence contrast with the beauty of its landscapes. The political community, in its struggle to gain or maintain power, manipulated and exploited the ethnic groups and created a cycle of violence that pitted the majority Hutu against the minority Tutsi group that, from independence on, has had the political and military might. Massacres, assassinations and other crimes against humanity have marked the recent history of the country. The tragedy of 1972 was a determining factor in the recent history of Burundi due to the trauma that it left within the Burundian community. After a Hutu insurrection which resulted in the death of 2,000–3,000 Tutsis, as many as 200,000 Hutus were killed in reprisal. During this campaign of violence, almost all of the educated Hutu population was wiped out. As many as 150,000 fled the country.

The crisis of 1993, triggered by a failed *coup d'etat* during which the first democratically elected president, Melchior Ndadaye (a Hutu) was assassinated, is certainly linked to the tragedy of 1972. The assassination sparked massacres of an estimated 50,000 Tutsi by Hutu, followed by a brutal repression of Hutu by the army. More than 600,000 Hutus then fled the country. This crisis[8] and ensuing civil war has already caused considerable loss to the country in terms of: human lives; hundreds of thousands of refugees and internally displaced persons; the deterioration of social relations, security and political stability; as well as the destruction of an already fragile economy.

In August 2000, the representatives of the government, the National Assembly and 17 political parties signed the Arusha Peace and Reconciliation Agreement (APRA) in Burundi. This agreement constitutes a political platform for the restoration of peace based on the values of justice, the rule of law, and the respect of fundamental human rights and freedoms[9]. The agreement provided for a 36 months' transitional period devoted to the restoration of state institutions and the rule of law. However, this transitional period was extended by six months from November 2004 to April 2005 and then from April 2005 to August 2005 because the provisions of the APRA – in particular those relating to the elections and the demobilisation of the combatants – were not yet fully implemented.

The APRA also provided the background for many of the provisions of the Post-Transition Constitution, which was ratified by referendum in February 2005 and promulgated in March 2005.

7 The Kirundi word *ubwoko* also means species. The term 'ethnic group' is deliberately used in this report while knowing that it does not correspond to the reality of the components of the Burundian population. The commission established in 1991 to examine the question of national unity had proposed to use the term in quotation marks. For example, there is continued debate as to whether the Baganwa constitute an ethnic group or a dynastic clan. This paper will use the abbreviated 'Ganwa', 'Hutu', 'Tutsi' and 'Twa'.

8 'Crisis' is the term most commonly used to refer to the mass violence that took place after the assassination of the president in 1993 and the prolonged state of violence that has followed and that is inflicted to this day by armed groups and bandits on parts of the population.

9 The Arusha Agreement for Peace and Reconciliation, Prot. I, chap. II, art. 5.

# 2 The Traditional System: *the Bashingantahe*

## 2.1 Presentation of the bashingantahe

*Bashingantahe* is the plural of the word *mushingantahe* that is derived from the words *gushinga* ('to plant or fix') and *intahe* ('ficus stick') and means 'the one who plants the stick into the ground'. It is so named because of the court stick, *intahe,* that the *bashingantahe* strike rhythmically and in turn on the ground to insist on the importance of the words they are using and the decisions they render while arbitrating conflicts; it has been transmitted from generation to generation. In a metonymical and symbolic sense, *intahe* means justice and equity. The word *ubushingantahe* means, on the other hand, the set of values underlying the *bashingantahe* institution.[10] Legends of origin agree and confirm that justice is the foundation of the *bashingantahe* institution.[11]

An example of perhaps the most important legend is that of Ngoma ya Sacega considered as the symbol of the upright and sagacious judge:[12]

> *One day, summoned to arbitrate between Imana (God) and Rupfu (Death) to say who is the most important, he is threatened by Rupfu that he will only be saved if he renders a decision in favour of him, but that he will be put to death if he (Rupfu/Death) loses the case. Perfectly aware of the consequences, Ngoma ya Sacega settled the case against Rupfu since the latter's only strength relies on killing and not on saving people. Of course Rupfu killed him and he thus died for truth and justice. But he took care to associate the other Bashingantahe, and he bequeathed them his stick of justice (intahe) which he had used to settle the case. The stick was, for them, the symbol of truth at any cost.*

### Characteristics

A study on the traditional techniques for peaceful conflict resolution in Burundi[13] argues that the institution has the following characteristics. First, it is national, in that it represents two of the three ethnic groups all over the country. The exception is the Twa ethnic group, comprising about 1 per cent of the population, which has not traditionally been part of the *bashingantahe* system. According to tradition, the Twa were excluded from the *bashingantahe* as they had their own way of life on the edges of society. Certain projects are being supported to help the Twa increase their participation in political life and to fulfil their rights to education and land. As they are beginning to be integrated into the present socio-cultural and political life, they are beginning to be invested as *bashingantahe* alongside Hutu and the Tutsi.[14] Women have traditionally been excluded from being invested in their own right. They are invested with their husbands as *bapfasoni,* persons of wisdom and integrity, but do not have the right to deliberate with the men nor render judgment. Second, the *bashingantahe* institution is multidimensional, having a role in judicial, moral and cultural, as well as social and political affairs. It is also universal due to its underlying values, such as the concern for justice, the love of truth, and concern for the common interest. Finally, an important

10 Among them justice, truth, honesty, conciliation.

11 For more details on the *bashingantahe* institution, see Ntahombaye, Ph., Ntabona, A., Gahama, J., Kagabo, L. (under the direction of), 'Updating the *Bashingantahe* Institution, a Pluridisciplinary Study', University of Burundi, 1991 (with a summarised version in Kirundi and English); and Ntabona, A., *Itinerary of Wisdom. Past, Present and Future Bashingantahe in Burundi*, Bujumbura (ed. CRID), 1999, 303 pages.

12 Kagabo, L., 'The *Bashingantahe* Institution in Burundi', *in* Report of the Seminar 'Traditional institutions for peaceful conflict resolution and peace promotion in the Great Lakes and in the Horn of Africa', organised by the University of Burundi and Life & Peace Institute, Bujumbura, 5–8 December 2001.

13 Ntahombaye, Ph. and Manirakiza, Z, 'The role of traditional techniques and mechanisms in peaceful resolution of conflicts in Burundi', UNESCO, Bujumbura, December 1997; Studies carried out on the institution and the Project *Identification of the traditionally invested bashingantahe*, UNDP, BDI 99, confirmed this national character.

14 The *bashingantahe* registries in all communes confirm this. The Gatara Commune, in Kayanza Province, invested 12 *Batwa* in 2002 and 2004. The traditional exclusion of the *Batwa* from the institution is seen differently by some *Batwa*. One explained that it is not customary for them to be invested *bashingantahe*, as 'all *Batwa* are equal'. RCN, *Bulletin of RCN Justice and Democracy*, Special Issue Custom, 2nd quarter 2004, Bulletin 8, Brussels.

characteristic is the collegial and consensual nature of the deliberations and decisions of the *bashingantahe*.

According to legend, the *bashingantahe* institution[15] began under the reign of King Ntare Rushatsi, the founder of the monarchy, towards the end of the seventeenth century. The king *(mwami)* administered his territory by delegating members of his royal lineage, the Banwa princes, to various regions. The G*anwa*, or chiefs, would then delegate the administrative power of a number of *collines* to another individual, the sub-chief. The *bashingantahe* were the representatives of the colline and the interlocutors of the administrative authority, and, based on this status, Ntare Rushatsi institutionalised the *bashingantahe* throughout the territory. They then became specialised in judicial affairs and became part of an administrative structure that, however, did not recognise a clear separation of powers.

15 An 'institution' being defined in this context as 'a decision-making body or a publicly recognised council with or *without* legal status, and whose members express themselves on topics of interest to the whole or part of the society.' (Deslaurier, C., 'The Bushingantahe in Burundi', in Fauvelle, F.X. et Perrot, C.H., *Le Retour des Rois*, Paris, Karthala, 2003, page 401.)

The king, the chief and the sub-chief all held political, legislative and judicial powers. Each of these authorities had *bashingantahe* to advise them and to provide checks and balances.[16] Although, the King's jurisdiction was unlimited in geography and subject matter and his judgments were not subject to appeal, he was in fact somewhat limited in his power by the counsel given by the *bashingantahe* of his court, based on the just and equitable application of custom.

16 This role was possible as their mission was neutral and impartial. A case is quoted in the pluridisciplinary study edited by the University of Burundi (1991), in which the *bashingantahe* prevented the selling by the king of the Muramvya royal palace. Ntahombaye, Ph. et al. (see Note 14 above), pp.104–113. One may also refer to a case mentioned by Augustin Nsanze, a case in which the king lost a land case to a woman (*A royal property in Burundi*, Mbuye, around 1850–1945, Paris, pp. 17–18).

This advisory role was informal. But concerning justice, there were formal jurisdictions with, at the lowest level, the family committee (*abashingantahe bo mu muryango*), the colline-level tribunal (*intahe yo ku mugina*), the sub-chief tribunal (*sentare y- i butware*), the chief's tribunal (*sentare y- i buganwa*) and the king's tribunal (*sentare y- i bwami*).

The family committee would undertake a process to reconcile the members of the family in conflict. The colline-level tribunal treated minor affairs such as family disputes, insults, minor assault, theft of crops, damages caused by roaming livestock, and debts. The sub-chief's tribunal resolved land cases and theft of small livestock. The chief's tribunal resolved cases of greater gravity such as homicide, the theft of cows and the provision of dowry. Certain cases on appeal from the sub-chief's tribunal were heard at this level. The king's tribunal would settle disputes among the chiefs and the most serious cases, particularly high treason. All cases could theoretically be brought before the king's tribunal and the king himself would preside. Particularly long delays could be expected before having a case heard at this level.[17]

17 Ph. Ntahombaye and Z. Manirakiza, 'The role of traditional techniques and mechanisms in peaceful resolution of conflicts in Burundi', UNESCO, Bujumbura, December 1997, p. 80.

## Selection criteria and the investiture of a *mushingantahe*

Traditionally, a *mushingantahe* should possess the following qualities: maturity, experience and wisdom, a heightened sense of justice and equity, concern for the common good, a sense of responsibility (individual, family and social), a sense of moderation and balance (in his words and acts), dedication and the love of work. To these essential qualities are added the moral and intellectual qualities of truthfulness, discretion, intelligence, a sense of dignity and honour, and courage. He should also be materially self-sufficient.

The community discerns these qualities over time; there are several stages in becoming a *mushingantahe*. Often, an adolescent would be singled out as a candidate based on his qualities. Otherwise, a young man would ask to be

considered for investment. He would be observed by his community over a period of years, and his character would be tested. His use of language and overall self-control are outward signs of his worthiness. He would undergo a gradual integration into the judicial functions with the help of a sponsor: first, he would be an observer and take in the teachings of the *bashingantahe*, then he could become an auxiliary in the resolution of conflicts, becoming associated with the investigation, then eventually being allowed to attend the deliberations. Not until invested could he actually participate in the judgement.[18]

18 See generally Laely, Thomas, 'Le Destin du Bushingantahe: Transformations d'Une Structure Locale d'Autorité au Burundi', *Genève-Afrique* 30(2), 1992, pp. 75–98; Ngorwanubusa, J., 'The *bashingantahe* institution and the universal ideal of a gentleman' in *The Bashingantahe Institution in Burundi, a Pluridisciplinary Study*, University of Burundi, Life & Peace Institute, 1999, pp. 156–160 (English translation).

Traditionally, the candidate must have had beer available to celebrate the various steps in the process of becoming a *mushingantahe*. If he did not have the economic means available at the time to provide a large quantity of beer, he had to have the social contacts on his colline and two or three neighbouring *collines* to 'mobilise' it. The beer was then distributed to the entire community according to a hierarchy and among a range of representatives of the community, with the most powerful authorities and senior *bashingantahe* receiving first. In fact, there was a clear hierarchy among the *bashingantahe*, based on seniority.

At the final ceremony, the candidate was presented by his sponsor, and barring legitimate objection from any member of the community,[19] he was then invested by his peers (*ukwatirwa*), at which time he took an oath of commitment and fidelity (*indahiro)*. He would often swallow a small stone to symbolise the discretion required for his office. He would also receive the *intahe*. The oath included a stated recognition that sanctions would be imposed for failure to carry out the responsibilities undertaken. It was not unusual for a *mushingantahe* to be relieved of his position – or disinvested – for cases of corruption, or violation of secrets or other social misconduct. Corruption or being bought off could be punishable with banishment.

19 Even the opposition of a child was taken into account in determining the consensus of the population.

## 2.2 Structure and functioning of the *bashingantahe*

The *bashingantahe* adhere to the principles of faithfulness to commitments (a reference to the oath), dialogue and consultation, consensus and collegiality in decision-making, the requirement for truth and the sense of responsibility, discretion and impartiality.[20] The procedures for judging cases are accusatory, contradictory, oral and public. In principle, his services are to be provided without a fee.

20 Ph. Ntahombaye and Z. Manirakiza (see Note 20), p. 87. This list is not exhaustive.

According to the traditional process, followed to this day, prior to any decision-making, the *bashingantahe* attempt reconciliation through an informal process. They provide advice (*guhanura*) through patient and careful use of language. After listening to the parties they would repeat the facts, showing that they are listening to each, and inspiring the parties also to listen to each other and have an open mind.[21] They use common-sense terms in characterising the case and explaining their reasoning to the members of the public who are attending. If these techniques fail, the second and last stage is arbitration. In this case, the *bashingantahe* become judges and render a decision. There is also the possibility of lodging a complaint before a higher court in case one is not satisfied with the rendered decision.

21 The listening techniques are very important for the *bashingantahe's* conciliatory role. See Ndayishinguje, P., 'The functioning of the *bashingantahe* in a rural village', in University of Burundi, 'Updating the *Bashingantahe* Institution, A Pluridisciplinary Study', 1991, pp. 107–13.

The *bashingantahe* have the moral authority to summon any person residing in their area of influence to appear. This appearance is voluntary but anyone not cooperating is looked down upon by the community, and will certainly not be received by the *bashingantahe* if they later have a case to be decided. A council or 'college' of *bashingantahe* sits for a case, and usually the most experienced presides.

Traditionally the hearing began with the oath-taking of the parties, which included a promise by the parties to pay certain amounts if they perjured. The parties would present their evidence without the presence of the witnesses. The *bashingantahe* would summarise the arguments made by both sides and ask for the parties to confirm their understanding. The *bashingantahe* would question the parties. At least two witnesses for each party would testify and be questioned by the *bashingantahe* under oath. This part of the proceeding was of vital importance. The deliberation was then done in secret. There was no majority vote; the *bashingantahe* reached a consensus according to what was most equitable. The person who presided over the deliberations would render the decision while tapping the ground with the *intahe*. Proverbs were often used to convey a message, rather than long oratory. Axioms were used for legal reasoning, such as 'The child belongs to his father' and 'the homestead belongs to the head of the family'. An appeal was possible to the chief or the king's court.

Once a case had been settled, the parties offered banana or sorghum beer to the *bashingantahe* (*agatutu k'abagabo*) and everyone shared the drink. This was a sign of gratitude towards the *bashingantahe*.[22] For the people in conflict and the observers, it was at the same time a way of celebrating and sealing the newly restored relationship. A certain person was charged with overseeing the enforcement of the decisions. Normally, the person who lost the case would comply with the judgment spontaneously (before the tribunal) to avoid the opprobrium of his community and the authority of the chief to confiscate all his goods or, to impose the worst of all punishments – exile. Because of the prestige of the *bashingantahe* and the confidence in their process, the person who lost a case might call into question the result, but never the *bashingantahe.*

22 The Kirundi term '*Kunywâna*' means to share a glass of beer, and also to reconcile.

The decisions of the *bashingantahe* are based on customary law,[23] which is guided by a patrilinear structure of society as well as the importance of the extended family, and the primacy of the community over the individual. Thus, if 'the homestead belongs to the head of the family', that means the man. In Burundi, according to custom, a family is not the 'nuclear' family but includes uncles, aunts and the other descendants of the father's side. Women and girls were not traditionally allowed to inherit. A girl was expected to marry and have the benefit of the property of her husband and his family, and her offspring would be perpetuating his family, not hers. Even after a woman has cultivated land for decades, she cannot own that land. Her husband alone has the right to sell property. After his death, the widow must have the approval of the family council (members of the husband's family and *bashingantahe* who were friends of his family) to sell land, which is often refused.

23 The examples of custom given here are those that apply to this day, as succession is not regulated by written law.

A man may make an oral or written last will and testament. This is executed in front of family members, neighbours and *bashingantahe*. The will must be just and reasonable in favour of the sons. The son who will become head of the family is designated in the will. After the death, there is a partial mourning

period of one week during which the son who is appointed head of the family, and other beneficiaries, if any have been designated, are recognised. If not, the designated head of the family decides on the division of the property. The *bashingantahe* are called to witness and certify the succession, and they are then available to assist with any conflicts or claims against the beneficiary. The end of a year marks the final mourning period, at which point any claims must have been made or they are likely to be lost.[24]

24 Even today, though this is the domain of customary law, the tribunals are not sympathetic to claims made after the final mourning period has ended.

## The weakening of the *bashingantahe*

In the early 1920s, the Belgian colonisers brought their legal system, based on a more individual orientation to the organisation of society. They set up a dual system of law, including the written law that regulated Europeans and Burundians, and the customary law, which regulated only Burundians, in all civil matters and limited criminal matters unless the customary law was contrary to public order. Eventually, by the time of independence, criminal matters, as well as both civil and criminal procedure, became the unique domain of the written law.

The Belgian authorities began to diminish the *bashingantahe* institution by controlling their judgments, modifying their verdicts and withdrawing their right to impose certain sanctions.[25] The actions by the colonial authorities 'who arrogated to themselves the right of evaluating the authenticity of custom, deprived for the first time the *bashingantahe* of their fundamental mission of ensuring the continuity of customary law'.[26]

25 The sanctions deemed barbarous by the colonial administration were abolished. See Massinon, p. 93.

26 Deslaurier, C., 'The Bushingantahe in Burundi', in Fauvelle, F.X. and Perrot, C.H., *The Return of the Kings*, Paris, Karthala, 2003, pp. 406; Deslaurier, C. *Can the bushingantahe reconcile Burundi*, African Politics, Justice and Reconciliation: Ambiguities and Impasses, no. 92, December 2003, p. 76.

The Belgian colonial administration, which served as the model for the post-colonial administration, reorganised the jurisdictions and appointed judges who were in charge of investigating and settling conflicts. The *bashingantahe* had an auxiliary role and answered to the administrative authority. At the chief's tribunal, the *ganwa* was the judicial authority, at the district tribunal, the colonial district commissioner was in charge, and the king's tribunal was maintained. This measure severely broke down the functions of the *bashingantahe*, particularly that of bringing together and reconciling people. In fact, the power of social regulation moved from the local community to the administrative centre of every locality.

During the colonial period, missionaries, too, undermined the *bashingantahe* with the emergence of parochial counsellors and other catechists who listened to and advised the community, particularly in family matters. Thus, the missionaries took over one of the traditional functions of the *bashingantahe* and some *bashingantahe* were co-opted to become their auxiliaries.

The politicisation of the *bashingantahe*, which contributed to their undermining, started after independence, under the Republican Regime (1966). The Uprona Party, which became the single party in the country, 'sought to confiscate and manipulate the *bashingantahe*. As a matter of fact, in this new regime…an institution of that nature, informal, escaping the regulation of the central power, representing a local space of relative autonomy, was rather disturbing'.[27] That is why the single party interfered in the appointment and investiture of the *bashingantahe*. Political criteria rather than virtue as advocated by the *bashingantahe* institution became dominant and the

27 Deslaurier, 2003 (see Note 26 above), p. 407.

government would confer the title and function of *mushingantahe* on its own territorial administrators and local party bosses who were invested *en masse*.

Under the Second Republic (1976–1987), the investiture of new *bashingantahe* was prohibited all over the country. The president authorised the communal administrators, appointed by the government, to appoint individuals to play the role of the *bashingantahe* on the colline. Because the government could not destroy the esteem that the *bashingantahe* had on the colline, it created posts that would usurp all their functions. Eventually only the party committee members could be officially invested as *bashingantahe*. The party committee, for example, would sit on certain days to hear the grievances of the community. The *bashingantahe* invested by the party had authority, but they never had the same status as the traditionally invested *bashingantahe*.

In 1988, the Third Republic (1987–1993), established in a bloodless *coup d'etat* by Pierre Buyoya, was shaken by the magnitude of ethnic massacres in the north of the country (Ntega and Marangara). Following these killings, a team of mixed ethnicity was set up 'to examine the national unity issue'. After wide public consultation, it produced a report that was at the origin of a National Unity Charter. In this report, the commission recommended the rehabilitation of the *bashingantahe*. Actions to be taken on this recommendation were slowed down by the 1993 crisis.

## The *bashingantahe* and the crisis of 1993

According to those interviewed for this study, before the 1993 crisis, the role of the *bashingantahe* was crucial in that their intervention (mainly in family matters) often led to a reconciliation of the parties. The informal judicial system was like 'a colline-level tribunal', which exceeded the formal justice system in importance. The interviewees noted that the *bashingantahe* settled cases and reconciled Burundians without asking for fees. Despite the negative changes the institution had undergone over the years, as of 1993, before the crisis, it still played a role in dispensing justice at the colline or community level.

After the crisis in 1993, questions were asked about where the *bashingantahe* had been and what role they had played during the events. While its usefulness to parties in conflict on the colline continued, it was also largely associated with the Party, which had been implicated in the attempted coup d'etat and murder of the president. Under these circumstances, it seems that some *bashingantahe* would doubt their own usefulness in reasoning with anyone who would consider them guilty by association and in effect, people who might otherwise listen to the counsel of the *bashingantahe* were barely able to listen to reason due to the chaos around them. Many kept a low profile during the killing and looting and some participated in it. Others tried to contain the damages by reassuring the members of their communities and protecting those that they could. Though the criminal behaviour of some cannot be denied, there were also many heroic acts, which have been recognised through efforts by university researchers, NGOs and UN agencies to honour *bashingantahe* and others embodying the values of *ubushingantahe* during the crisis.

Though the *bashingantahe* had already been weakened by the time of the crisis, many people have realised that, wherever the *bashingantahe* functioned well, it had been possible to limit damages from the crisis, and even to prevent

them.[28] Thus, in areas where the *bashingantahe* were widely respected and where they had access to the people of the community (there were areas that were physically blocked by the uprisings) they were able to have a positive impact. Even in face of personal risk, there are reports of how some *bashingantahe* tried to assume their role of protecting persecuted neighbours. In many cases, they rescued persons from the hands of killers and cooperated with fellow *bashingantahe* as much as possible to stop the looting and killing.[29] They tried to discourage people from fleeing and to remain united on their *collines*; for those who did flee, the *bashingantahe* sought them out later to encourage them to return. Following the crimes, they succeeded in gathering people who were too fearful or resentful to associate and initiated a movement of dialogue and reconciliation among them, sometimes in collaboration with the local authorities. There were many instances of *bashingantahe* returning looted goods. The study revealed that the *ubushingantahe* ideal also inspired, in some cases, the actions of the women, youth, and administrative and military authorities who took risks to save people who were in danger.[30] In certain cases, notably in Bujumbura township, women actually judged as *bashingantahe*, where the men were absent.

In interviews conducted for this study, respondents gave a particular example of how a *mushingantahe* contributed to containing the crisis and prevented some people from avenging themselves. For instance, in Nyabihanga, in Mwaro Province in 1993, the *mushingantahe* Pie Ndadaye appealed for the population to remain calm: 'Tragedy has befallen our country. But, I beg you not to tear one another down. Do not avenge me. I tell you that because, before anyone else, I am the one who has just lost a son.'[31] In Bujumbura, some *bashingantahe* prevented the burning of houses, as was the case in the Kamenge and Bwiza districts/zones.

The interviewees confirmed that in their areas, as in others already studied, after the chaos, the *bashingantahe* invited people to repair the wrongs they had done to other people and to return looted goods.

**Rehabilitation activities**

From 1996, the government, Burundian civil society and the international community have responded to the suggestions to rehabilitate the *bashingantahe* institution as one of the means of ending the crisis. A National Council of *Bashingantahe* for National Unity and Reconciliation was appointed by a decree of the president. The members of that National Council did not get unanimous approval within the political arena, nor among the general public which criticised the selection criteria, representativeness and the very notion of presidential appointment.

Between 1998 and 2000, the political protagonists participating in the Arusha peace talks[32] recognised the ongoing importance of the *bashingantahe*, and this has been inscribed in the APRA. First, it was acknowledged that the *bashingantahe* constitute a factor of cohesion on the *collines*.[33] Second, the APRA recognises in its provision on the judiciary the judicial function of the *bashingantahe* institution: 'The Council of Ubushingantahe sits at the colline level. It dispenses justice in a spirit of reconciliation'.[34]

The international community has recognised the need to support a grassroots rehabilitation of the *bashingantahe*. UNESCO began this support in 1998 with

28 Ntahombaye, Ph. and Kagabo, L. (s/d): '*Mushingantahe* Wamaze Iki? – The Role of the *Bashingantahe* during the crisis', University of Burundi, 2003, 211 pages. Life & Peace Institute (with a summary in Kirundi, French, and English). The surveys are enriched by testimonies gathered from other communes during regional conferences and a national conference. Later on, the NGO Search for Common Ground built on the experience in its radio programme on 'heroes' (i.e. persons who acted courageously during the crisis), thus promoting and publicising the pursuit of the *ubushingantahe* ideal.

29 See Note 31. This study also points out some reasons why it was difficult for some well-intentioned *bashingantahe* to act: they were impeded in their interventions by gangs of youth; they were aware of the killing of those who attempted conciliation or to save others.

30 See Note 31. There are also some interesting testimonies. There is a book dedicated to the behaviour of a group of youths who were killed because they refused to be divided into separate groups, Hutu and Tutsi, thus exhibiting the *ubushingantahe* spirit. Bukuru, Z. *The Forty Young Martyrs of Buta, Brothers in Life, Brothers in Death,* Karthala, 2004, 241 pages. Interviews conducted for this study confirmed the previous findings.

31 Testimonies collected in Nyabihanga Commune. Pie Ndadaye was the father of the democratically elected President Melchior Ndadaye who was assassinated on October 21, 1993. Pie Ndadaye was a renowned *mushingantahe*, member of the communal council of *bashingantahe*. Due to his intervention, Nyabihanga Commune was spared during the killing madness that followed the assassination.

32 Incidentally, the *bashingantahe* were not represented at the talks in Arusha.

33 APRA, Protocol 1, chapter II, article 7, paragraph 27.

34 APRA, Protocol II, article 9, paragraph 8.

several seminars held in rural areas. The rehabilitation gained continued support from UNDP which coordinated the activities related to the identification of the traditionally invested *bashingantahe* throughout the country in 1999 and 2001.[35] This survey identified 34,000 'traditionally invested' *bashingantahe*,[36] active in the 17 provinces of the country. This project led, eventually to the creation of a new national council of *bashingantahe,*[37] at which time the president-appointed council ceded its powers to the new council. One year after this project and based on the recommendations of the various communal-level conferences of *bashingantahe*, UNDP launched a second project to implement these recommendations.[38]

The UNDP project was implemented by CRID[39] for a two-year period (2002–2004). To fulfil its objective to rehabilitate the *bashingantahe* institution, it had three main activities: lobbying for the legal recognition of the *bashingantahe* institution in the Constitution; both technical and operational capacity-building in the areas of non-contentious justice, education for peace and reconciliation; and creation of a structure of representation at all administrative levels. The project results are controversial. Many criticised the fact that the more ceremonial aspects of the institution were built up at the expense of building capacity for preventing and resolving conflicts at the grassroots level.[40] Among the most concrete accomplishments was the creation of councils of *bashingantahe* at the national, provincial, communal and colline levels. This aimed to facilitate communication between the *bashingantahe*, but also to rectify some functional errors encouraged by years of isolated actions and control by the government. The different structures, powers and duties of the institution are provided for in the *Bashingantahe* Charter adopted in Gitega on 22 April 2002.[41] The *bashingantahe* renewed their commitment to the Charter in a national conference in February 2005.

According to a recent opinion poll on the project to rehabilitate the *bashingantahe*, 'the activities so far undertaken in the framework of the *bashingantahe* institution are viewed positively by 73% of the surveyed people'.[42] Although the rehabilitation of the institution is supported by most Burundians, the problem is that there is no consensus on the approach adopted for the process. Furthermore, suggesting the rehabilitation of the institution often evokes the fear of it again being used for political ends, and the resentment of the corruption that has crept into the institution. These reactions are legitimate, and have begun to be addressed through the rehabilitation activities. One of the remaining controversies concerns the rehabilitation modalities in urban areas.[43] The selection of the *bashingantahe* and the way of investing them will be the main subjects of debate.

## 2.3 Current competences of the *bashingantahe*

From January 1987 until April 2005,[44] Burundian law provided a role for the *bashingantahe* within the judicial system. Although a similar provision was proposed in the revised legislation, it was not adopted. The previous legislation provided for a Council of Notables (or *bashingantahe*) at the colline level, charged with reconciling parties in dispute in any civil case falling under the jurisdiction of the communal tribunal. The law provided that the communal tribunal ask whether the parties had had their dispute heard by the Council of Notables before bringing it to the court, and could refer the parties back to the *bashingantahe* before hearing the case. It was provided also that the

35 Project BDI/99/003, *Identification of Traditionally Invested Bashingantahe.*

36 Verifying the venue and date of investiture, as well as the names of sponsors ('godfather' to the *mushingantahe*) and witnesses. The lists were circulated in every commune to check their authenticity.

37 Project Number BDI/99/003, *Identification of Traditionally Invested Bashingantahe.* The members of the previous council, some of them being traditionally invested *bashingantahe*, clarified, however, that their mission was rather technical and aimed at the rehabilitation of the institution. This previous council also launched an ongoing weekly radio broadcast on the institution

38 *Support to the Rehabilitation of the Bashingantahe Instituton* Project, funded by the European Union. The recommendations centred on training in the fields of land law, family law, conflict prevention and settlement techniques, and adult literacy, having a building and some office supplies to carry out their mission.

39 CRID was selected as the implementation sub-contractor after deliberation of the Steering Committee of the project. Some political parties and other critics have asserted that CRID was continuing a policy of the Buyoya regime to the effect of holding the *bashingantahe* hostage, which CRID flatly denies. For more details on the controversies, read: Deslaurier, C (see Note 29); 'Declaration of the Sahwanya Frodebu Party on the ongoing activities relating to the rehabilitation of the *bashingantahe* institution', Bujumbura, 12 September 2002; Kavakure, L., 'The rehabilitation of the ubushingantahe, a wrong answer', Brussels, 2002.

40 *Report of the Independent Evaluation Mission of the Project 'Support to the Rehabilitation of the Bashingantahe Institution',* BDI/02/B01, 5–25 July 2003, p. 67.

41 The structure provides for councils at the colline level, in every commune, every province and national council. The *Bashingantahe* National Council includes 40 men and 20 women elected by their peers at the provincial level. The structure includes a number of specialised commissions.

42 HDPR-Shingarugume, 'Opinion polls on the population's expectations towards the "Rehabilitation of the *Bashingantahe* Institution" Project', Bujumbura, August 2003, p.18. The survey

comprised 2103 people in different regions of the country.

43 There is still resistance to this issue, as expressed by the Frodebu Party: 'The present-day *bashingantahe* institution, as compared to that of the past must first of all establish its rule at the colline level', 'Declaration of the Sahwanya Frodebu Party on the ongoing activities relating to the rehabilitation of the *bashingantahe* institution', Bujumbura, 12 September 2002. Deslaurier, 2003 (see Note 29), p. 91.

44 Law No. 1 of 14 January 1987 providing for the organisation and powers of the judiciary in Burundi, articles 209–218; Law No. 1/08 of 17 March 2005, Law on the Organization and Competence of the Judiciary.

45 These comments were collected before the law was changed, and the present tense is maintained.

*bashingantahe* provide a written transcript of the proceedings including a summary of the evidence and the proposed settlement; however, the court would not be bound by the settlement proposed by the Council of Notables. Also, the notables' decision had no *res judicata* and was not enforceable in the formal system. According to the law, the procedure before the *bashingantahe* was to be free of charge.

The interviewees in all provinces confirm that magistrates rely on the minutes of the *bashingantahe* to understand better the background for cases in which the *bashingantahe* have rendered a decision.[42] If the parties did not seek a decision before the *bashingantahe*, the case is sent back to that institution. The minutes prepared by the *bashingantahe* are very useful for the tribunals since they provide a detailed and precise account of the subject of the conflict between the parties, as well as of witness statements. The information the *bashingantahe* gather indicates contradictions in witness statements and/or the plaintiffs' declarations during the hearing of the case. A majority of respondents recognised the practice of the magistrates consulting the opinions of the *bashingantahe* before judging as an effective collaboration between the two systems, and recommend that the magistrates systematically consult the minutes of the *bashingantahe* procedure.

The *bashingantahe* on the colline have the advantage of proximity for collecting all the information needed for their deliberations. Our respondents compare the *bashingantahe* institution at the the colline level to the 'eye' of the communal tribunals, since the *bashingantahe* also have the advantage of knowing the origin of the households' conflicts and often eventually act as witnesses if the parties go to court. Thus, when the judges are confronted with a dilemma and hesitate on the verdict, they refer to the *bashingantahe* to clarify the situation.

According to respondents, when the plaintiffs first refer criminal matters to the *bashingantahe*, the latter are never reluctant to listen to them if it is for minor offences, their first objective being to reconcile the parties. However, many respondents feel that the fact that the *bashingantahe* do not have any recognised power over criminal matters encourages or exacerbates impunity, since it is by letting minor offences go unpunished or with light punishment that these become, afterwards, major crimes. In case of a major offence such as a murder or killing, the *bashingantahe* may try to restore the relationships between the families by searching for a common ground of understanding. (However, criminal liability should not be extinguished by the parties' reconciliation.)

In Makamba Province where the community is dealing with numerous returning refugees, the formal and informal sectors collaborate in that tribunals call on the *bashingantahe* to assist in the implementation of their judgments in land disputes.

**Legal recognition**

Although the *bashingantahe* no longer have a place in the new law on organisation and competence of the judiciary, the institution has not been left out of recent legislation. The Communal Law directs the administrative council at the colline level to work with the *bashingantahe* of their area, for the conciliation, mediation and arbitration of neighbourhood conflicts.[46] This provision corresponds with the role of the *bashingantahe* in their traditional sphere of influence, the colline. It suggests a collaboration with the administrative authority which will allow the *bashingantahe* to be more effective at this level.

46 Law No. 1/- of 21 April 2005, Communal Law, article 37.

## 2.4 The effectiveness of the *bashingantahe*

Our field research sought to ascertain the effectiveness of the *bashingantahe* by looking at how the communal tribunal viewed their decisions. Although it may be difficult to quantify, information was collected from the communal tribunals on the number of cases that contained a prior decision of the *bashingantahe* to see if they were affirmed or rejected.[47]

Before the 1993 crisis, 63 per cent of *bashingantahe* opinions were confirmed by the courts in 225 cases examined by the judges in the Gitega communal tribunal (Gitega Province). Between 2002 and 2003, 60 per cent of opinions were approved by the judges. The corresponding proportions were 65 per cent in Giheta, and 83 per cent in Bugendana.[48] In 1992, in urban Bujumbura Province, in Rohero communal tribunal (for the Bwiza and Kinindo districts/zones), the corresponding value for 100 cases accompanied by the opinions of the consulted *bashingantahe* was 80 per cent. In 2003, of 200 consulted files, 81 per cent were confirmed by the courts. Detailed data for the Mwaro and Makamba Provinces are included in Appendix II.

47 Two other studies by Africare (2001) and RCN (2002), on the harmonisation of the role of the *bashingantahe* and the role of the local judicial structures, carried out under the supervision of Ph. Ntahombaye in seven other provinces, show that the opinions expressed by the *bashingantahe* were confirmed by the communal tribunals in more than 60 per cent of the cases.

48 It is worth noting that in the Bugendana communal tribunal, judges pass the *bashingantahe* opinions they have consulted on to the parties. This is why very few *bashingantahe* opinions are on file.

## 2.5 Summary table

**Percentages of *bashingantahe* decisions upheld by the formal courts**

### Before the war (1988–1993)

Z= zone C=commune[49]

| PROVINCE | C1 | C2 | C3 | Average |
|---|---|---|---|---|
| Bujumbura | | | | 80 |
| Gitega | 63 | 60 | – | 61.5 |
| Makamba | 89 | 92.2 | 94.2 | 91.8 |
| Mwaro | 32.2 | 55.7 | 73.3 | 53.7 |
| Cumulative average | | | | 71.7 |

### During the war (1993–2003)

| PROVINCE | C1 | C2 | C3 | Average |
|---|---|---|---|---|
| Bujumbura | | | | 81 |
| Gitega | 65 | 78 | 83 | 75.3 |
| Makamba | 96.3 | 90.3 | 94.5 | 93.7 |
| Mwaro | 50 | 66 | 66 | 60.6 |
| Cumulative average | | | | 77.6 |

Overall average before and after the war: 74.6 per cent

49 Z: zone of the Urban Bujumbura: percentage of judgments with the *bashingantahe*'s opinions confirmed by the communal tribunal. C: commune that belongs to a rural province. 1,2,3 represent the target communes (or zones in Bujumbura) of the survey. The figures represent the percentage of judgments confirmed by the communal tribunal after the *bashingantahe* opinions.

The table shows an increase of the system's effectiveness by 5.9 per cent during the war compared to the previous period. No final conclusion on the *bashingantahe*'s efficiency relative to that of the courts can be reached, since we do not know how many conflicts are settled by the *bashingantahe*,[50] why some parties do not refer their dispute to the *bashingantahe* or why the parties appeal the decisions of the *bashingantahe*, except for the failure of the reconciliation. Certain people feel that the magistrates do not confirm the decisions of the *bashingantahe* because they were corrupt or because they perceived that the *bashingantahe* were biased in favour of one of the parties.

50 This information is not gathered systematically and was not available in the communes covered in the study. However, as an example, for the month of February 2005, 120 cases were settled by the *bashingantahe* in Muyinga Commune. This commune is served by approximately 575 *bashingantahe* (communication with the President of the Provincial Council of *Bashingantahe* in Muyinga, March 2005).

## Strengths and weaknesses of the informal institution

The interviewees think that the informal system should be encouraged since it is the most accessible to the parties to a dispute. They also praise the swiftness of the procedure and the concern for reconciling the parties. The *bashingantahe* generally know, in the slightest details, the origin of the disputes they are called upon to settle, and thus it is easy to establish facts. It seems that, without the *bashingantahe*, the courts would be overwhelmed by disputes that would stifle their normal functioning. Several cases are conclusively settled by the *bashingantahe* without any later referral to the courts. The informal system is also perceived in a positive light in that the services are, in principle, free of charge.[51] The *bashingantahe* are in general of use to the courts during the process of implementing judgments, particularly for land cases. In fact, in determining land boundaries, the courts must rely on the *bashingantahe* as they have been present at the making or changing of the boundaries. The latter are at the same time reliable witnesses and legitimate officials in the event of a subsequent dispute. They are there to enforce the provisions of the court decisions and to ensure their validity from one generation to the other. They are also the reference persons for contracts and other commitments, such as last will and testament.

51 In practice, this is not always the case. Particularly since the crisis, the traditional 'gift' of beer or other things is asked for before any hearing takes place. In view of the traditional ethics of the institution, this is payment, and thus corruption.

The interviewees were asked whether all social groups are treated equitably by the *bashingantahe*. Most of our interviewees are satisfied that the *bashingantahe*, with a few exceptions that were not specified, make their decision in relation to the case and not to the people in conflict, regardless of the sex, wealth, age group, physical condition, and ethnic or political membership.[52] Some respondents said clearly that women are not treated equally because of the discrimination that is inherent in Burundian culture. Other respondents did not take into account the element of gender inequality perhaps because it still permeates the actions and decisions of all institutions. It seems that the *bashingantahe* are representative of the general population, and so their decisions that, for example, do not recognise the equal rights of both genders to inherit, do not seem surprising.

52 The perception was the same with regard to judges, contrary to other comments made by some interviewees on the perception of a lack of confidence in a magistrature perceived as controlled by one single ethnic group.

Despite its many strengths, the informal institution is not a panacea. Due to their ignorance of the written law, the *bashingantahe* may make their decisions without taking the law into consideration, thus depriving someone of their lawful rights. Some communal tribunal judges state that it is sometimes difficult to rely on the decisions proposed by the *bashingantahe*, since they are guided by common sense and equity in relation to the custom, and not by written law.[53] Because of this, some judges prefer to listen to them as witnesses; if not eyewitnesses, at least as reliable witnesses, rather than refer to their decisions.

53 This problem can be overcome by training and a framework of exchange between the two systems that could stimulate the magistrates' imagination to integrate the *bashingantahe*'s solutions in their decisions.

The *bashingantahe*'s decisions are not binding. In contrast with a court decision, which becomes enforceable after a set time limit, the 'enforcement' of the *bashingantahe*'s decisions depends on the goodwill of the parties, who may not be concerned about the restoration of harmony in the community, nor the community opprobrium that bears on those who reject the decision. Further, the *bashingantahe*'s decisions remain forever subject to appeal, which diminishes the certainty the parties need for a conflict to be resolved.[54]

54 Certainty is not necessarily found in the formal system as extensive delays are extremely common; however, some parties do prefer the system which at some point will adjudicate a clear winner and loser based on the written law.

In Bujumbura municipality in particular, some citizens reproach the present *bashingantahe* for having been invested without enough preparation. Some of

them might even be '*bashingantahe* for the glory of it', invested for having been able to give enough beer to the other *bashingantahe*, instead of having been observed by those who live in their neighbourhood. They are accused of not caring for their commitments and functions. A similar issue is raised, to a lesser degree, in the rural areas. In those areas, however, there are complaints about *bashingantahe*, whose behaviour spoils the image of the institution.

There is often a lack of written records of settled cases. In some cases, they are not produced in the first place, as many *bashingantahe* are illiterate. Our respondents were unanimously of the view that the *bashingantahe* should receive literacy training. Other *bashingantahe* prepare minutes but refuse to give them to the parties if no beer is offered.[55] Thus, disputing parties often prefer going to the communal administrator for resolution of their problem and pay a small amount of money to do so. Corruption is a reality that causes people to lose faith in the *bashingantahe*. More common is the complaint that too much beer is required. This differs from one region to another. Finally, some respondents in every location fear the possible politicisation of the institution, as has been the case in the past.

55 As described above, this too constitutes corruption according to the basic ethics of the institution.

## Recommendations from interviewees and other actors

While some respondents view the fact that the *bashingantahe*'s decisions are not based on the statutory laws as a weakness, others think that this can be an asset. Many interviewees believe that social peace is better achieved through a solution of equity without any reference to the existing law, rather than by a legal decision imposing on the parties the objective solution of the law, provided that the *bashingantahe* understand their limits and avoid dealing with criminal cases. Nevertheless, training in modern law has been widely recommended and has already begun in certain areas, so that they are better equipped to deal with issues related to the written law.

The lack of written records may be corrected by providing training for the *bashingantahe* in writing the minutes of their proceedings. During the identification project,[56] the *bashingantahe* identified the need for adult literacy programmes. They also recommended the setting up on every colline of official archives for the records. This would improve the functioning of the institution and provide a resource for executing the decision and having written proof on hand to guarantee that it is respected over time. This provides the public with a measure of certainty and predictability that underlie their confidence in justice, even though it is informal.

Recent studies show the positive effects of the *bashingantahe* in the community. A study carried out by the organisation CARE[57] found that, among the local structures in charge of dispute settlement,[58] the *bashingantahe* are most in demand. The study recommended actions for more effective conflict resolution: among them was the rehabilitation of the *bashingantahe*. The main recommendations of the participants were to eliminate the practice of requesting beer before settling disputes, to consult the population about which *bashingantahe* to invest, and to pay the *bashingantahe* mission fees to be derived from the judiciary fees paid at the communal tribunals.[59] Another recommendation was to provide technical training for the *bashingantahe*, which CARE has already done for the *bashingantahe* in Ngozi in the context of a peace education project.[60]

56 UNDP Project BDI/99/003, *Support to the Promotion of Good Governance*.

57 CARE, Environment Protection Project in the Karuzi and Gitega provinces, 2002, p. 22.

58 Family heads, *nyumbakumi*, colline heads, *bashingantahe*, chiefs of zone/district officers, communal administrators.

59 CARE, 2002 (see Note 57 above), pp. 28–29. The population is often not consulted on the investiture.

60 Following an external evaluation, after three years of operation, a good number of *bashingantahe* had '*been strengthened in their operational capacities through training in conflict prevention and management techniques, in techniques of group organization, and on laws that will enable them to settle conflicts that may arise within the population. The training sessions organized for these bashingantahe have had an impact in the field since the majority of the people surveyed recognize the fact that the bashingantahe have changed their behavior and attitude and settle, in a fair, honest, and equitable manner the conflicts that arise within the communities*' (CARE, 'Final Evaluation Report', June 2004, p. 2).

Other studies, carried out by the International Crisis Group (ICG) and by the African Centre for Technology Studies (ACTS), show that, with some corrections to its functioning in general, the *bashingantahe* institution should be enabled to 'defuse the land time bomb' that could explode with a massive repatriation of refugees. As the ICG report states, 'the bashingantahe institution is the only one whose involvement in the sustainable restoration and maintenance of a fair and equitable order (*intahe*) can be useful for the peace process and the political neutralization of the land time bomb'.[61] ACTS considers that, while still waiting for the reform of the formal justice system, 'it is best to settle land conflicts at the community level, especially by the *bashingantahe*'.[62] The *bashingantahe* are in fact, settling land disputes all the time. This is an area in which their decisions should have more weight, that is, legal recognition, even if the councils of notables or *bashingantahe* are no longer officially recognised in the Code on Judicial Organization and Powers.

61 International Crisis Group, *Refugees and Displaced Persons in Burundi: Defuse the Land Bomb,* Nairobi, Brussels: ICG, *Africa Report*, no. 70, October 2003, pp. 11–12. Some Burundians working on the land issue believe that characterising the land question as a time bomb is dramatising problems which have existed for a long time, have been managed progressively, and is thus not constructive.

62 Huggins, C., Mbura Kamungi, P., Oketch, J.S., 'Land Access and the Return and Resettlement of IDPs and Refugees in Burundi', African Centre for Technology Studies, 2004, p. 38.

## Integration into the formal system

The strengths of the institution and the advantage of its conciliatory approach seem to justify the extension of the *bashingantahe*'s powers to some fields that are within the prerogative of positive law. The issue of partial integration of the institution into the formal system is important, as it would give the institution a greater impact on everyday life. It would in this context also be necessary to contemplate the legal form the institution should take, all of this to encourage a conciliatory approach to judging civil matters and at the same time to lighten the load of the tribunals.

While contemplating the legal form of the institution, it must be kept in mind that its actions need to be visible. This was the case in traditional society and under customary law. As much as the institution was the vehicle of a set of values, it was also an integral part of the traditional legal system. Thus, respect for the institution was also respect for the law. Modern law has progressively replaced customary law, but the *bashingantahe* institution was not integrated into the modern structure. It is obviously for that reason that, while still present in the collective consciousness, it is difficult for it to find a place in a modern state.

The institution should therefore be given a new legal identity. One should recall that Burundians understand that this institution is mainly based upon non-judicial methods. However, Burundian positive law provides for other non-judicial modes of settling private disputes than just the *bashingantahe.*[60] These other modes unfortunately are not followed, more by sheer ignorance than for any other reason. Here, the institution might reactivate its non-contentious services while at the same time being incorporated into positive law.
These and other recommendations are to be considered by the National Council for Unity and Reconciliation as provided for in the Constitution. The Council is an advisory body in charge of, among other things, conceiving and initiating the necessary actions for the rehabilitation of the *bashingantahe* institution in order to make it an instrument of peace and social cohesion.[61] It will propose to the relevant institutions any measures likely to promote reconciliation and forgiveness. This is another example of consensus on the importance of the institution for social cohesion. Upon the creation of the Council, the government should take into account this consensus and translate it into action.

63 Among others, conveyancing and transfers and preliminary conciliation. One may add arbitration which is a judicial but private mode of conflict resolution. These already existing legal instruments might also be used by the institution in some types of conflicts.

64 Constitution of Burundi, article 269.

# 3 Other Informal Mechanisms

## 3.1 Legal aid clinics and community mediation

Other informal justice mechanisms exist in Burundi independently from the *bashingantahe*. They include legal aid clinics and community mediation projects. Initiated by Burundian non-profit organisations and international NGOs, the legal aid clinics provide counselling, orientation and mediation services free of charge, particularly for vulnerable persons in rural areas. Some have lawyers giving legal advice and, in rare cases, legal representation. Most of them train paralegals, chosen from residents by the local community. They are given basic training in modern law[65] as well as in mediation techniques. The NGOs monitor and assist the paralegals in their role of local mediators.

65 The land law, the criminal procedure code, the family code, and the law governing judiciary organisation and competence.

The legal aid clinics aim to promote non-judicial mechanisms of conflict resolution and legal advice that are accessible to the public, particularly the poor. Some of the services are mobile. The legal aid services also provide a way for citizens to become more aware and better able to defend and promote their rights.

Confronted by the slowness, complexity and costs of the judiciary procedure, many parties to conflict use the legal aid clinics to solve the most common disputes – mainly land and family disputes. In the limited areas where the legal aid clinics currently operate, there are people who have lost confidence in the *bashingantahe* or they may have tried the *bashingantahe* and moved on to the legal aid clinics as part of forum shopping. It is estimated by one NGO that half of the cases received are settled out of court,[66] either by the staff, or by the community's paralegals. Many unsolved conflicts are referred to the courts.

66 Interview with Global Rights, Bujumbura, December 2004.

These services are useful for parties to a conflict who are trying to find a proper forum for resolving their disputes. Often parties are not informed of the competence of the authorities to which they have recourse. The parties spend time and money bringing certain matters before the administrative authorities, for instance, even though these are not competent to deal with the issues. On other occasions, the parties may be aware of other mechanisms. However, the paralegals are sometimes mistaken for a judiciary body. They, too, should clarify their competence towards the parties seeking a solution so that the latter will not be disoriented.

## 3.2 Parallel informal justice

Although they have a character completely different from the *bashingantahe* and the legal aid clinics, and cannot be equated to them, other 'informal systems' exist in Burundi. Members of some armed or formerly armed groups have denigrated or ignored the *bashingantahe* and simply taken over their

activities. They have also detained and punished people without referring to the formal system. In the Kamenge Zone/District of Bujumbura Municipality the CNDD-FDD has been accused by the population of having courts that try people illegally, and in Bujumbura Rural the FNL has been accused of doing the same.

In Mwaro and Gitega, the interviewees mentioned that some youths of political parties also openly challenge the *bashingantahe* institution. Citizens claiming to be members of the CNDD-FDD Movement refuse to use the words *mushingantahe* and *mupfasoni* and replace them respectively by the words *mugabo* and *mugore*[67]. It is not clear if the political parties would call for the suppression or replacement of the institution by another mechanism of community justice or simply change its name, but it is obvious that the institution is being challenged. According to some field reports, the local population is unwilling to invoke the *bashingantahe* in fear of possible reactions of these opponents.

With the inclusion of the CNDD-FDD into the government, the transformation of the rebel movements into political parties, and the integration of the military and the combatants (ex-rebels) into the National Defence Force, this form of parallel justice should be eliminated. It will, in fact, be incumbent upon these actors to combat the vigilante movement, another parallel justice system.

67 *Umugabo* and *umugore* are respectful terms but more general terms to refer to an adult man (*umugabo*) or woman (*umugore*). The question raised by the CNDD-FDD is also found in other provinces of the country. This contrasts with the use of the term *mushingantahe*, which has lost its precise meaning and is now used to name any male person to whom respect is due because of his level of education, his administrative or political status or his wealth (Deslaurier, 2003 (see Note 29) pp. 407–408).

# 4 The Formal Justice System

## 4.1 Presentation of the formal judicial system

The community's interests in justice are considerable. Justice and peace are indissociable, hence the slogan that there can be no peace without justice. This is why the process of restoring civil concord must integrate the reform of the justice sector in order to achieve the restoration of the rule of law.

Since the colonial period, the judicial system moved from customary law to positive law. At independence, positive law covered all branches of law, with the exception of some private, civil law issues. After independence, positive law has come to govern almost all the fields of society, with important exceptions related to inheritance, marital property, gifts/liberalities, acquisition and sale of non-registered land and relationships between employers and workers of the traditional or unstructured sector.[68] Reforms are proposed finally to codify the remaining areas covered by customary law.[69] Thus, there will be no return to customary law; there will be a unified positive law.

The formal system did not collapse completely under the effects of years of crisis, but has remained operational. It is perceived to be weak, however, and this is deepening a lack of confidence in the justice system. Some of the criticism against the formal system is a consequence of a torn and confused society in which all sorts of suspicions and resentments have become

68 Massinon (see Note 28), pp. 102–103. Massinon also notes that written law has been rejected when it comes to the prohibitions on polygamy and limitation of the dowry.

69 Laws on succession and land reform have been drafted and are awaiting review as provided for in the APRA, Prot IV, chap. I, art. 8 (g) and (i).

widespread and deep-rooted. An example of this is the negative vision of justice that may be attributed to an ethno-political perception of the Burundian system, particularly in criminal matters. The magistrates, the military and police are thus first of all perceived according to their ethnic group and seen as biased in favour of it. Although the magistrates in the higher courts have been mostly Tutsi, the requirements of the APRA for ethnic and, to some extent, gender balance are being applied.

The formal system is severely jeopardised by perceptions of impunity and the lack of enforcement of judiciary decisions.[70] In general, the formal judicial apparatus did not manage to deal efficiently with the crisis of 1993 and its effects. One hears of people saying that the prosecution of the murders and assassinations related to the crisis concern only 'small fish' and the 'big fish' get away. Public outcry is specifically directed against cases such as the assassination of President Melchior Ndadaye, or crimes against humanity or genocide that are not dealt with even if their final settlement would have gone a long way towards restoring the rule of law.

70 Interview with the Ministry of Justice, October 2004. Depending on location, numbers vary between 215 and 1293, which can surpass the number of executed decisions.

An epidemic of banditry, murders, rapes, highway ambushes, looting of property, theft or abduction with ransom has occurred since the end of the war. The population does not feel protected by the authorities, and this crisis of confidence leads people to take the law into their own hands. As one example, in a rural commune, the crowd caught and seriously beat two thieves wielding guns until one died of his wounds.[71] The number of similar cases is still limited, but the recourse to vigilantism is frightening and also symbolic. 'Popular justice' takes encouragement from the impunity for offences and crimes, and is a negation of the justice system.

71 Iteka, 'Two people killed by armed groups in the Muramvya province', 17 July 2003, www.iteka.org.

Finally, it must be mentioned that the formal system is severely lacking funds. The budget of the Justice Department (some 4.6 billion FBu) in 2004 amounted to 3 per cent of the national budget, and 25 per cent of the Justice Department's budget was devoted to the penitentiary sector.

## 4.2 Structure and functioning of the formal system

### The judiciary

Law No. 1, of 21 March 2005, which promulgated the Constitution of the Republic of Burundi provides in its article 205 that 'justice is rendered by the courts and tribunals on the entire territory of the Republic on behalf of the Burundian people'. The law on the organisation and competence of the judiciary describes the system:[72]

> *There are 126 communal tribunals (tribunaux de residence) which equals one tribunal per commune. At this level, the tribunals have fewer than one thousand judges, with one communal tribunal covering 55,000 inhabitants. It is thus clear that there are not enough courts for a population of 7 million. A wide material competence is entrusted by the law to the communal tribunals, but this is in contrast with the low level of education of the magistrates who tend to be secondary school graduates with six months of training provided by the Justice Ministry. Nonetheless, they hear cases related to land, marriage, inheritance and minor crimes. The resources given to the courts are not sufficient for the*

72 Law No.1/08 of 17 March 2005, Code on the Organization and Competence of the Judiciary.

*magnitude of their task. The enforcement of judgments, particularly for land cases when a field visit is necessary, is obviously slowed down by a lack of resources.*[73]

There are province-level tribunals (*tribunaux de Grande Instance*) of general jurisdiction established in every province of the country and in Bujumbura Municipality. Fewer than one hundred magistrates work in these courts. Until recently, magistrates at this level were required to have a university degree, but to provide more balanced ethnic representation, magistrates from the communal tribunals who might not have such degrees have been promoted. They are receiving in-service training. These province-level tribunals were given greater criminal jurisdiction in 2003.[74] This reform favours access to justice and guarantees the right of appeal in criminal matters.

There are three Courts of Appeal with a more limited number of magistrates compared to the province-level tribunals. The Supreme Court, which is subdivided into three chambers (judiciary, administrative and supreme chamber of appeal), now has ten magistrates. There is one Constitutional Court with nine magistrates.

There are specialised jurisdictions for labour (2), commerce (1), military issues (6), administration (2) and accounting (1). The Post-Transition Constitution provides for a High Court of Justice formed by the Supreme and the Constitutional Court meeting together with the power of judging the President of the Republic.

The Office of the Prosecutor has offices attached to the 17 province-level tribunals. The main mission of the Office is to uncover offences, receive complaints, carry out all the case investigation, and bring the offenders before the courts. The Minister of Justice is entitled to give injunctions to the Office. This undermines its independence, particularly when it must investigate or take action against political or sensitive offences.[75]

There is an Office of the Prosecutor at the level of the Appeal Courts in Bujumbura, Gitega, and Ngozi Provinces. In their areas of jurisdiction, they fulfil the functions of public prosecution in appeals and administrative courts. An Office of the Prosecutor attached to the Supreme Court ensures the coordination of the Prosecution Services.

Members of the judiciary auxiliary service include court clerks, secretaries and bailiffs. In principle, they are judicial procedure specialists, whose role it is to facilitate the work of the judiciary services. Nevertheless, their education level is low and the means at their disposal for carrying out their tasks are inadequate, provoking instances of graft. In the rural areas, there is a general shortage of equipment, even of simple typewriters.

## Police

A new national police service was created in 2004.[76] It consists of the Internal Security police, Air, Borders, and Foreigners (Immigration) police, Judicial police, and the Penitentiary police. Demobilised soldiers are being integrated into the police. The police service lacks a sufficient operating budget and training. It is severely constrained in its investigations by the lack of transportation and other scientific tools. Training is being provided by the UN Peacekeeping mission.

73 Cases are relatively often taken to courts. A research project was carried out on the use of the courts all over the country and statistical data show that every year there is one civil case brought for every 570 people. This is a high frequency when compared to data from Botswana, Kenya and Togo. (Weilenmann, M., 'Semi-autonomous Interactions in Legal Institutions: a case-study from Burundi', in Christina Jones-Pauly and Stefanie Elbern (eds), *Access to Justice. The Role of Court Administrators and Lay Adjudicators in the African and Islamic Contexts*, The Hague, London and New York: Kluwer Law Internatonal, 2002, pp. 51–74.

74 Law No. 1/105 dated 9 September 2003, Article 3. Until 2003, any criminal matters for which a sentence of life imprisonment or the death penalty was prescribed, as well as the prosecution of certain high officials, fell under the jurisdiction of the criminal departments of the Courts of Appeal as the court of first and last resort.

75 Makoroka, S., *La justice du droit ecrit: Lutte contre l'impunité au Burundi et dans la région des Grands Lacs.*, 1997, p. 104.

76 Law No. 1/020 of 31 December 2004 setting forth the creation, organisation, missions, competence and functioning of the National Police of Burundi.

## The Bar

The Bar has been in existence in Bujumbura since 1950 but no Burundian lawyer was sworn in until 1964. The number of lawyers[77] is not sufficient when one considers the volume of cases they normally deal with. The Bar exists to promote ethical standards, discipline those who clearly abuse those standards, provide training to its members and provide legal services to the public. The Bar does not function in rural areas due to a lack of resources.

77 Fewer than one hundred at the time of writing.

Despite the advantage of education and experience of some lawyers, compared to the other actors of the judiciary sector, the training of young lawyers remains inadequate. Often, the magistrates and officers of the court benefit from the contribution of the Bar in order to keep up with some areas of law in constant evolution. The lawyers are also accused of being the cause of the lengthy court procedures because of their numerous requests for postponements and appeals.[78] It is not clear that the Bar effectively promotes ethical standards or imposes disciplinary measures.

78 Sectoral Policy of the Ministry of Justice, p. 18.

The international community supports the cost of legal assistance from the Bar for destitute parties, a responsibility which should eventually be undertaken by the government.

## The Council of Magistrates

The Council of Magistrates[79] is an auxiliary body of justice with the responsibility of nominating and disciplining magistrates and working with the Head of State to guarantee the independence of the judiciary. It is headed by and includes five members from the executive branch in addition to seven members of the judiciary and three jurists from the private sector.

79 Constitution of Burundi, Articles 210–220.

The Council assists the president and the government in policy creation for the justice sector in monitoring the country's justice and human rights situation and in creating strategies for combating impunity. It has a consultative role in the appointment of magistrates in that it receives the proposal of the Minister of Justice and gives its advice before the magistrate is appointed for life by the president. The Council also gives its advice on the nomination of other members of the judicial branch (other than the Constitutional Court). Certain members of the magistrature believe that its decisions should be enforceable and not just consultative.

The Council is responsible for promoting the strict respect and enforcement of the magistrate's ethics, and to sanction those who disrespect them.

## Legislation

Most of the current legislation is in French, which the majority of the population does not speak. There is an ongoing effort to disseminate the content of the legislation to the general public, and to translate it into the national language, Kirundi. There is also a desperate need for new legislation, which is being answered in part by the work of consultants to the government and specialised segments of civil society on drafting legislation. Some legal instruments have become obsolete, inapplicable or are simply unknown to those who are tasked with applying and enforcing them. The Criminal Code

must be revised, particularly for sentences and to provide for alternative solutions to imprisonment, for instance community service. The Land Law is being revised to include, among other reforms, the treatment of marshlands and the revamping of the land administration.

Most importantly, the corpus of positive law must be completed with the legislation of succession/inheritance and marital contracts, including gifts.

### The penitentiary system

There are 11 prisons in Burundi. They have a combined capacity of 3650 prisoners but, in fact, now accommodate more than 7500.[80] This overpopulation is a critical problem, making the amelioration of conditions difficult despite the joint efforts of the penitentiary administration, the International Committee of the Red Cross and civil society associations. In the penal and penitentiary areas, preventive imprisonment is a serious problem, in both the prisons and the holding cells. Many of these are located a great distance from the tribunals.

Staff of the penitentiary administration are not adequately trained, and need to be aware of human rights with regard to both the deprivation of freedom and preparations for reintegration in the community.

### International human rights law

Burundi has so far ratified the main instruments of international law related to human rights,[81] but still has to adapt its internal law to its international commitments. This is most notably the case with regard to discrimination against women and the rights of the child. The Rome Statute on the International Criminal Court has been ratified, but still has to be incorporated into the Burundian legislation.[82]

Burundi applies the death penalty. Though there is no moratorium, the last civilian executions were carried out in 1997 for murders committed in 1993.

## 4.3 The effectiveness of the formal system

The report on the sectoral policy of the Ministry of Justice mentions the inefficiency of the communal tribunal, mainly with regard to the pronouncement of verdicts before written judgments are available, the pronouncement of deliberately unfair decisions, the non-execution of decisions, and corruption. The report also deplores the interference of the territorial administration in the functioning of justice. According to the Ministry, the settlement of disputes should be the exclusive prerogative of the tribunal or of the *bashingantahe* on the *collines*. The problem is most blatant for the resolution of land disputes. The sub-district authority, the district authority chief, the communal administrator and the provincial governor should no longer seek to establish their authority in civil or criminal cases.[83]

The interviewees criticised the slowness of the decision-making process,[84] and the very long distance to be covered by the parties to the dispute in some cases. The service is also not free of charge. The corruption some judges indulge in does not allow for the fair administration of justice.

80 There are some 90 holding cells around the country at the commune headquarters and the police stations. They would accommodate on average 10 people but are known regularly to house up to 30. See *Bulletin de la Ligue Iteka*, January 2005.

81 The Universal Declaration of Human Rights, the UN treaties on Civil and Political Rights (acceded in May 1990), Economic and Social Rights (acceded in May 1990), Racial Discrimination (ratified 1977), Elimination of Discrimination Against Women (ratified January 1992), Torture (acceded February 1993), Rights of the Child (ratified October 1993). Some implementing legislation has been adopted; the provisions of certain human rights treaties can be invoked before the courts and tribunals applied directly.

82 Following the refugee massacre in Gatumba, in August 2004, Burundi announced that it will eventually submit the case to the International Criminal Court, necessitating implementing legislation.

83 Sectoral Policy of the Ministry of Justice, (see Note 81 above), p. 17.

84 In a study on the justice sector carried out in 2001, the estimated duration of a civil procedure after referral was 5 to 10 years. (The German Cooperation for Development, 'A study of the judiciary sector: strengths and weaknesses of the judiciary system in Burundi', Bujumbura, November 2001, p. 16.

A good number of people interviewed deplored the fact that the formal system at the highest level is dominated by the Tutsi ethnic group. The work of the judiciary system in general and of the criminal chambers of the Courts of Appeal, and particularly since 1993, has often been disparaged in some Hutu circles that have considered it as an apparatus used for their oppression.[85] One of the consequences of this, the parallel justice practised in some areas by the former rebel groups – supposedly to compensate for the weaknesses of the formal system – constitutes a constraint for the effective functioning of the judiciary system. Despite these serious weaknesses, the interviewees appreciated the structured nature of the system, the written procedure and the keeping of records, as well as the magistrates' knowledge of the law and power to execute their decisions.

85 These findings should be taken seriously, but an effort should also be made to sensitise the population on the measures being taken to remedy that situation. Another sensitisation measure which could put an end to the prejudice about the judge's partiality is to strengthen the perception of respect for the law – of citizens and magistrates alike.

Our interviewees indicated that during the period that preceded the crisis, the role of the courts was well apparent in criminal cases, with sentences rendered for murder, injuries and grievous bodily harm, etc. The respondents noted that the corruption among judges was less marked before the war began (and before the economy collapsed). Interviewees also praise the abnegation showed by the magistrates in the performance of their duties after the crisis, considering the destruction of the already poor infrastructure at their disposal (some tribunals were destroyed, others pillaged), their paltry salaries, and the general lack of basic equipment. Some magistrates carried out investigations, after which they judged the accused. Some believe that the difficulty most tribunals had in carrying out investigations and rendering judgments is that they were confronted by the creation of different 'factions' based on the ethnic components of the community. They were also caught up in the general workings of the crisis. It was noted that some of the alleged perpetrators of crimes were in fact also among the highest levels of authority, and this due to impunity which existed before the crisis, and which is a longstanding weakness of the formal system.

In addition to the responses to the survey carried out within the framework of this study, criticisms are common against the Public Prosecutor's office and the department of criminal investigations ('judiciary police'). The perception among the population of persistent impunity is often attributed to them. The respondents deplore the immediate liberation of renowned criminals caught red-handed and how the investigations are often botched. On the other hand, the abuses of the defendants' rights, particularly prolonged detention, must be deplored among other violations of the Code of Criminal procedure, such as the length of pre-trial detention and the use of torture on detainees.

# 5 Contribution of International Organisations and Civil Society

## 5.1 Foreign and national interventions[86]

After the signing of the Arusha Agreement, conditions relative to the progress of the peace process were attached to the disbursement of international reconstruction aid pledged by the donor community between 2001 and 2004. Only a relatively low portion of these pledges has been disbursed so far, as the transitional period which was supposed to lead the country to elections and to the appointment of a representative government was extended from November 2004 to April 2005 and then again from April 2005 until August 2005. Donor views and the reality on the ground do not meet in this case. Donors maintain that it is difficult to disburse funds in the absence of security and stability. At the same time, it is difficult to restore general security and stability needed for the progress of the peace process in the absence of adequate assistance. This is further accentuated by the extreme poverty in the country, added to the fatigue resulting from the war.

Some assistance has nevertheless been provided to the justice system[87]. There is a coherent approach among the UN agencies, the donors and NGOs to the implementation of reforms of the formal justice sector derived from the APRA and included in several provisions of the Constitution. It is on the basis of these reforms that this study presents the interventions in the formal system.[88]

The United Nations Operation for peacekeeping in Burundi (UNOB) has been present and working since June 2004. Among the objectives assigned to that mission is the restoration of the rule of law.[89] Even before the establishment of UNOB, there were a number of interesting approaches in the field of justice, as is shown below. Nevertheless, our respondents in the field revealed that there was a lack of impact among the population in the four provinces,[90] as well as a lack of information about the available services. The problem is partly due to a disparate geographical coverage of certain projects[91] and partly to a lack of cooperation and coordination among the actors. In the past year, for example, several surveys on the operation of the justice system and several situation assessments have been carried out but not widely disseminated – a costly and time-consuming duplication of efforts.

It can be said that there is a lack of political will or commitment to work with the justice sector. The donors and the United Nations must be more engaged in this sector and they should prioritise the fight against impunity in the short term through the transitional justice provided for by the APRA.

86 This is not an exhaustive list and covers only interventions through 2004, and some planned for 2005.

87 The paper on the sectoral policy of the Ministry of Justice (see Note 81 above) notes that one of the constraints to its programme will be 'the difficult mobilization of international cooperation.' (p. 35).

88 Some donors such as GTZ, Belgium and the EU support both the formal and the informal systems at the same time. Belgium supports this work through the NGOs RCN and ASF.

89 The report of the United Nations Secretary General on The rule of law and transitional justice in conflict and post-conflict societies, www.un.org, dated 23 August 2004, signals the importance of this sector to peacekeeping and peacebuilding.

90 The question was: 'How do the civil society associations and the international organisations cooperate with the courts and the informal justice system?' The people interviewed mentioned nothing about the assistance of NGOs to the population. A number of magistrates mentioned training as one form of assistance provided.

91 Since the beginning of some projects, regions were excluded for security reasons. The security situation has improved and this should encourage better coverage of the country.

## 5.2 Support to reforms and to strengthening the formal system

### Training

The UNHCHR supports the formal system in the field of human rights (magistrates, police officers, staff of the ministries) as do the Iteka Human Rights League, Association des Femmes Juristes (Association of Women Jurists) and UNHCR. GTZ will train the judiciary staff in some zones/districts of Bujumbura Municipality and Ruyigi. A project for the strengthening of the rule of law assisted by the French Cooperation trained a good number of magistrates but was discontinued, as its mid-term review could not demonstrate any results. Through this project, the law creating the Magistrate's Training centre was drafted. The NGOs, ASF and RCN assist in the decentralisation of the criminal courts. Instead of continuing a judiciary assistance project, ASF trains the magistrates, which also helps in solving the issue of ethnic balance in the judiciary sector.[92] The UNHCR, among others, supports the training of community leaders on basic legal principles and on the need for human rights protection. It remains necessary to assist the formal system in the development of training programmes and training-of-trainers sessions.

92 This integration initiative is obtained through the promotion of communal tribunal judges to the province courts. The communal tribunal magistrates who are promoted to the province/criminal tribunals are trained in criminal law and receive in-service training in other fields of the civil law. A Training Centre for the magistrates is being created, with its statute and organisation having been supported by the French Cooperation and the physical infrastructure to be funded by another donor.

### Improvement of working conditions

GTZ, in its programme to support the rehabilitation of judicial institutions, plans to equip some communal tribunals in Bujumbura Municipality and in Ruyigi Province, and would like to improve their physical infrastructure. The European Union also has planned to support a project for the improvement of physical infrastructure through the construction of tribunals, while RCN contributes to the improvement of the work environment by providing equipment at the community/grassroots level. This NGO has also carried out a pilot project for the computerisation of the prosecutors' offices.

UNDP and the US government have equipped some courts as well as the National Assembly and the Senate with computers. As spare parts are expensive, it is not certain whether the computers will be maintained, which would make this a less sustainable effort when compared to the costs. There have been projects managed by the Iteka League for Human Rights to pay the field mission allowances for investigative magistrates.

### Re-edition of the legislation and translation and dissemination of laws in Kirundi

Belgium is assisting a project for the re-edition of the Burundian legislation. Global Rights and UNHCHR are working on the harmonisation of codes and laws with international norms. The UNHCHR has also supported the translation into Kirundi of several codes and the Universal Declaration of Human Rights. The French Cooperation supported the revision of the legislation on the status of magistrates. GTZ is working on the modernisation of rules and regulations and would like to publish a judicial revue. In addition to the distribution and dissemination of the laws in Kirundi, the organisation plans training for civil society, with the aim of educating the population on the Land Law.

There still is a role to be played by the international community, especially to assist the National Legislation Commission responsible for the development and preparation of draft laws.

## Access to justice by the population

In order to respond to the issue of the appearance in court of parties and witnesses, civil society organisations such as the Iteka League cover transportation of these persons to the courts. Now that the criminal courts are spread all over the country, the problem has been partly solved but has not been totally eliminated. There are several international actors in the domain of promoting access to justice by the poor: for instance, Global Rights and Human Rights Watch.

## Technical assistance to lawyers and support to the Bar

ASF provides substantial support to the Bar to encourage it to become more diversified and to assist and supervise young lawyers. The training programme for lawyers covers the disputes concerning the 1993 crisis, sexual violence, torture and land laws. ASF also provides the expertise of foreign lawyers who work with the local ones, particularly on serious crimes and genocide. UNHCHR provided this type of support until 2002, when the Office changed its focus from individual assistance to institutional change, through training and the reform, translation and dissemination of legislation.

## Penitentiary reforms

For more than ten years, the UNHCHR provided judiciary assistance to the prisoners involved in cases relating to the 1993 crisis. The ICRC contributes, together with several national NGOs and Catholic diocesan offices, to the improvement of prisoners' conditions in the different prisons. The NGO Penal Reform International worked for 18 months on a series of reforms including training for the penitentiary staff members, legal assistance aiming at reforming the present penitentiary legislation, the introduction of income-generating activities for the detainees in four pilot prisons, as well as the implementation of an identification and registration system for all the prisoners. An effort facilitated by UNOB has also been made to improve the coordination of the interventions in that sector between the penitentiary administration, the NGOs and the UN agencies.

## Assistance to the National Police

UNOB has a Rule of Law and Civil Affairs unit that provides training and technical assistance to the new National Police Force, and intends to work on judiciary and penitentiary reforms. The ICRC as well as the UNHCHR organises training sessions in international humanitarian law and human rights for the army and police officers.

## Fighting against impunity and corruption

Several actors, including a great number of civil society associations, are working to find ways of sensitising the authorities and the population on

impunity and corruption issues. Discussions and exchange fora are organised by UN agencies or the national and international NGOs with local civil society to that end. These discussions have led to the conclusion that it is necessary to find mechanisms to punish the different crimes perpetrated, without waiting for the UN's intervention with an international criminal tribunal or even an international judiciary investigation committee.

### Land issues

The reform of the Land Law is still ongoing. RCN, CARE and other organisations are collecting field information on that issue. Action Aid works on sensitisation in order to provide information to the administration, the *bashingantahe*, and the population. PREBU, a programme of the European Union, is supporting work on the land question. The Commission in charge of the Reinsertion of War Victims, particularly its Sub-Commission on Land, has the mandate of finding solutions to land issues for victims of the war, and it relies on the *bashingantahe* to help it in the settlement of land disputes.

## 5.3 Support to the *bashingantahe*

### Capacity-building

In an effort to find solutions to the crisis, various actors are aware of the need to cooperate with the *bashingantahe* institution as a structure representing the interests of the population and as a framework for the promotion of non-contentious justice and peaceful conflict resolution. For the time being, the weak point is the lack of structured consultation and synergy between the various projects.[93] Recently, the European Union supported a national project for the rehabilitation of the *bashingantahe* institution. Critical reflections continue to feed the debate on the form and modalities of the rehabilitation.

93 This does not mean that the exchange does not exist, but that it is not put to best use.

There are very few actors who support the judiciary aspect of the institution, but they have significant programmes. This is the case with RCN, supported in this aspect of its work by several donors including the Belgian Cooperation, the European Union and the Austrian Cooperation. There is a project for the promotion of justice carried out by that organisation with the grassroots leaders and authorities who include the *bashingantahe*, the local magistrates, the local government agents and the judicial police who participate in training seminars on their respective functions and powers, on the land law and the succession law, and on the distinction between civil and penal matters. The programme plans a national coverage and aims at solving the fundamental problem, which is the lack of understanding of the respective responsibilities of those local authorities, a current problem that confuses the population in search of a resolution to a conflict. The programme aims at improving collaborative action among these various authorities. This should reinforce the efforts already undertaken by that NGO, CARE and Africare in sensitising these authorities on the importance of justice, as well as the complementarity of their roles.

GTZ supports a training component for the *bashingantahe* in Ruyigi Province. The training focuses on women's rights, information on the modern judiciary system and the elections. A project aimed at assisting victims of torture and

sexual violence is implemented by Search for Common Ground: it trains and sensitises the *bashingantahe*, which is important because of the confusion existing among some *bashingantahe* who try to settle rape cases, a serious criminal matter, instead of focusing on the role of conciliation after the recourse to formal justice.

In a variety of projects sponsored by UNHCR, *bashingantahe* have been selected to be members of the refugee and IDP reception committees. The *bashingantahe*, the local administrative authorities and other community leaders were thus trained together on conflict resolution and land law in order to be able to manage the reception, reinsertion and reconciliation of displaced persons or returning refugees.

### The *bashingantahe's* contribution to economic development

Three NGOs work in community development and specifically work with the *bashingantahe*. Africare, Actionaid and CARE promote the organisation of informal groups of *bashingantahe* into civil society organisations. While these organisations provide training in some relevant subjects pertaining to modern law, they go further to involve the *bashingantahe* institution in all the development projects. On the one hand, this strategy enables the NGOs to involve the *bashingantahe* directly as community representatives, and to have the benefit of the cultural component in their interventions; on the other hand, it enables the *bashingantahe* to recover their status of community leaders. On the material level, the latter have more opportunities of preparing a project for their economic self-reliance.

## 5.4 The legal aid clinics

The Iteka League, the Judicial Information Office, the Association of Women Jurists and the Episcopal Commission in charge of Justice and Peace provide counselling, mediation, orientation and legal advice and assistance, including legal aid clinics. Among international organisations: GTZ envisages a programme with legal aid clinics; ASF intends to create a mobile clinic to be used for legal advice, and also for mediation; the Norwegian Refugee Council supports a counselling centre in the southern part of the country; ACCORD supports two legal aid clinics in the provinces that receive a great number of returnees; Global Rights, with the support of USAID, supported the creation of a paralegal service and a legal aid clinic in order to provide more information on rights and give advice on local disputes, and it also intends to support a consultation framework for locally based legal aid clinics.

## 5.5 Communications

The media have an important role to play in a country where rumours, lies, and distortions of history have fed the conflicts. If objective, verifiable information could reach the population, there would be an end to many types of tensions. International assistance in this domain has already created better communication, at least by inspiring the creation of several independent radio stations.

Several radio stations that have been recently established try to inform the population on issues related to justice, particularly by disseminating the laws. The government used the radio to disseminate the content of the post-transition constitution before the referendum. Studio Ijambo's programmes, which are pre-recorded and then broadcast on several stations, put a particular emphasis on the judicial role of the *bashingantahe*, with, for instance, a *mushingantahe* answering people's questions. In addition, parallel to the project on the identification of the traditionally invested *bashingantahe*, a series of programmes had been aired on the *bashingantahe* institution: the programmes continue to be broadcast on national radio and should be broadcast more widely.

Other radio stations, in addition to the national radio, frequently broadcast programmes dealing with justice. They are willing to disseminate information on the activities of various organisations in order to raise the population's awareness. The programmes produced by UNOB and broadcast on the existing radio stations will certainly concern justice. RCN, among other organisations, supports the preparation of radio programmes in order to educate on the law, particularly on fundamental human rights. ASF has a project of radio theatre in order to inform the population about its rights and responsibilities, particularly in criminal matters and cases related to the 1993 crisis.

The theatre, particularly the interactive theatre, is an effective popular tool. GTZ plans to fund communication on the theme of justice through theatre. It should be noted in this connection that RCN already covers the whole country with a drama group that deals in its repertory with justice and reconciliation. Theatre has been used for some time by Search for Common Ground and CARE. In addition to these quite effective techniques that utilise the still important oral cultural tradition, other channels of information can be initiated, such as public and private newspapers, and newsletters, preferably written in the national language.

## 5.6 Recommendations

Through the interventions of the various actors, the importance of supporting the different systems of justice for the strengthening of the rule of law is evident, and the projects undertaken are relevant. The population should benefit from better planning and organisation of the interventions; that is, the assistance could have a greater impact if it could be organised more efficiently.[94] It should take into account the real needs of the population as determined on the ground and, at the same time, encourage the application of fundamental principles of human rights by continued support of the implementation of reforms set out in the recent Accords. For instance, the UNOB adopted an approach that – at least in principle – is quite relevant. In developing the programme for strengthening the rule of law, the UN mission chose to give priority to a long period of observation and assessment of the population's needs and priorities, assessing first the initiatives already undertaken, as well as the local capacities.[95] The actors have to face the challenge of working with a formal justice system attached to a transitional government that is itself confronted by serious problems resulting from the long period of civil war that Burundi has experienced. One part of the assistance to the formal system should be allocated to the facilitation of the government's coordination. The UNOB could initiate such coordination

94 For example, avoiding dissipation of effort and resources, or lack of coordination with others.

95 The World Bank is carrying out a diagnosis of the justice system in order to prepare a project of economic management. The legal and judiciary reforms, including support to the Accounts Courts and the Private Arbitration Centre, are planned.

activities to reduce the political and security challenges, and use its organisational apparatus to support government and NGO initiatives.

The rule of law is an important sector for assistance and requires a framework for consultation.[96] As mentioned above, Burundi benefits from international experts in the justice sector who can assess the practice of the present assistance and suggest changes to be introduced to strengthen the rule of law most effectively. The European Union organises periodic exchange meetings among its member states that intervene in the sector of good governance. The UNHCHR is developing a project for the creation of a consultation framework for all those intervening in human-rights-related sectors, including justice. It aims to create a permanent framework to enable exchange of ideas and information, needs identification, and the prioritisation of the interventions. The sequence of the interventions is important but rarely harmonised. The creation of a unit, within the Ministry of Justice,[97] specifically devoted to the strengthening of the rule of law would be an ideal initiative. Such a unit could benefit from the support of a technical adviser who would assist the actors in orienting the intervention policies in the justice sector. It could also continuously collect the data from all of the studies conducted and develop a guideline document to include a collection of the most relevant interventions and recommendations. Also, that unit/cell could assist the appropriate actors in the monitoring and evaluation of the interventions, in order to ensure their effectiveness and their sustainability, and this above all in order to facilitate long-term interventions.

Finally, coordination and collaboration in the field are facilitated by donors' and other agencies' having decentralised decision-making and financial arrangements. A mechanism for financing projects that could respond to the dynamic political situation and the urgent questions of the day should be in place.

96 In Burundi, there is a relevant example in which other assistance sectors are creating tools to increase the cohesion and efficiency of outside interventions. Among the donors, there is an ongoing consultation to adhere to the principles and best practice of Good Humanitarian Donorship, to be implemented in partnership with NGOs and other humanitarian agencies. There is also a movement among the actors in the peace restoration to reflect on the best practices, called Reflecting on Peace Practices.

97 Instead of being a mere project or a secondary activity, this initiative would be more sustainable if it were integrated within a national institution.

# 6 Challenges to the Restoration of the Rule of Law

After analysing the functioning, strengths and weaknesses of the informal and formal justice systems in Burundi, it is clear that actions focused on each system will require substantial external technical and financial assistance. This section describes further some of the particular problems facing the justice system. A special emphasis is put on the contribution of the traditional informal system, in order to discover possible interventions for some of the most important issues relating to the system and its effective collaboration with the formal system.

## 6.1 Impunity

As one expert has observed: 'In practice, there is no prosecution for the notorious criminals whose number is impressive. The de facto impunity is as plain as the nose on your face.'[98] In Burundi:

98 Nindorera, E., 'Is reconciliation in Burundi on the right track?' *Au Cœur de l'Afrique*, no. 1–2, 2004, p. 61.

*the extreme violence observed since 1993 can largely be explained by the impunity for the previous massive crimes and an unappeased fundamental need for justice; the exacerbation of the ethnic consciousness which gave birth to 'wounded' collective ethnic memories; and deep individual trauma.'*[99]

99 Nindorera, 2004 (see Note 101), p. 62.

The APRA requires the enactment of laws against the most serious crimes, and reforms have been introduced with the aim of putting an end to this impunity, as mentioned above. However, provisional immunity, the release of political prisoners and amnesty – except for genocide, war crimes and crimes against humanity – mitigate the positive measures that promote the end of impunity[100] and call into question the political will for its eradication.

100 Nindorera, 2004 (see Note 101), p.61. A table of the favourable and unfavourable elements in place in Burundi for fighting against impunity shows contradictions.

Data collected from our respondents in the field show that the formal and informal justice systems can fight efficiently against the impunity but under certain conditions. The courts must be impartial and actually exercise their right to independence, as fighting impunity is likely to encounter opponents inside the formal system itself. In fact, currently, the executive power interferes in sensitive cases or takes sides in favour of important people who are prosecuted.

If the *bashingantahe* can prove their impartiality and neutrality, they should break the silence within the institution and denounce impunity and particular criminals openly. According to the respondents, the *bashingantahe* would be an objective source of evidence that would assist the work of a national truth commission or a judicial commission of inquiry. Other interviewees maintain that it is in fact the *bashingantahe* who hold the reliable information on the sequence of the events leading to the crisis in 1993 and who can denounce, without bias, the perpetrators of the massacres.

## Transitional justice

Burundi is defining how to implement some of the mechanisms for 'transitional justice'. The National Commission for Truth and Reconciliation (NCTR) was recently created.[101] One of the missions of the NCTR is to establish the truth about the serious acts of violence committed during the cyclical conflicts that have kept Burundi in mourning since its independence in 1962. The NCTR was provided for in the APRA. The existence of that Commission, as such, is not questioned: it is even clearly called for by most people in the country. However, there is serious scepticism about its efficiency. The fear prevailing among the general public is that the NCTR will be manipulated by politicians to the point of emptying it of its substance and diverting it from its stated objective. It is on the basis of this well-founded fear that the role of the *bashingantahe* could be turned to the best account. True cooperation should exist between the informal and the formal systems. Local *bashingantahe* elected by their communities can be very useful in creating the best conditions to ensure the credibility of the NCTR's work. If successful, this would restore credibility in the *bashingantahe* institution as well.

101 Law no. 1/018 dated 27 December 2004 on the missions, composition, organisation and functioning of the National Truth and Reconciliation Commission.

The *bashingantahe* could play an appropriate role in preparing the community, and sensitising the population on the NCTR's mission.[102] The population's commitment is essential for the NCTR's success and, if the *ubushingantahe* values are not reflected by the members of the NCTR, its credibility will be in question. One of the recommendations made by a conference with the

102 It will be important to avoid some of the problems of perception that may be behind the flight of thousands of Rwandans from the *gacaca* system. 'Most of these people don't understand *Gacaca'*, said one official. He continued by saying that the *Gacaca* department is planning to step up sensitisation about the *gacaca* courts to counter 'negative rumours spreading in some places'. (Irin News Service, www.allafrica.com, 20 April 2005.)

103 'Burundi: Justice under

Reconstruction, Report of the International Federation for Human Rights', No. 368, October 2003, p. 27.

International Human Rights Federation is that the members of the Commission should be appointed by the *bashingantahe*.[103] The *bashingantahe* can play an important advisory role for the commissioners. The practical functioning and everything relating to the collection of testimonies and the establishment of the truth (through facilitating the investigations and helping to establish the list of the victims of their colline) should be defined by the *bashingantahe* in cooperation with civil society organisations.

According to Article 2(b) of the law on the NCTR, at the end of the investigation and in order to arbitrate and reconcile, the NCTR must put in place or suggest to the relevant institutions the measures that are likely to promote reconciliation and forgiveness. It decides on the return to the beneficiaries of the property they have been deprived of and the reparation for destroyed property. It also decides on the adequate compensation to be paid by perpetrators. The Commission will suggest any political, social or other measures deemed appropriate and aimed at fostering national reconciliation. An advisory role would be appropriate for the *bashingantahe* who have already assisted the communities and the individuals in the reparation of damages linked to the crisis.

The other mission of the commission is to clarify the history of Burundi by going as far back as possible in order to enlighten the people about their past. The *bashingantahe* are particularly well suited to assisting the NCTR in fulfilling this part of its mission.

Another instrument provided for by the APRA for transitional justice was the International Judicial Investigation Commission in charge of carrying out investigations on the crimes of genocide, war crimes and crimes against humanity committed in Burundi from 1962. The government submitted the request for the establishment of this Commission in July 2002. A UN mission came to Burundi in May 2004 to analyse the timeliness, advisability and feasibility of creating it. In March 2005, the UN Security Council refused the request to establish the Commission. The report of the mission recommends both a non-judicial truth commission and a prosecuting special chamber within Burundi's court system. Each would have a mixed national and international composition.[104] If this recommendation is followed, the formal system will be greatly challenged and the work of the NTRC will be extremely important. The informal system will have played a crucial role in the fight against impunity.

104 The proposed truth commission would be composed of five commissioners, three of them international and two of them national. The prosecuting special chamber, of national and international composition, would have the competence to prosecute those bearing the greatest responsibility for serious crimes. Its temporal jurisdiction would be limited to specific phases of the conflict and would include, as a minimum, the events between 1972 and 1993, inclusive. ('Report of the Evaluation Mission concerning the creation of an International Judicial Commission of Inquiry for Burundi', S/2005/158, 11 March 2005.)

## 6.2 Reconciliation

Reconciliation is an important element to the restoration of the rule of law. This study heard in the field the cry for truth and justice in order to achieve reconciliation. Unanimously and without a lot of comments, the interviewees conveyed the importance of favouring formal justice while at the same time suggesting a recourse to the *bashingantahe* institution for the reparation of damages, the return of stolen goods and other material settlements related to the 1993 crisis. They further stated that conciliation is necessary for the cohabitation of individuals as such, but that the judicial path to justice is necessary for crimes related to the management of society as a whole. Therefore, for those cases, they concluded, 'justice first, reconciliation next'. The *bashingantahe* can have various roles in both, through taking part in the field investigations foreseen by transitional justice, and in working with victims

in order to restore justice, abolish revenge and divisions, and generate tolerance and forgiveness.

The support for the reforms provided for in the agreements signed by the political and military protagonists of the Burundian civil war requires the promotion of reconciliation initiatives that almost logically involve the *bashingantahe*, as the *bashingantahe* distinguish themselves and their process by the reconciliation achieved among the parties to a conflict. As the field research points out, the *bashingantahe* are particularly well placed when it comes to quantifying damages or choosing the means for symbolic compensation. Half of the opinions given in Gitega Province indicate that the *bashingantahe* can, through their advice, definitely solve the ethnic conflict. Since ethnic motives are often used as pretexts to conceal social realities that are not easily discovered, the *bashingantahe* who live within the population are more likely to be able to detect the underlying injustice and to reconcile people. In any case, it is claimed that the *bashingantahe* institution can fight against ethnic manipulation in the competition for power. It can be useful in the development of an accountable and responsible citizenry and to prepare the minds of other citizens for the changes that are to come.

## 6.3 Equity

Within the framework of this field research, it was necessary to query whether the formal and informal justice systems contain mechanisms that ensure equity: gender equality, and inclusiveness of all the social categories.

In Gitega Province, for example, most of the collected answers indicate that the *bashingantahe* and the magistrates treat people in the same way. In general, the people interviewed indicate that the informal justice system makes equitable decisions regardless of the characteristics of the parties. However, many women argue that customary law does not sufficiently protect the rights of women. Some women are in favour of legislating the elements of the customary law concerning inheritance, the marital contract and gifts/liberalities, conforming to the requirement of gender equality in the Burundian Constitution and in international human rights law. According to the communal tribunals' dossiers analysed for the purpose of this study, the Burundian magistrate most often makes a decision according to equity and based on evolving customary law, that which recognises increasingly the right of women to inheritance.[105] The issue of women's inheritance is more acute when land is at issue. Currently, fixed assets in general do not pose a problem.[106]

Until these aspects of law are codified, eliminating those customs that are outmoded and socially harmful, the customary law should evolve under the influence of the formal system that, itself, is taking inspiration from the modern legal principles of non-discrimination, equality and equity,[107] and these principles must be applied by the informal system.[108]

Representation of women in both systems is not adequate. This is a question of respect for human rights. It is also a practical question. A *mushingantahe* has a decision-making position and in general an elevated and traditionally venerated status in the community. Today, if women are to occupy 30 per cent of the seats at the decision-making levels, as provided for by the APRA, the

105 Interview with a lawyer on his study on judgments related to the issue of succession funded by Global Rights. Bujumbura, November 2004.

106 All the questions of girls' inheritance are related to fixed assets. In the majority of cases, the fixed assets concern land. It is the latter that raises issues because of the atomisation of land properties. What causes the reluctance of the legislator in particular, and of the political leaders in general, is the risk of creating a social crisis with unpredictable consequences, by enforcing laws ensuring the equality of men and women in land succession, without having alternative solutions to the issue of land atomisation. On the one hand, one cannot modernise the right to succession while ignoring the issue, and not doing anything in this regard is not reasonable either. The middle way would be to adopt a step–by-step approach to legislation.

107 Constitution of Burundi, article 19.

108 The tribunals are evolving their methods of resolving land questions related to customary law. Citizens' Network, 'Justice and Democracy. The harmonisation of practices in land law', April 2004.

*bashingantahe* must move toward integrating women as well. As the *bashingantahe* are charged with protecting human rights, there is a danger that the rights of women are not sufficiently protected by an entirely masculine decision-making structure and one based on custom. Though it has been noted that custom is evolving, it can be accelerated with the participation of women in dispensing non-contentious justice. The new structuring of the *bashingantahe* institution to some extent takes gender equality into account as at least 30 per cent of the seats on the various councils are held by women. The inclusion of women into the structure will facilitate the reflection on the conditions of their individual investiture and ability to render decisions. These changes should not be imposed from the top down, but through a continued sensitisation for the promotion of equality and the elimination of exclusion. An imposition of quotas for the short term could break down family cohesion and create unnecessary conflicts. On the other hand, continued and deliberate sensitisation should speed up the evolution of understanding that women's rights are human rights.

## 6.4 Corruption

In general, the people interviewed deplore corruption, which has become a real cancer undermining the Burundian systems of justice. The Council of Magistrates has the responsibility of sanctioning magistrates for misconduct but the people interviewed see that the sanctions provided for punishing corrupt judges are not applied. They suggest that both the corrupter and the corruptee be punished, implicating the criminal justice apparatus as well. If the public becomes aware that these measures are taken, the image of the judiciary is likely to be improved. As for resisting political directives, the Professional Magistrates Training Centre could be used to inculcate a culture of justice, a spirit of solidarity and an understanding and appreciation of the constitutional provision according to which the judge is answerable to only the Constitution and the law.[109]

109 Constitution of Burundi, article 209.

Some respondents even suggested that the *bashingantahe*, based on their commitments and the particular nature of their mission, should monitor cases before the formal system for accuracy in the recording of the plaintiffs' and witnesses' statements in order to better denounce the injustice exacerbated by corruption. Further, when corruption is alleged in certain institutions, the *bashingantahe* should become the privileged collaborators of the Ombudsman institution.[110]

110 It has been suggested that the Burundian Ombudsman should be carefully studied in its institutional and functional aspect in order to adapt it better to the national and cultural context.

As for corruption within the *bashingantahe* institution, respondents believe that this could be reduced if the *bashingantahe* were routinely selected by the community in which they reside, after a period of preparation and evaluation by the community. Sensitisation is also mentioned as one of the solutions to the problem. Many believe that this would not be enough in this era of generalised poverty. There should be an in-depth debate on the continued policy of gratuity of the services of the *bashingantahe*, taking into account the social and economic changes. Any sort of recompense settled upon however, could not be at the expense of access to justice for the poor, one of the most important attributes of the *bashingantahe*. Until the country improves its economic situation, recompense might be in-kind, as project funding would not be a feasible or appropriate solution.

## 6.5 Land

Today, land disputes alone represent 70 per cent of the cases submitted to the formal tribunals. Far from being a new phenomenon, the 'land time-bomb' is fuelled by various effects dating back to periods before the crisis, such as the population explosion, the disproportionate occupation of land, the ontological attachment of Burundians to their plots of land,[111] as well as the haunting disputes generated by the expropriation orders issued by the government itself. Furthermore, as thousands of Burundians have fled abroad, and as others live in internally displaced persons' sites, there is a generalised tendency to despoilment of lands and a series of illegal land sales. The issue is crucial, particularly since 1972, and it would be accurate to say that the despoilments that have always followed the massacres aggravate the already delicate land issue.

111 Manirakiza, Z., 'Terrorism and social life, a point of view on the social therapy', *Au Cœur de l'Afrique*, no. 1–2, 2004, p. 55. For a Burundian to be attached to land property is justified by anthropological and economic motives; anthropologically, the land property is a physical manifestation of the existence of past generations that prove at the same time the origin of a person, justifies his reason of being and provides irrefutable evidence of the right to existence on this same plot of land.

The legal aid clinics are intermediary bodies of justice whose main purpose is to guide the returnees, particularly on land issues. Some of these clinics have the advantage of involving the citizens and the 'para-jurists' in the search for justice and social cohesion: members of the community acquire the capacity to intervene as advisers. Considering the criticisms of Burundian justice, this innovation can be considered an alternative solution to redress some errors in the short term. Support to the *bashingantahe* institution aims at the long term, due to its historical depth and robust character. Strengthening the *bashingantahe* institution means strengthening the confidence and the pride Burundians find in it, and, therefore, also preserving the sustainability of the decisions arrived at, particularly those pertaining to inheritance and land cases involving at least a genealogical continuity.

The measures advocated by the APRA and which are being implemented by the National Commission for the Rehabilitation of Returnees require the involvement of the *bashingantahe* who are familiar with their colline and should serve as the guarantors of community harmony. Since the government has not yet put in place formal solutions related to the land issues, alternatives such as the *bashingantahe*'s colline-level land 'councils' suggested by the ICG and ACTS should be considered. More specifically, 'On every hill/colline, the land commission of the CNRS should proceed to the identification and appointment of councils of *bashingantahe* devoted to solving any land conflicts resulting from the return and resettlement of the refugees and internally-displaced persons.[112]' ICG also recommended that an independent land court be appointed in every province in order to receive, in appeal, the disputes that could not be settled at the level of the hill/colline. Independent land courts have been discouraged by legal practitioners, the judiciary and members of civil society as impracticable, but special chambers and/or procedures and additional staff within the existing tribunals have been recommended. There are efforts to examine how best to guarantee the right to appeal decisions while limiting the time and money that is spent by the parties and the formal system on what are largely unsuccessful appeals.

112 ICG (see Note 61 above), pp. 11–13.

Intensive training on land for the *bashingantahe* and other grassroots authorities is recommended, and is already done by some NGOs as mentioned above. This increased capacity is necessary before the judicial role of the *bashingantahe* can be reinforced and eventually recognised by the formal system.

## 6.6 Political conflict

Concerning political conflicts, according to the interviewees and other actors, the contribution of the *bashingantahe* should not be overestimated. The time has passed when the *bashingantahe* were compulsorily consulted in order to settle power conflicts, as was the case during the monarchy, when the king and the chiefs regularly had recourse to the wise *bashingantahe* in order to collect the required information and seek their advice. This explicit role has diminished steadily since the colonial period; and, because of the politicisation of the institution by the one-party state, it does not have a legitimate standing in the eyes of some of the opponents of that system. According to the interviewees, the current political class with its formal education does not take into account the opinions of the *bashingantahe* on the basis that they are mostly illiterate.

For other political matters, however, such as misuse of public resources, those interviewed noted that the *bashingantahe*, who are by essence guided by equity and normally opposed to the increase of 'wrongly acquired' wealth, would be qualified to advise political actors. Others say that the *bashingantahe* should take the role of mediator between the political protagonists. For that purpose, they must improve the functioning of their institution by the selection and investiture of *bashingantahe* whose integrity and political neutrality cannot be questioned. This is another way of saying that the institution must be rehabilitated to be effective in any of its functions – judicial, moral, cultural, social, and political leadership in general.

# 7 Conclusions

The justice system in Burundi needs strong support in order to be able to restore the rule of law as a determining factor for the future of the country. This is why the international community is urged to bring its assistance, as the Burundian system cannot alone find the appropriate solutions to the issues that undermine the community. A large number of reforms were recommended by the APRA and proposed by the Ministry of Justice. Coordination of the foreign interventions is necessary also in this respect. Reforms lead to behaviour change, which cannot be achieved during a two-year period corresponding to the life cycle of a project: those intervening in Burundi can become pioneers in the field of strengthening the rule of law through long-term commitment. A greater fundraising effort is necessary in general, and the international community should contribute to the improvement of the material conditions of the actors in the judicial system in order to ensure justice in the short term.

Despite the vicissitudes and deteriorations that it underwent, the *bashingantahe* institution has remained vivid in the hearts of the Burundians. There is therefore, throughout the country, a widely shared support for its rehabilitation. Social tensions of the post-conflict period can easily degenerate into conflicts, particularly land disputes, and these are typically settled by the *bashingantahe*. The *bashingantahe* institution is often functioning as an auxiliary of the formal system, and will quite likely remain operational long after the expiration of projects initiated during the crisis and even during the post-conflict period. The revision of the legislation should give a greater role to the

*bashingantahe* in the formal system in order to increase its efficiency, as the courts and the *bashingantahe* councils can be mutually beneficial.

In order to strengthen the two systems, three levels of cooperation and coordination are envisaged. The first level concerns the *bashingantahe* and the formal system. The formal system would benefit from a strengthened corps of *bashingantahe*, and the legal recognition of that corps should be specific. The formal system should support capacity-building for all the grassroots authorities in their well-defined and understood fields of competence. If the two systems work in synergy and complementarity, they can relieve the province-level Courts, and give them an opportunity to use their resources better. As far as transitional justice is concerned, a role should be given to the *bashingantahe* in the sensitisation and mobilisation of the population and, next, in the search of the truth, and a role of adviser should be given in the operation of the commissions of inquiry, particularly those concerning compensation and reparations.

The second level is between the external and international actors and the two systems of justice. The priority support activities for both systems of justice would not differ greatly since capacity building is a key element for both systems. Some donors have already planned or envisage continuing support for both sectors. Joint efforts by the various actors should foster complementarity between the grassroots authorities, and could furthermore support all the informal-system mechanisms for the resolution of community conflicts together.

The third level is between those intervening in the restoration of the rule of law. A coordination unit would help the intervening parties to develop and implement a strategic, concerted and sustainable programme.

# 8 Recommendations

The study led to the following recommendations for the international community, the government of Burundi and the actors in the informal system.

## Capacity building

### Informal

- Provide training for the *bashingantahe* on positive law and its application, and literacy training where needed.
- Promote collaboration opportunities within the administration, the judges and the *bashingantahe* through seminars on their legal powers and the modern laws.
- Set up a framework for permanent dialogue between the magistrates, the *bashingantahe* and the administration so that each of those parties remains well aware of its role and takes care not to interfere in other parties' roles.
- Train the *bashingantahe* along with the magistrates on questions relating to their field of competence.
- Ensure that there is a good identification of the support to other mechanisms of informal justice for a better synergy with the *bashingantahe* institution.

- Support self-help associations initiated by the *bashingantahe* to enable them to seek economic self-reliance and better avoid the temptation of corruption.

### Formal

- Provide continuous/in-service training opportunities to the actors of the justice system (for example through seminars, documentation, creation of a library, supply of codes in sufficient quantity, and experience-sharing with other magistrates).
- Reform the law in order to broaden the legal authority of the *bashingantahe*.

### Two systems

- Continue to support in a systematic way the reforms recommended in the Arusha Agreement.
- Carry out studies on the insertion of the *bashingantahe* into the modern legal structure and other non-judicial mechanisms.
- Support the public and private media to improve coverage of issues of justice – in Kirundi.

## Impunity

- Undertake priority actions for the fight against impunity, using the resource of the *bashingantahe* and other upstanding persons for this work.
- Involve the *bashingantahe* in the work of the National Truth and Reconciliation Commission and the National
- Commission for the Rehabilitation of War Victims.
- Guarantee the safety of the members of the Truth and Reconciliation Commission and other mechanisms of transitional justice, and facilitate their investigation work.

## Corruption

- Eradicate by all means the corruption that is now growing within and undermining the *bashingantahe* institution and, in particular, clarify the philosophy that must guide the offering of banana or sorghum beer to the *bashingantahe* (*agatutu k-abagabo)* to avoid the perversion of the informal system of justice.
- Strengthen the Council of Magistrates, in particular to fight against corruption and to lobby for the means of achieving genuine independence of the judiciary.

## Reconciliation

- Include the *bashingantahe* in the work of the Truth and Reconciliation Commission.
- Allow the *bashingantahe* to be involved in determining the reparation of damages.

## Land

- Provide intensive training to the *bashingantahe*, paralegals, local authorities and the population on the Land Code.

## Equality

- Apply the provisions of the Constitution, prohibiting discrimination based on ethnic origin or gender.
- Apply the provisions of the APRA, giving women 30 per cent of decision-making positions in national institutions.
- Sensitise the *bashingantahe* on the rights of women.

## Coordination and strategic support

- Create an independent and multi-sectoral technical commission, under the responsibility of the Ministry of Justice, to coordinate the planning, dialogue and synergy with the international organisations on the actions to be undertaken in order to support the formal and informal systems; evaluate the interventions in the justice sector to determine the best means of restoring the rule of law in Burundi.

### Government

- Take the opportunity of the national forum on the justice sector to hold a popular consultation as well as to engage all of the external actors in strategic planning.
- Create a unit in charge of coordinating the interventions so that they are carried out in a strategic and coherent way.

### Donors

- Take advantage of the national forum on the justice sector to reinvigorate cooperation with the government and among the international organisations and agencies.
- Within the 'Justice Commission' of the National Council of *Bashingantahe*, set up a committee responsible for dialogue and coordination of the activities to be carried out for the strengthening of the *bashingantahe*.
- Mobilise all the programmes and agencies of the United Nations to support the rule of law.
- Mobilise the other donors for a sustainable investment in justice.

### United Nations Operation in Burundi

- Employ political capital to encourage the Burundian political will for the re-establishment and strengthening of the rule of law.

## Legislative reform

- Finalise the uniformisation of Burundian law by codifying inheritance, gifts and matrimonial systems.
- Bring the Public Prosecutor Department's services closer to the local courts, so that the local magistrates are not 'judges and parties'.

## Independence and autonomy of the *bashingantahe* institution

- Avoid the instrumentalisation and politicisation of the *bashingantahe* in order to safeguard their autonomy and independence and thus guarantee neutrality and justice in the settlement of conflicts.
- During election periods, ensure the general interest by avoiding any partisan spirit in the advice that the *bashingantahe* provide to the population in order to safeguard social cohesion and prevent manipulation.

## Rehabilitation of the *bashingantahe* institution

- Prepare carefully the future *bashingantahe* through close
- observation and the advice of their immediate community; invest the *mushingantahe* in his colline/village or city district of origin in order to allow the neighbours to provide their opinions on his integrity, as well as to enforce sanctions planned for the cases of defaulting *bashingantahe*.
- Examine the issue of the remuneration of the *bashingantahe*, especially in matters of national interest, such as the question of the land.
- Involve all relevant actors in an in-depth reflection on the best strategy to adopt for an effective and uncontroversial rehabilitation in urban areas.

# 9 Priority Actions

## Action I: Ensure effective and sustainable interventions for restoring the rule of law

***Justification:*** The formal and informal systems of justice are closely interlinked. In the context of general justice-system reform, strengthening of the rule of law will therefore require concerted effort and work with both systems simultaneously to help Burundi meet its international obligations.

***Strategy:*** Guide project implementers to execute activities that are strategically planned and coordinated.

### Activities

- Create a consultative committee comprising the Ministry of Justice, the donors and international agencies and the NGOs[113] working in the justice sector to set out strategies and harmonised interventions and to conduct regular exchange sessions.
  ACTORS: Ministry of Justice, donors, international organisations and NGOs

  – Provide for this committee a technical secretariat within the Ministry of Justice which has the responsibility of coordination; it is to serve all of the actors – governmental and non-governmental, internal and

113 An NGO (non-governmental organisation) is defined as an international or national non-governmental organisation, or an association of Burundian civil society.

external – and may be technically assisted by representatives of different actors.
ACTORS: donors

- Create and keep updated a guide for interventions, reports and studies produced for the justice sector, and ensure effective communication among the actors.
ACTOR: the secretariat
- Engage in monitoring and evaluation of the effects of the harmonisation process.
ACTOR: the secretariat

- Support the media for a better knowledge of the activities promoting justice.
ACTORS: NGOs, public and private media, donors

***Expected results:*** A more effective justice system due to consultation and improved coordination of interventions, particularly of the international community.

## Action II: Strengthen the informal system to contribute to the overall effort to restore the rule of law

***Justification:*** The informal system functions often as an auxiliary to the formal system. The *bashingantahe* are always sought out to resolve disputes at the local community level. The informal system serves the population without regard to ethnic group (the Twa are now represented among the *bashingantahe*) or gender, chosen for its easy accessibility and the conciliatory approach to justice. According to field research, the local courts confirm 60 per cent of the cases brought to them after the *bashingantahe* have heard them. Strengthening the capacity of the *bashingantahe* will make them all the more effective, and will in turn guarantee the rights of the population and reduce the number of cases before the courts.

***Strategy:*** Strengthen local (informal) justice.

### Activities

- Organise working sessions with magistrates, local government authorities and the *bashingantahe* on clarifying the legal authority of each and the limits of the intervention of each.
ACTORS: NGOs working in the informal and formal justice sectors.

- Strengthen the technical skills of the *bashingantahe*.

  - Popularise the legal texts which have already been translated.
ACTORS: NGOs working in the informal system (by their personnel, national experts and the *Fondation Intahe*)
  - Train the *bashingantahe* on the Land Code, the Family Code, basic human rights law, other legal texts, modern conflict resolution

techniques; monitoring and evaluation of the effects of the training.
ACTORS: NGOs working with the informal system (by their personnel, national experts, the Ministry of Justice, the *Fondation Intahe*)

- Provide literacy education for the *bashingantahe* who need it.
ACTORS: NGOs, Ministry of Education
- Train the *bashingantahe* in preparing minutes of proceedings and creating a basic filing and storage system for them.
ACTORS: NGOs, Ministry of Justice
- Sensitise the *bashingantahe* on the fight against corruption, and specify sanctions to be applied for those who practice it.
ACTORS: NGOs, *Conseil national des bashingantahe*, *Fondation Intahe*;
- Sensitise the *bashingantahe* on gender equality with the aim of investing women in their own right in the near future, as is the case with women's integration into other national institutions.
ACTORS: NGOs, *Conseil national des bashingantahe*, the *Fondation Intahe*

- Create a consultation framework with the legal aid clinics.
ACTORS: NGOs, the Bar Association

***Expected results:*** A more effective corps of *bashingantahe*, shown by a systematic follow-up on the number and quality of decisions made.

## Action III: Resolve land disputes in the way that is the most equitable and rapid

**Justification:** As Burundi is one of the most densely populated countries in Africa, land conflicts are frequent. The local population goes regularly to the *bashingantahe* to resolve land disputes. The resolution of these conflicts, particularly by using a conciliatory approach, is crucial to the stability and cohesion of the community. The *bashingantahe* can help the courts guarantee the rights of the population, especially the fundamental right to property.

***Strategy:*** Provide specialised training to the *bashingantahe* to strengthen this resource for resolving land conflicts.

### Activities

- Produce a training manual for the resolution of land conflicts.
ACTORS: NGOs, national experts; Ministry of Justice

- Provide a summarised and simplified version of the land code for the *bashingantahe*.
ACTORS: NGOs.

- Provide intensive training to special committees of *bashingantahe* and the local government authorities.
ACTORS: CNRS (National Commission for the Reinsertion of Returnees); NGOs

- Continue to integrate the *bashingantahe* in the programmes for the welcome, reinstallation and reintegration of refugees and displaced persons.
  ACTORS: NGOs, CNRS, UNHCR

- Introduce of written records with registers to have all decisions on file.
  ACTORS: NGOs

- Organise regional fora for exchange of experience and the harmonisation of procedures being followed in resolving land disputes.
  ACTORS: CNRS, Ministry of Justice

***Expected results:***

- The *bashingantahe* are more efficient so that more land issues are resolved effectively.
- The caseload of the courts is reduced.
- The efficient resolution of disputes by the *bashingantahe* fosters community harmony and reconciliation.

# Appendix I: Objectives and Methodology

The Centre for Humanitarian Dialogue posed a number of questions as terms of reference for this study. The stated objectives of the study included:

- establish the data informing the way in which the informal justice system, namely the institution of the *bashingantahe* in the case of Burundi, has developed and survived in the country across the vicissitudes of time, despite the effects of colonisation and the interference and manipulation by the post-colonial regimes;
- enhance understanding of how the formal justice systems relate to informal justice systems;
- determine how international justice and rule of law programming can be used to support the peaceful settlement of disputes within the current political context; and finally,
- provide an analytical framework to further the development and coordination of international justice and rule of law programming for donors, United Nations agencies and NGOs.

With documentary research, the team tried to summarise the data available in selected written materials on the functioning of justice in Burundi. Special attention was given to the *bashingantahe* institution which, today more than ever, is the subject of both critical research and debates, the researchers' purpose being to analyse the possibilities of making it a springboard for the restoration of the rule of law in the country.

In principle, it can be said that the reflections are unanimous with regard to fundamental issues, that is the values which the institution defends and the assets that it offers for the restoration of peace in general, and the rule of law in particular, are largely recognised in the writings. Nevertheless, only the form of its contribution is subject to debate – the institution's mode of operation, and especially the way of rehabilitating it so that it plays its role fully and unambiguously. The concern shared by everyone is to protect this institution against a possible political instrumentalisation that, in the past, played a great role in its disintegration.

The team of researchers of the Centre for Humanitarian Dialogue also tried to describe the current situation of the formal justice system through examining the publications and considering the facts which show its strengths and weaknesses within the difficult circumstances of the current crisis: a crisis of identity coupled with a generalised crisis of confidence in the institutions, including those whose existence would be futile without equity, dedication to truth, impartiality and transparency procedures.

Field research was conducted in four provinces over two weeks to establish the current status, the perceptions and the wishes of the actors and the beneficiaries of the customary (informal) and statutory (formal) legal systems. The 'focus group' methodology was used for these field surveys.

1 In Gitega Province, surveys were conducted in the communes of Gitega, Giheta and Bugendana.
2 In Mwaro Province, three communes were visited: Gisozi, Kayokwe and Nyabihanga.
3 In Makamba Province, three communes were visited: Makamba, Mabanda and Vugizo.
4 In Urban Bujumbura ('Bujumbura Town'), research was done in the zones/districts of Kinindo, Musaga, Bwiza and Kamenge.

In all these communes and districts of investigation, the team held interviews with a sample representative of the population. The sample was distributed as follows:

1 members of commune-level *bashingantahe* councils (20 people)
2 municipal/commune-level administration officials (10 people)
3 local (county/commune-level) tribunal judges (5 judges)
4 civil society (10 people, mainly representatives of human rights leagues/associations)
5 beneficiaries (4 people)
6 *bashingantahe* and judges jointly, especially to make concrete recommendations and list actions to be implemented.

Lastly, during the same research, the consultants effected site visits to note the activities in progress, especially in the provinces of Muyinga, Makamba, Gitega and Mwaro. They also held discussions with leaders of national and international non-governmental organisations to supplement the data collected in the field.

Research in the field made it possible to refine and confirm the conclusions of former research initiatives, especially with regard to the appreciation of the role played by the institution of the *bashingantahe* in times of crisis, collaboration between the non-formal system and the local (county-level) tribunals, as well as the possibilities of resorting to both systems for the repair of the 'social fabric' and the restoration of the rule of law. The examination of the dossiers covers only the number of opinions confirmed or invalidated by the court and does not analyse the basic issues of the files.

# Appendix II: Effectiveness of the Informal System in Interaction with the Formal System

**Mwaro Province**
Nyabihanga Commune

| Year | Closed dossiers | With the opinion of the *bashingantahe* | Confirmed opinions | Percentages |
|---|---|---|---|---|
| 1988 | 121 | 7 | 3 | 42.8 |
| 1989 | 116 | 4 | 1 | 25 |
| 1990 | 121 | 9 | 6 | 66.6 |
| 1991 | 110 | 6 | 0 | 0 |
| 1992 | 81 | 5 | 0 | 0 |
| 1993 | - | - | - | - |
| 1994 | 176 | 2 | 0 | 0 |
| 1995 | 181 | 8 | 3 | 37.5 |
| 1996 | 107 | 10 | 7 | 70 |
| 1997 | 107 | 6 | 1 | 16.6 |
| 1998 | 113 | 13 | 8 | 61.5 |
| 1999 | 126 | 8 | 4 | 50 |
| 2000 | 76 | 9 | 5 | 55.5 |
| 2001 | 25 | 7 | 4 | 57.1 |
| 2002 | 57 | 3 | 2 | 66.6 |
| 2003 | 57 | 5 | 2 | 40 |
| TOTAL | 1574 | 102 | 46 | 45 |

NB: No records of the judicial activities were found in Nyabihanga for the year 1993. Even the judicial staff could not be evaluated for that year.

**Kayokwe Commune**

| Year | Closed dossiers | With the opinion of the *bashingantahe* | Confirmed opinions | Percentages |
|---|---|---|---|---|
| 1988 | 47 | 12 | 8 | 66.6 |
| 1989 | 98 | 14 | 7 | 50 |
| 1990 | 93 | 6 | 2 | 33.3 |
| 1991 | 91 | 9 | 5 | 55.5 |
| 1992 | 91 | 11 | 7 | 63.6 |
| 1993 | 137 | 17 | 12 | 70.5 |
| 1994 | 45 | 10 | 7 | 63.6 |
| 1995 | 124 | 13 | 10 | 76.9 |
| 1996 | 41 | 4 | 0 | 0 |
| 1997 | 103 | 5 | 2 | 40 |
| 1998 | 100 | 8 | 6 | 75 |

| | | | | |
|---|---|---|---|---|
| 1999 | 82 | 7 | 4 | 57.1 |
| 2000 | 163 | 4 | 3 | 75 |
| 2001 | 111 | 7 | 4 | 57.1 |
| 2002 | 168 | 6 | 3 | 50 |
| 2003 | 119 | 19 | 15 | 78.9 |
| TOTAL | 1613 | 152 | 95 | 62.5 |

**Gisozi Commune**

| Year | Closed dossiers | With the opinion of the *bashingantahe* | Confirmed opinions | Percentages |
|---|---|---|---|---|
| 1988 | 88 | 10 | 7 | 70 |
| 1989 | 126 | 18 | 14 | 77.7 |
| 1990 | 110 | 7 | 4 | 57.1 |
| 1991 | 131 | 12 | 9 | 75 |
| 1992 | 153 | 13 | 10 | 76.9 |
| 1993 | 127 | 14 | 12 | 85.7 |
| 1994 | 164 | 6 | 2 | 33.3 |
| 1995 | 62 | 5 | 3 | 60 |
| 1996 | 68 | 13 | 9 | 69.2 |
| 1997 | 77 | 11 | 5 | 45.4 |
| 1998 | 103 | 9 | 5 | 55.5 |
| 1999 | 100 | 16 | 13 | 81.2 |
| 2000 | 71 | 6 | 2 | 33.3 |
| 2001 | 68 | 10 | 8 | 80 |
| 2002 | 57 | 5 | 3 | 60 |
| 2003 | 62 | 8 | 6 | 75 |
| TOTAL | 1567 | 163 | 112 | 68.7 |

Makamba Province

**Makamba Commune**

The data on the closed dossiers were not available.

| Year | Dossiers with data on the *bashingantahe*'s opinion | Dossiers in which the opinion was confirmed | Percentages/ effectiveness |
|---|---|---|---|
| 1988–1989 | 71 | 65 | 91.5 |
| 1989–1990 | 68 | 55 | 80.8 |
| 1990–1991 | 185 | 166 | 89.7 |
| 1991–1992 | 43 | 42 | 97.6 |
| 1992–1993 | 46 | 36 | 78.2 |
| 1993–1994 | 95 | 72 | 75.7 |
| 1994–1995 | 111 | 90 | 87.3 |
| 1995–1996 | 163 | 149 | 91.4 |
| 1996–1997 | 159 | 154 | 96.8 |
| 1997–1998 | 103 | 85 | 82.5 |
| 1998–1999 | 107 | 96 | 89.7 |
| 1999–2000 | 96 | 87 | 90.6 |
| 2000–2001 | 81 | 68 | 83.9 |
| 2001–2002 | 97 | 92 | 94.8 |
| 2002–2003 | 75 | 59 | 78.6 |
| TOTAL | 1500 | 1316 | 87.7 |

**Mabanda Commune**

| Year | Dossiers with the *bashingantahe*'s opinion | Confirmed opinion | Percentages |
|---|---|---|---|
| 1988–1989 | 97 | 91 | 93.8 |
| 1989–1990 | 104 | 99 | 95.1 |
| 1990–1991 | 93 | 85 | 91.3 |
| 1991–1992 | 85 | 82 | 96.4 |
| 1992–1993 | 71 | 58 | 81.6 |
| 1993–1994 | 46 | 38 | 82.6 |
| 1994–1995 | 49 | 36 | 73.4 |
| 1995–1996 | 54 | 52 | 96.2 |
| 1996–1997 | 47 | 46 | 97.8 |
| 1997–1998 | 63 | 55 | 87.3 |
| 1998–1999 | 61 | 51 | 89.7 |
| 1999–2000 | 76 | 71 | 93.4 |
| 2000–2001 | 73 | 65 | 89 |
| 2001–2002 | 88 | 81 | 92 |
| 2002–2003 | 108 | 106 | 98.1 |
| TOTAL | 1115 | 1017 | 91.2 |

**Vugizo Commune**

| Year | Dossiers with the *bashingantahe*'s opinion | Confirmed opinion | Percentages |
|---|---|---|---|
| 1988–1989 | 142 | 129 | 90.8 |
| 1989–1990 | 131 | 126 | 96.1 |
| 1990–1991 | 72 | 70 | 97.2 |
| 1991–1992 | 68 | 64 | 94.1 |
| 1992–1993 | 73 | 69 | 94.5 |
| 1993–1994 | 61 | 59 | 96.7 |
| 1994–1995 | 44 | 42 | 95.4 |
| 1995–1996 | 54 | 51 | 94.4 |
| 1996–1997 | 49 | 49 | 100 |
| 1997–1998 | 43 | 36 | 83.7 |
| 1998–1999 | 41 | 33 | 80.4 |
| 1999–2000 | 76 | 70 | 92.1 |
| 2000–2001 | 104 | 100 | 96.,1 |
| 2001–2002 | 54 | 52 | 96.2 |
| 2002–2003 | 113 | 112 | 99.1 |
| TOTAL | 1125 | 1062 | 94.4 |

# Appendix III: Interview Guide (Focus Group)

In your answers to the following questions, please express your ideas in a clear and thorough way, with practical recommendations. The purpose of the study is the strengthening of the formal and informal systems of justice so that they play a visible role in the restoration of the rule of law in Burundi. Your answers will be integrated into the ideas collected in other localities in order to generate a synthesis intended to show the current situation of the informal and formal systems of justice, the challenges to be met and the aspects to be supported.

1. What was the importance of the formal and the informal justice systems prior to the outbreak of the war?

2. What was the role of the two systems during the war? What was the contribution of the *bashingantahe* and the tribunal judges in the restoration of peace in Burundi? Express your wishes.

3. How were the informal and formal systems of justice affected by the war?

4. According to you, what is the role that the two systems can play in this post-conflict situation?

5. Do the *bashingantahe* have buildings that they use as work facilities when they sit to settle disputes? If those premises exist, are they in good condition? If they do not exist, is it necessary to make them available? What would be improved thanks to the availability of work facilities?

6. Do the judges of the tribunals have buildings that they use as offices/courtrooms? If these buildings exist, are they in good condition? If they do not exist, is it necessary to make them available? What would be improved thanks to the availability of work premises?

7. In what ways do the two systems of justice (informal and formal) differ? Are they complementary? What are the strengths and limitations?

8. Could you tell us the similarity ('common points') between the *bashingantahe* and the judges? How do they collaborate in the implementation of their duties?

9. What are the types of conflicts covered by the informal justice system, the one administered by the *bashingantahe*? What are the limits of the *bashingantahe*'s intervention under their system of informal justice?

10. According to you, what should be the field of intervention of the informal justice system? For example, should the informal justice system be from now on entitled to deal with the crimes committed in periods of war?

11. Are the decisions taken by the informal system applied/enforced by the formal system?

12. Are the responsibilities reserved for the *bashingantahe* as well as the authority that they have with the informal system based on a hierarchy or are they the same for all? Explain.

13. Here in your vicinity, are there individuals or groups of individuals who do not appreciate the formal and informal judicial systems? If that is the case, which reasons do they give to justify this attitude? Who are they?

14. What are the factors on which the respect for the informal justice system is founded and which ensure that the decisions taken by that system must be applied/enforced?

15. What are the categories of people who can be summoned/called by the informal system? In this case, for which reasons?

16. Do the tribunals find it more convenient and easier to deal with cases settled beforehand by the informal justice system?

17. Is the informal system used to complement the formal system (tribunals), as a means to compensate for its deficiencies and weaknesses? Which ones?

18. In which context does it prove more effective to resort to the informal system rather than to the tribunal? In which context does it prove more effective to resort to the tribunal rather than to the *bashingantahe*?

19. Does the informal system function in the same way throughout the country? Does this system contribute to the fight against impunity?

21. According to you, can the informal system contribute to the resolution of the ethnic and political conflict?

22. To settle the ethnic and political conflicts, do you find it convenient to resort to the informal system of justice or to the formal one, and how?
    - Sentence of the tribunals?
    - Conciliation of the parties?
    - Repair of the wrongs committed?
    - Others?

23. Do the informal and informal systems take equality into consideration in their operation? For example, is there equity between men and women, the rich and the poor, children and adults, people in good health and those in poor health, those who belong to different ethnic groups or political parties, etc.

- For better fighting against impunity:
- What can the *bashingantahe* institution do?
- And the formal system of justice (tribunals)?

24. According to you, which steps should be taken in order to fight effectively against the corruption that has become widespread within the administration, in the tribunals and the informal system?

25. Which kind of support could the donors bring to the *bashingantahe* institution? Specify your answer.

26. Which kind of support could the donors bring to the tribunals in terms of training (capacity strengthening), legal reforms, logistic support, etc.

27. How do civil society associations and international organisations collaborate with the tribunals and the informal judicial system? What are your criticisms on this subject?

28. Can the informal justice system – on the basis of Burundian customs – deal with a crime or acts of violence? In which cases is that possible?

29. Which errors should be corrected for the best operation of the informal judicial system? Specify how?

30. Why, in certain cases, are the decisions taken by the informal system of justice not confirmed by the local tribunal?

31. Would there be obstacles in the administration to prevent the informal and formal systems of justice performing their work without interference? How can these impediments be eliminated?

32. According to you, taking into account the role played by the informal system and the formal system, which system should be given priority in terms of support: the *bashingantahe* system, or the formal one?

**Question for the judges only**

33. Could you indicate the cases settled by the local tribunal in confirmation of the decisions taken by the *bashingantahe,* and the proportion of the decisions thus confirmed compared to those which were rejected by the tribunal between 1988 and 2003.

**Question for the *bashingantahe* and the judges jointly**

34. What are the actions to be implemented so that the *bashingantahe* institution and the tribunals resolutely continue to strengthen justice in the country? What are the specific needs which require an intervention?

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