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The Problem of Impunity and Judicial Reform in Burundi

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Introduction

Some observers would suggest that the best way to achieve reconciliation in a situation such as that present in Burundi is to leave the past in the past. They argue that prosecution of past atrocities will most likely be show trials unbefitting a sincere effort to establish peace and democracy, that a public review of the abuses committed on both sides will inflame passions and hatreds rather than calming them, that Burundi's shattered society should focus its limited human and material resources on the urgent task of economic reconstruction--building a brighter tomorrow--rather than diverting those limited resources to dwell on the sins of yesterday.

If the goal, however, is something more than a tenuous, temporary pause in the violence, dealing in a clear and determined manner with past atrocities is essential. To assume that individuals and groups who have been the victims of these crimes will simply forget about them or expunge their feelings without some form of accounting, some semblance of justice, is to misunderstand human psychology and to leave in place the seeds of future conflict. What is true of individuals emerging from massive abuse and trauma is no less true of nations: mechanisms are needed to confront and reckon with that past, facilitating closure rather than revenge. Otherwise, the past can be expected to haunt and infect the present and future. Victims may harbor deep resentments that, if not addressed through a process of justice, may ultimately be dealt with through one of vengeance. This has been the experience time and again in Burundi. Virtually every analysis of the conflict in Burundi has identified the endemic problem of impunity as a central factor in the cycles of violence that continue to destroy the country. Issues of justice and impunity are not "soft" issues to be considered only in the later phases of a reconciliation process; these problems have become basic to the conflict and need to be integrated at the outset into any viable effort to end the conflict. A number of options will be explored in this paper to deal with this problem.

Prosecution before Burundi Courts

In this context, prosecutions for past abuses can serve several functions. They provide victims with a sense of justice and catharsis--a sense that their grievances have been addressed and can more easily be put to rest, rather than smoldering in anticipation of the next round of conflict. In addition, they can establish a new dynamic in society, an understanding that aggressors and those who attempt to abuse the rights of others will henceforth be held accountable. They can make it possible to restore a modicum of confidence in the judiciary as a non-violent and credible channel for the redress of such abuses. In addition, as noted in 1994 by the UN Commission of Experts appointed to investigate the Rwandan genocide, domestic courts can be more sensitive than an international body to the nuances of local culture and resulting decisions "could be of greater and more immediate symbolic force because verdicts would be rendered by courts familiar to the local community." Perhaps most importantly for purposes of long-term reconciliation, this approach makes the statement that specific individuals--not entire ethnic or religious or political groups--committed atrocities for which they need to be held accountable. In so doing, it rejects the dangerous culture of collective guilt and retribution which has produced further cycles of resentment and violence.

Given the ineffectiveness of the Burundi judiciary, prosecution--particularly for such politically charged cases as those related to the 1993 coup or the massacres that followed--is not feasible within the existing system. Foreign judges, prosecutors, investigators, and adminstrative personnel should be imported on a temporary basis to bolster the Burundi judiciary. Some have proposed that these individuals serve in an observer and advisory capacity to their Burundi counterparts. This approach would add an important element of objectivity and credibility to the process while maintaining maximum respect of concerns with respect to national sovereignty.

Alternatively, these foreign jurists would serve not merely as observers but in an active capacity within Burundi's judiciary. This approach would ensure promptness and maximize the credibility of the proceedings. It would be complemented by the intensive training programs for Burundi jurists discussed below.

If the principle of criminal accountability is implemented, then a method must be adopted to bring the numbers into a manageable range. As noted by the recent UN

Commission of Inquiry report, "tens, if not hundreds, of thousands of individuals from both ethnic groups have at one time or another committed homicide. To prosecute every one of them is clearly beyond any system of justice." The question then becomes whom should be prosecuted.

There is a growing consensus in international law that, at least for the most heinous violations of human rights and international humanitarian law, a sweeping amnesty is impermissible. International law does not, however, demand the prosecution of every individual implicated in the atrocities. A symbolic or representative number of prosecutions of those most culpable may satisfy international obligations, especially where an overly extensive trial program will threaten the stability of the country, as would undoubtedly be the case in Burundi. In several cases ranging from post-war Germany to Ethiopia to Rwanda, given the large number of potential defendants, an effort has been made to distinguish three categories of culpability and design different approaches for each. Roughly, these classifications break down into (a) the leaders, those who gave the orders to commit these crimes, and those who actually carried out the most heinous offenses (inevitably the smallest category numerically); (b) those who perpetrated abuses not rising to the first category; and (c) those whose offenses were minimal. The severity of treatment then follows accordingly.

Most of the thousands who have committed crimes in Burundi, including those incited to commit individual murders, will presumably not be prosecuted. They might instead be considered eligible for the confession and amnesty program described below. Should such an approach be adopted, certain relatively small categories of perpetrators would be excluded from this program and would be subject to prosecution. These might include the key planners and organizers of the coup or of subsequent atrocities, those who have killed large numbers of people, and those responsible for provoking abuses through the mass media.

Borrowing from the approaches recently adopted in Rwanda and South Africa, a program of amnesty can be offered to those who come forward and confess to their crimes. As an incentive to come forward, there would be a deadline for all amnesty applications. A confession would need to include not only the details of one's crimes, but information regarding one's accomplices and superiors involved in these crimes. This will aid the prosecution in preparing cases against these other individuals

(particularly the superiors in the chain of command) and will also serve as a further incentive for the superiors themselves to come forward voluntarily and avail themselves of the temporary amnesty program.

This approach will also aid in one of the first tasks to be undertaken: the processing of the cases of several thousand prisoners who have yet to be given any trial. By establishing a maximum time frame within which applications for amnesty would have to be reviewed and adjudicated (perhaps 2-3 months), many prisoners would be motivated to confess to their crimes rather than wait the much longer time period within which their case will be brought to trial under the regular procedures. It may be necessary as well to accompany this program with a national information campaign and local monitoring to ensure the protection of those who have confessed following their release and return home. Should confession result in retribution, the program will fail.

Beyond the current prison population, the credibility of this confession and amnesty program will depend on the ability of the Burundi criminal justice system, with its foreign participants, to undertake the prompt arrest and prosecution of selected individuals for their roles in the coup and the massacres. This needn't be a large number of prosecutions; some have suggested that the coup-related trials, for example, may be effectively limited to some twenty cases.

Criminal accountability--or amnesty--must be applied on an even-handed basis. As a consequence, any standard of accountability applied to those who engaged in the massacre of Tutsis, for example, must also be applied to members of the military and security forces involved in atrocities against Hutu civilians. In addition, there is an overlap in jurisdiction over many of these crimes between military and civilian courts. It is preferable that crimes committed against civilians be tried in civilian courts.

Experts on the subject disagree as to the time frame for reviewing past abuses. Many--such as the recently concluded UN Commission of Inquiry--suggest that accountability (whether through prosecution or the other means described below) should extend back to the massacres of 1972. Others urge that efforts at accountability should only look back as far as the 1993 coup and its aftermath. This question may be an appropriate matter for negotiation between the parties to the conflict. In the immediate term, however, what is most important is the prompt prosecution of any

present and future atrocities committed by any party. This step is arguably necessary to change the current dynamic of violence and counter-violence in Burundi and to give people a sense of security and protection from further such abuses; it should not be subject to negotiation.

Prosecution before an International Tribunal

The question of prosecution of those implicated in atrocities in Burundi before an international tribunal may also be considered. The arguments in favor of an international tribunal include the following: Such an entity is better positioned to convey a clear message that the international community will not tolerate such atrocities, hopefully deterring future carnage of this sort both in the country in question and worldwide. It is more likely to be staffed by experts able to apply and interpret evolving international standards in a sometimes murky field of the law. It can do more to advance the development and enforcement of international criminal norms. Relative to the often shattered judicial system of a country emerging from genocide or other mass atrocities, an international tribunal is more likely to have the necessary human and material resources at its disposal. It can more readily function--and be perceived as functioning--on the basis of independence and impartiality rather than retribution. Finally, an international tribunal stands a greater chance than local courts of obtaining the arrest and extradition of those perpetrators who have left the country.

Three possibilities exist in this regard. In the first scenario, a new international criminal tribunal could be established, as the Security Council has done with respect to Rwanda and the former Yugoslavia. This would be expensive and, based on the experience of the two tribunals mentioned, would take more time to become operational than is appropriate to address the current crisis in Burundi. In addition, it is questionable whether the political will exists at the current time to create a third international tribunal. In a second scenario, the Security Council might expand the jurisdiction of the International Criminal Tribunal for Rwanda to cover genocide, war crimes and crimes against humanity committed in Burundi. (The tribunal's jurisdiction currently extends to such crimes committed in Burundi by Rwandese citizens in 1994.) Given the difficulties and delays which have been experienced by the Rwanda tribunal with its current jurisdiction--the first trials have yet to begin, more than two years after the genocide--this approach would be ill-advised and would spread the

already inadequate human and financial resources of the tribunal too thinly. Under a third scenario, the international community would simply provide the Rwanda tribunal with the resources and personnel it needs to pursue its existing mandate in a more robust and high-profile manner. One practical consequence would then be the indictment, arrest and prosecution of some of the principal organizers of the Rwandan genocide who are now, in exile, providing support to Hutu extremists in Burundi and further fueling the conflict there. The Rwanda tribunal should be strongly encouraged and assisted to promtly undertake these indictments and arrests. More broadly, establishment of the tribunal without providing it with adequate means or enforcement powers to be effective has left extremists in both Rwanda and Burundi with the sense that the international community is not serious about ensuring accountability for ethnic atrocities; quickly shoring up the Rwanda tribunal now can convey the opposite message to extremists on both sides in Burundi.

Non-criminal Sanctions

In some countries grappling with the aftermath of mass abuses, a relatively small number of those culpable for the abuses are prosecuted; a second, larger category of perpetrators is subject to certain non-criminal sanctions. The most important of these is disqualification from certain elected or appointed positions in the public sector. The rationale for such a vetting process is simple: confidence cannot be restored to reformed governmental institutions if these institutions are in the hands of those responsible for abusing the public. In the case of Burundi, arguably the most important vetting should take place with respect to the security forces. A viable peace process in Burundi will necessarily entail an overhaul of both the army and the various civilian police forces (of which there are arguably too many). The membership of these forces will need to be adjusted to achieve a greater degree of ethnic balance. In the context of any reform, it is advisable to screen out from the security forces anyone from any party to the conflict who is implicated in the 1993 coup or in atrocities committed against civilians. Any such vetting process should be undertaken by a body comprised of representatives of both ethnic groups; consideration might also be given to having one or more representatives of the international community as members of such a body. Finally, given the high level of unemployment and the general state of the economy, consideration should be given to retraining and/or other forms of economic

reintegration into Burundi society for those members of the security forces who are excluded from service through this process.

Commission of Inquiry

Over the past decade, several countries attempting to deal with the aftermath of massive repression or abuses have established commissions of inquiry or "truth commissions," comprised of eminent citizens charged with investigating the violation of human rights under the old regime and producing an official history of those abuses. In many of these countries, as in Burundi, much of what had occurred was already generally known; what the commissions added was a meaningful *acknowledgment* of past abuses by an official body perceived domestically and internationally as legitimate and impartial. Such an entity cannot substitute for prosecutions--and does not afford those implicated in their inquiry the due process protections to which they are entitled in a judicial proceeding--but it can serve some of the same purposes: permitting a cathartic public airing of the evil and pain which has been inflicted, resulting in an official record of the truth; and providing a forum for victims and their relatives to tell their story, have it made part of the official record, and thereby provide a degree of societal acknowledgment of their loss. In some cases, such a process has also established a formal basis for subsequent compensation of victims. The dynamics of such a process vary depending on the particular circumstances: in countries in which both sides to a conflict have committed abuses, a truth commission can provide a mechanism for both victims and parties on both sides to come forward in a process of mutual acknowledgement, as is currently being attempted in South Africa.

In Burundi, domestic attempts to use a commission of inquiry, particularly with respect to the 1993 coup and its aftermath, have been too politicized to be effective, being comprised of only Tutsi members. After extensive deliberation, the UN International Commission of Inquiry for Burundi undertook its work, but it was significantly limited in its access to evidence and witnesses. While a purely international commission carries the imprimatur of the world community and is arguably free from the same suggestions of bias that might accompany a purely domestic entity, it is easier for local leaders, when they deem it politically expedient, to distance themselves from an international commission and its findings. In this

sense, a commission of inquiry or "truth-telling" process is most effective when local parties feel a degree of ownership in the effort; it is in that circumstance that the lessons of such a commission are most likely to be integrated into Burundi society.

To date, there have been private NGO commissions of inquiry for Burundi, national commissions and now the UN commission. Arguably, Burundi does not need yet another commission of inquiry. One configuration, however, may still have some utility for the effort to achieve an accounting, closure and reconciliation: a truth commission comprised by (1) senior representatives of the parties to the conflict (including the military and rebels) to ensure a sense of investment in the process and to improve access to information and (2) international representatives to ensure objectivity and credibility.

Treatment of Victims of Past Massacres

The UN Commission on Human Rights and the Representative of the Secretary-General on Internally Displaced Persons have each urged that victims of massacres in Burundi and their families should be compensated. Such compensation could help victims to feel that their suffering has been formally acknowledged--particularly when the perpetrators of the crimes against them are not being prosecuted or punished--facilitating some degree of closure. On the other hand, given the limited resources available, any compensation might more efficiently be tied to the specific financial needs of the victims, using compensation as a mode of overall economic reform for the rebuilding of victimized communities rather than simply disbursing lump sums to all victims irrespective of need.

Judicial Reforms

Beyond the essential task of ensuring accountability and ending impunity for mass abuses, the judicial system in Burundi needs to be reformed to enable it to play a second, equally important role. At the most fundamental level, the principle purpose of the courts in virtually any system is to serve as a forum for the peaceful resolution of disputes. Conflict and disagreement is inevitable in any human system; to forge a durable peace, it is necessary to channel those conflicts into a routinized and accepted mode of amelioration before they become violent and less tractable. By addressing normal, everyday disputes between people--whether they deal with injury or land or

discrimination--the courts will ultimately contribute to an overall culture which resolves its conflicts through such nonviolent means.

Achieving a degree of ethnic balance within all parts of the Burundi legal system will be essential if the judiciary is to serve these purposes. The 446 members of the current judiciary are overwhelmingly Tutsi. Attention must be paid to the recruitment, diversification and training of judges, prosecutors, investigators, administrative personnel, and private attorneys. [1] This balance cannot be achieved in the short term in light of the dearth of appropriate individuals to be recruited and trained for these positions. Large numbers of Hutu intellectuals have been killed, while others have been denied access to the educational system. As a result, it will likely take several years before any substantial balance can be attained. In the interim, as discussed earlier, foreign judicial personnel should be imported to serve in the Burundi legal system. Judges and prosecutors should come from countries with similar legal systems to Burundi; being sensitive to the fact that jurists from certain countries may be viewed as biased in favor of one of the parties to the conflict in Burundi. Foreign investigators, clerks, and police, on the other hand, need not necessarily come from countries with similar legal systems.

Simultaneously, intensive training should be undertaken, both within the country and through the rotation of judicial personnel for training and practical experience abroad. This is necessary not only for new recruits to legal service, but also for those currently serving on the courts. The majority of judges on Burundi's 123 "tribunaux de résidence" currently have no legal training, and corruption is common. The goal should be not merely the acquisition of technical knowledge about the legal system, but, as least as importantly, intensive indoctrination in judicial ethics, professional standards and principles of ethnic impartiality, to reverse the culture of "negative solidarity" which has characterized the system to date.

The process of nomination of judges requires examination. Consideration should be given to nomination by an independent, impartial, bi-ethnic board, rather than the political nominations by the executive branch which have been the norm.

It is advisable to expand the number of criminal chambers in Burundi beyond the present three cours d'appel--a proposal that has previously been considered by the Parliament. If future crimes and violence are to be deterred, the kind of backlog and

inertia which exists today must be removed.

At least 80% of the cases which come before the courts in Burundi deal with land disputes. Specialized courts, staffed by magistrates and arbitrators specifically trained to handle this category of controversy, may be considered.

For the courts to function effectively, the police need to function more effectively. There is currently too great a dispersal of authority and jurisdiction between several police forces operating in the country, with little coordination. These should be consolidated, and the judicial police force expanded. The absence of sufficient judicial police, clerks, bailiffs or process servers severely hampers the functioning of both the civil and criminal process in the courts. The present near-impossibility of enforcing civil judgments further undermines confidence in the judiciary and encourages citizens to take the law into their own hands. It is also necessary to separate the responsibilities of the army for external security and the police for internal order. Most gendarmes are apparently transferred to that service from the military, and are ill-trained to the tasks of civilian law and order. The police should be placed under civilian control.

Both the courts and the police require improvements in basic equipment to more effectively and efficiently carry out their functions. Magistrates often lack offices, typewriters, and even basic texts necessary for their work such as the Constitution or the Civil and Penal Codes.

Finally, prison conditions and security also need to be improved if there is to be a credible system of criminal justice. The Special Rapporteur for the UN Commission on Human Rights recently reported, for example, "several attempted escapes from jail, probably faked, which ... resulted in the disappearance and physical elimination of a number of embarrassing eyewitnesses or of persons who took part in the assassination of President Ndadaye."

Conclusion

The process of ending the culture of impunity and enabling Burundi's judicial system to play its key role in achieving a durable peace within the country will be a slow and delicate process. Many of the options discussed in the present paper will be appropriate for the short and medium term, while others will entail processes lasting several years. Two steps, however, are pertinent for immediate implementation: (1)

the parties should agree in principle that the subject of justice and impunity will be part of the agenda for negotiations, and (2) any new atrocities committed by any party should promptly be prosecuted.

As noted by the Special Rapporteur for the UN Commission on Human Rights in his November 1995 reports,

> Since the loss of loved ones recurs generation after generation, whatever the ethnic group concerned, the accumulated grief has been transmitted to their descendants for decades. Because of these sad memories or a desire for revenge, Burundi society has become paralysed and Burundi culture stifled, with no solution in sight. This state of mind could well have psychotic consequences, which are very difficult to cope with at the national level and which, above all, create a context conducive to the development of extremist and totalitarian ideologies among the population....

In his follow-up report three months later, the Special Rapporteur declared his "deep conviction that there will be no salvation for Burundi until it has exorcised its past ... thereby paving the way towards national reconciliation." The proposals outlined above will hopefully be of assistance in moving Burundi in that direction.

[1]With respect to expansion of the number of private attorneys, it should be noted that there are reportedly only twenty-three lawyers in the entire country to provide any representation of criminal defendants.