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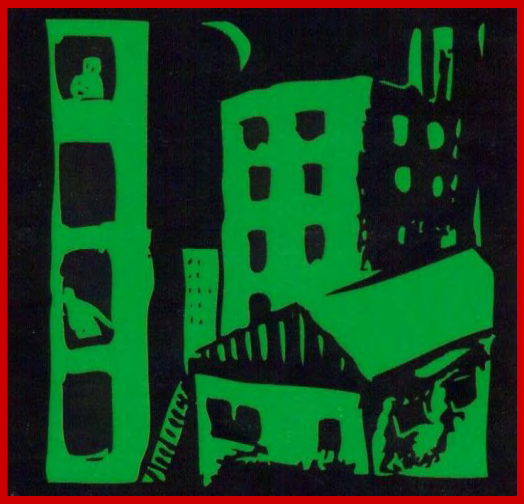

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The impact of the flaws of transitional justice mechanisms in Burundi on Aspiration 4 of the African Union's Agenda 2063

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ABSTRACT

This article examines how transitional justice mechanisms have been used to reconcile warring parties in Burundi. It draws on the findings of the Truth and Reconciliation Commission (or Commission vérité et reconciliation, commonly known as the CVR) to demonstrate the deficiencies of transitional justice in addressing Burundi's dark history. Among the key findings of the CVR report of 2021 is the revelation that the mass killings of 1972 amount to the international crime of genocide, a characterisation which is still contentious in Burundi. This article explores the strained relations between Burundi and international donors. As the year 2024 marks the passage of 52 years since the 1972 mass killings, it is

surprising that many Burundians are still waiting for justice to be served. The article critically examines the application of transitional justice mechanisms through the flaws of truth-telling, reconciliation, and reconstruction in post-conflict Burundi.

Keywords: transitional justice, truth and reconciliation commission, reparations, restitution, Aspiration 4 of the African Union's Agenda 2063, Burundi.

1 INTRODUCTION

Burundi is a small landlocked country in the Great Lakes Region of Central Africa surrounded by Rwanda, Tanzania, and the Democratic Republic of the Congo. As in Rwanda, its population is made up of three tribes: the Twas (1 per cent), Tutsi (14 per cent), and Hutus (85 per cent). The Tutsi military leaders – Michel Micombero (1966–1976), Jean-Baptiste Bagaza (1976–1987), and Pierre Buyoya (1987–1993 and 1996–2003) – assumed power through *coup d'états* and, for all but a short interval between 1993 and 1996, dominated Burundi's political landscape since independence in 1962.

In 1966–2003, they orchestrated the execution of Hutu and Twa civilians and political elites. Further evidence of gross violation of human rights was the mass killing of Hutus and Twas in incidents in 1972, 1988, 1991, 1993, and 1995. What is more, the assassinations of Hutu leaders – such as prime ministers Joseph Cimpaye in 1965, Pierre Ngendandumwe in 1965, and Joseph Bamina in 1965, the Deputy Speaker of Parliament, Paul Mirerekano, in 1965, and presidents Melchoir Ndadaye in 1993 and Cyprien Ntaryamira in 1994 – were directly traceable to institutionalised ethnic cleansing under Tutsi-led military regimes.

Ethnic turmoil, assassinations, arbitrary arrests, extrajudicial killings, unlawful arrests of political leaders, and exclusionary policies in education and employment – all of these factors and more warranted the need for transitional justice in Burundi. Post-conflict societies generally adopt transitional justice processes as a first step towards national reconciliation, peacebuilding, and reconstruction. These processes aim to address past injustices and transform post-conflict societies through mechanisms for dealing with deep-rooted hostilities among warring parties. Transitional justice encompasses a wide range of such mechanisms, including truth-telling in regard to what happened in the past; advancing accountability through restorative, retributive, or punitive measures; reparations for harm done to victims; and fundamental reform of oppressive institutions.

In post-conflict countries in Africa, it is imperative that transitional justice be effective in ensuring sustainable peace, human security, and development. Yet despite numerous efforts to bring about national healing in Burundi, transitional justice has failed to flourish in regard to retribution and reparations. Impunity for gross violations of human rights continues to prevail, and has often been identified as among the flaws in the country's transitional justice initiatives.

This article is a contribution to the ongoing debate on transitional justice in Burundi. It assesses the extent to which post-conflict transitional justice has succeeded in

reconciling Burundians and enabling sustainable peace and security in keeping with Aspiration 4 of the African Union's Agenda 2063, which envisages a peaceful and secure Africa. To this end, the article examines whether Burundi's transitional justice processes have achieved their objectives in consonance with Agenda 2063. It recommends that there be accountability for past crimes, as well as reparations – both individual and collective, and symbolic or material – which are suitable for bringing about meaningful healing, reconciliation and reconstruction. Key factors that influence transitional justice include endemic corruption and the weakness of the judicial, executive, and legislative organs of the state that were inherited from the repressive regimes of the past.

The article is divided into six sections, excluding the introduction and conclusion. The first discusses the deficiencies of transitional justice mechanisms, while the second undertakes a comparative analysis of transitional justice models between Burundi and other countries such as Chile and South Africa but also looking at experiences in Argentina, Guatemala, Cambodia, Rwanda, Sierra Leone and the Germany. The third evaluates the establishment and role of Burundi's truth and reconciliation commission, the *Commission vérité et reconciliation* (CVR), and other institutions. The fourth section argues for the need for accountability for the heinous crimes of the past, as well as land restitution and reparation for victims. The fifth section deals with the role of international actors, while the last analyses the extent to which transformative measures could be adopted to strengthen transitional justice and the role of international partners.

2 THE FLAWS OF TRANSITIONAL JUSTICE

2.1 Transitional justice in Burundi

Transitional justice mechanisms in Burundi are cluttered with puzzles the pieces of which it will take time to connect. In general terms, transitional justice can be used as a tool to address the injustices of past regimes and colonialism.[1] In Burundi, the transitional justice model that was adopted included the establishment of the CVR[2] and the International Judicial Commission of Inquiry to investigate acts of genocide, war

[1] United Nations Security Council *Question of the impunity of perpetrators of human rights violations (civil and political)* (1997), final report prepared pursuant to sub-commission decision 1996/119. E/CN.4/Sub.2/1997/20). See also Jamar A "Accounting for which violent past? Transitional justice, epistemic violence, and colonial durabilities in Burundi" (2022) 14(1) *Critical African Studies* 73; Russel A "Obedience and selective genocide in Burundi Africa" (2015) 85(3) *Journal of the International African Institute* 437; Dunlop E "Ethnicity, exclusion, and exams: Education policy and politics in Burundi from the independent republics to the civil war (1966–1993)" (2021) 56(2) *Africa Spectrum* 151.

[2] Article 7(18) of the APRA. Pursuant to the provisions of Protocol I to the Agreement, the promotion of impartial and independent justice was seen to be of paramount importance. In this respect, all petitions and appeals relating to assassinations and political trials were to be made through the establishment of the Truth and Reconciliation Commission pursuant to the provisions of article 8 of Protocol I of the APRA dealing with the nature of the conflict, genocide, social and political exclusions, and their solutions in Burundi.

crimes, and other crimes against humanity[3] as a way of combatting impunity and engaging with the country's legacy of repressive regimes.

Transitional justice was a noble cause that aimed to move Burundi from turmoil to the rule of law, democracy, national healing, peace and security, and reconstruction and economic development.[4] The Arusha Peace and Reconciliation Agreement (APRA), facilitated by former presidents Julius Nyerere of Tanzania and Nelson Mandela of South Africa, was signed in August 2000. It sought to end the armed conflict and cycles of mass killing akin to genocide that had been committed since Burundi gained independence in 1960. The Constitution of Burundi of 2005, as amended in 2018,[5] reinforced the APRA and emphasised determination to end to the deep-rooted causes of ethnic and political violence, genocide and other heinous international crimes, as well as social exclusion and instability more generally.

A transitional justice model was instituted under the APRA. However, it has been criticised for being based largely on Lijphart's Western-centric theories[6] and failing to resolve the crisis in the country. The criticisms of Lijphart's model stem from the fact that, because it focuses on the role of political elites and regards their cooperation as key to stabilising democratic governance, it does not take into consideration the nature and context of Burundian conflicts.[7] Unlike the approaches adopted in other jurisdictions, such as Chile, South Africa, Argentina, Guatemala, Cambodia, Rwanda, Sierra Leone, and the Germany of the Nuremburg trials,[8] transitional justice in Burundi has left a complicated factual situation in terms of the progress made and the challenges encountered during its implementation.[9] For example, some categories of amnesty in the Burundian transitional justice model included what Egbai and Chimakonam call "blanket" and "self-granted amnesties",[10] which aimed to shield the perpetrators of

[3] Article 18 of Protocol II of the APRA on democracy and good governance.

[4] The Preamble to the APRA states, inter alia, that the parties decided to put aside their differences to promote matters that were seen as common to them.

[5] Preamble to the Constitution of Burundi of 2005.

[6] Sullivan DP "The missing pillars: A look at the failure of peace in Burundi through the lens of Arend Lijphart's theory of consociational democracy" (2005) 43(1) *Journal of Modern African Studies* 75.

[7] Ndarubagiye L *The origin of the Hutu-Tutsi conflict* Nairobi (1995) 27; Gahutu R *Persecution of the Hutu of Burundi* Dar es Salaam: Great Lakes Higher Education Company Limited (2000) 17; Krueger R & Krueger K *From bloodshed to hope in Burundi: Our embassy years during genocide* University of the Texas (2007) 4; Bentley KA & Southall R *An African peace process: Mandela, South Africa and Burundi* Nelson Mandela Foundation & HSRC Press: Cape Town (2005) 43.

[8] Countries such as Argentina, Chile and Guatemala used transitional justice models that focused on the punishment of perpetrators or forgiveness of past wrongs. South Africa and Chile, by contrast, used models that focused on truth-telling, reconciliation, national-building and reparations for victims of gross human rights violations. The jurisprudence of these countries remains relevant for the future application of transitional justice models and principles of international criminal law.

[9] Ndimurwimo LA *Post-conflict reconciliation and transitional justice: A case study of human rights violations in Burundi* (2020) 15.

[10] Egbai UO & Chimakonam JO "Protecting the rights of victims in transitional justice: An interrogation of amnesty" (2019) 19 *African Human Rights Law Journal* 608 at 610.

gross violations of human rights from prosecution. Granting "provisional" or "temporary immunity" in respect of "politically motivated crimes" committed during the armed conflicts and excluding the crime of genocide, war crimes, and crimes against humanity did not advance the cause of those calling for the investigation, prosecution and punishment of the perpetrators of gross human rights violations.[11] As a result, the transitional justice model adopted in Burundi has not been effective.

Sarkin has rightly observed that "dealing with past human rights violations has become a common feature of societies that emerge from an atrocious past characterised by the massive violation of human rights".[12] Although most post-conflict societies tend to gloss over past atrocities and treat them as a thing of the past, ignoring the atrocious crimes committed in the past tends to reoccur in different forms as demonstrated in the case of Burundi. Sarkin's contention justifies the need for an effective transitional justice model in Burundi, the purpose of which would be to protect human rights while advancing peace, social, political, and economic integration, and the reconciliation of warring parties from diverse groups. This includes strengthening the rule of law and democracy, fighting against impunity,[13] and holding the perpetrators of gross human rights to account on the basis of the principles of international law, in particular as reflected in the United Nations Charter of 1945 (UN Charter),[14] international humanitarian law,[15] and criminal law. The issues that are considered in this article are power-sharing

[11] In 2003, when the ruling party, *Défense de la Démocratie – Forces pour la Défense de la Démocratie* CNDD-FDD (CNDD-FDD), was still a rebel movement, it entered into an agreement with the government providing that both CNDD-FDD combatants and members of the state security forces would have temporary immunity from prosecution for politically motivated crimes. Outgoing President Buyoya passed the genocide law as a condition of his transfer of power to the then transitional President Ndayizeye on 1 May 2003. The genocide law reinforced the provisions of the APRA, especially article 6 of Protocol 1. The genocide law defined genocide as intentional attacks on civilians who are not taking a direct part in hostilities to constitute a war crime under both international and non-international armed conflicts. It provided further that rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilisation, or any other form of sexual violence constituted a grave breach of the 1949 Geneva Conventions. However, the genocide law has not been applied to prosecute perpetrators of genocide and other crimes committed in Burundi to date.

[12] Sarkin J "Providing reparations in Uganda: Substantive recommendations for implementing reparations in the aftermath of the conflicts that occurred over the last few decades" (2014) 14(2) *African Human Rights Law Journal* 526 at 526.

[13] Article 18 of Protocol II of the APRA.

[14] Articles 1(3), 55 and 56 of the UN Charter.

[15] In international humanitarian law, states are under an obligation not to act in a way that violates human rights but rather to ensure that individuals are protected from violations of their rights and freedoms by state organs as well as private persons or entities. See United Nations Human Rights Committee (HRC), General Comment No. 31 of 26 May 2004, The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, UN doc CCPR/C/21/Rev.1/Add.13 available at https://www.refworld.org/docid/478b26ae2.html (accessed 16 March 2023). According to General Comment No. 31, positive obligations are imposed on state parties to the International Covenant on Civil and Political Rights 1966 to ensure that individuals are protected.

arrangements in terms of the APRA; the 2005 Constitution as amended; the upholding of multiparty democracy; the 2015 third-term mandate crisis; and the integration of refugees and internally displaced persons (IDPs) – all of which are key components of transitional justice mechanisms.

Since the conclusion of the APRA and the other peace and ceasefire agreements that followed it, Burundi has attempted to put behind years of political turmoil and armed conflict and ensure that transitional justice is achieved. The country's power-sharing arrangements, which, as noted, were based on Lijphart's transitional justice model of consociational democracy, were legitimated in the design of the 1992 Constitution, and in turn reinforced in the APRA, the 2001 Interim Constitution, and the Final Constitution of 2005. Lijphart's theory of consociational power-sharing, a theory which is indeed of major relevance to Burundi, focused on a grand coalition, minority over-representation, segmental autonomy, and a veto by minority parties. The model has been criticised, however, for its failure to anticipate its future impacts on Burundi's political landscape, impacts with which the country is still grappling.[16]

It is acknowledged that under Lijphart's model, Burundi has enjoyed a greater degree of political stability than it did prior to the APRA. Yet the effectiveness of the model remains a matter of contention, as it did not eradicate the root causes of conflict in Burundi.[17] Rubli is of the view that transitional justice should not be a value-neutral process but rather a political process in which material historical facts and truths are openly deliberated and contested.[18] However, a general problem is that politicians' understanding of transitional justice mechanisms does not necessarily correspond with universal norms of transitional justice that prioritise peace, human security, equality and justice. Instead, in order to protect their interests, they often try to twist the truth by supporting aspects of transitional justice which they see as favourable for them, as has been the case in Burundi.

Kofi Annan once envisaged justice ideally as a progression in which fairness and accountability are ensured through the protection of human rights and the prevention and punishment of transgressions.[19] In this regard, justice can take various forms, such as retributive, restorative, or distributive justice. Retributive justice, for example,

[16] See Mushoriwa's view that the AU's adoption of the theme of "silencing the guns in Africa" has not reduced warfare on the continent given that certain countries, such as Mozambique, Ethiopia, Burundi, Cameroon, and the Democratic Republic of the Congo, were affected by armed conflict. Mushoriwa L "The African Union's quest for a 'peaceful and secure Africa': An assessment of Aspiration Four of Agenda 2063" (2023) 27 *Law, Democracy & Developmen*t 55 at 65.

[17] Li Y "Embracing democracy: The development of Arend Lijphart's consociational model in Burundi" in G Ali et al. (eds) *Proceedings of the 2022 6th international seminar on education, management and social sciences (ISEMSS)* Beijing: Atlantis Press (2022) at 3406 available at https://doi.org/10.2991/978-2-494069-31-2_399 (accessed 19 March 2023).

[18] Rubli S "Knowing the truth – What for? The contested politics of transitional justice in Burundi" (2011) 27(3) *Journal Für Entwicklungspolitik* 21 at 21–25.

[19] Annan K "The rule of law and transitional justice in conflict and post-conflict societies" (2004) *Report of the Secretary-General* at 1.

involves imposing punishment based on the requirements of the law. In terms of international criminal law, retributive justice is a form of criminal liability where criminal tribunals can be created, as demonstrated by the Nuremberg trials, the International Criminal Tribunals for Yugoslavia and Rwanda, the Extraordinary Chambers of the Courts of Cambodia, the Court for Sierra Leone, and the International Criminal Court (ICC). These tribunals and the ICC successfully indicted high-level political elites and military officials for atrocities they committed that amounted to genocide, war crimes, and crimes against humanity. This serves to bring perpetrators of heinous crimes to account and prevent the recurrence of such actions.[20]

As for restorative justice, it is a process in which all parties agree to deal comprehensively with different dimensions of the crimes committed, including their implications for the future, the aim being to make opposing parties understand that when offences are committed, this affects not only the victims and perpetrators but also the community at large. Consequently, conflicts need to be resolved through collective interaction among all parties.[21] Restorative justice aims to repair the harm or damage done by crimes committed against victims who are members of the community in order to restore meaningful social cohesion. Restorative justice has been utilised in African countries such as South Africa, Kenya, Uganda, Nigeria and Ghana,[22] as well as countries such as New Zealand, Canada, and the United States.[23] Restorative justice takes various forms, including compensation, reparation, and public apology, which are guided by the aim of repairing broken relationships.

Some post-conflict societies opt for prosecuting perpetrators of international crimes by establishing criminal tribunals, special courts, or extraordinary chambers, as in the cases of Yugoslavia, Rwanda, Sierra Leone, and Cambodia.[24] These countries opted for the prosecution of persons responsible for genocide and other serious international crimes, especially those individuals who bore the greatest responsibility on a comprehensive manner. This helps address the problem and aims to protect vulnerable groups, such as children, women, people with disabilities, and elderly persons, who are affected by armed conflicts. The option of establishing truth and reconciliation commissions (TRCs), such as in South Africa and Chile, or extraordinary chambers, as in Cambodia, has also been shown to be relevant because its complements initiatives in

[20] Koko S "Implementing transitional justice in post-transition Central African Republic: What viable options?" (2021) 21 *African Human Rights Law Journal* 954 at 957.

[21] Here, "parties" refers to victims, perpetrators, and members of the community.

[22] Gabagambi JJ "A comparative analysis of restorative justice practices in Africa" available at https://www.nyulawglobal.org/globalex/Restorative_Justice_Africa.html#_ENREF_12 (accessed 16 March 2023).

[23] Kim ME "Transformative justice and restorative justice: Gender-based violence and alternative visions of justice in the United States" *International Review of Victimology* (2021) 27(2) 162 at 169.

[24] Ndimurwimo (2020) at 26.

pursuit of justice and reconciliation.[25] This is so because when TRCs are preferred, they are inclined to take a victim-centred approach and establish a historical record, investigate how crimes were committed, and recommend remedial actions.

Similarly, vetting processes have been shown to be a vital element of transitional justice in that they respect the rights of both victims and the accused and thus assist in restoring public trust in national institutions of governance. Victims also benefit from reparations programmes, which help to ensure that justice focuses not only on perpetrators but also on those who have suffered at their hands.[26] This is where the complexity lies, since focusing on justice for perpetrators and reparations for victims can become contradictory concepts, especially when perpetrators are required to reveal the truth to the victims, who in turn must forgive them.[27] Revealing the truth and granting forgiveness are encouraged in order to advance collective responsibility and national stability. The TRCs in South Africa and Chile, for example, utilised truth-telling and forgiveness as a way of collective responsibility. Many individuals who were killed or disappeared were identified and their next of kin qualified to receive full or part of social benefits and perpetrators of heinous crimes had to make public apologies. In Chile, the National Truth and Reconciliation Commission, *Comisión Nacional de Verdad y Reconciliación,* commonly known as the Rettig Commission, was established in 1991 and empowered to identify the victims who disappeared after being arrested during the repressive regime and those victims whose bodies were not found despite being legally declared dead.

In the case of Burundi, it is important to acknowledge that the APRA, as a founding document, has historical importance as a conceptual framework for trying to shift the country from a culture of armed conflict to one of peace and security. This is in line with Aspiration 4 of the African Union (AU) Agenda 2063, which emphasises peace and security in Africa.[28] As Mushoriwa notes, the scourge of armed conflict and unconstitutional changes of government through military coups has had a detrimental effect on the continent's socio-economic development.[29] The memorandum to the Draft Constitution of 18 March 2005 referred to the APRA and recognised it as Burundi's foundational roadmap to peace and stability. The parties resolved to set aside their

[25] South Africa, Chile, and Cambodia are viewed as success stories of transitional justice models that encourage truth-telling, national reconciliation, and reparations for victims of genocide and gross violations of human rights.

[26] Annan (2004) at 1.

[27] See the reasoning in *AZAPO and Others v Truth and Reconciliation Commission and Others* 1996 (8) BCLR 1015 (CC), where it was stated that granting amnesty to the perpetrators of gross violations of human rights in South Africa encouraged truth-telling and opened the door for broader reparations to the victims and a state of collective responsibility and accountability. In a separate concurring judgment, Didcott J stated at para 62 that "reparation is customarily payable by the states, hence, there is no reason to doubt that the postscript envisages accepting the national responsibility".

[28] AU Agenda 2023 was adopted on 31 January 2015 at the 24th Ordinary Assembly of the Heads of State and Governments of the African Union in Addis Ababa.

[29] Mushoriwa (2023) at 56.

political differences and promote common interests and values, pledging themselves to peace, stability, justice, the rule of law, national reconciliation, unity and development. This included their determination to put an end to the root causes of violence, mass killings, human insecurity, political instability, genocide, and unfair discrimination.[30]

However, the ambiguities in the APRA have to some extent allowed the current ruling party, the *Conseil National pour le Défense de la Démocratie – Forces pour la Défense de la Démocratie* (CNDD-FDD), to disregard the APRA, specifically in the following respects:[31]

- Many Burundians view the APRA as a political agreement that was signed by the political parties with several reservations at the expense of the interests of all Burundian citizens.[32]

- Other peace and ceasefire agreements – such as the Pretoria Protocol of 2003 and the Dar-es-Salaam Comprehensive Ceasefire and Peace Agreement of 2006 – which brought an end to armed conflict were not given the same constitutional status as the APRA.

- In terms of hierarchical legal norms, an agreement may not be superior to the Constitution, which is the supreme law of the country. Therefore, an agreement such as the APRA cannot be regarded as superior to the Constitution.

- Ethnic representation quotas among three ethnic groups of Hutus, Tutsis, and Twas in terms of the Constitution are 60 per cent for Hutus, 40 per cent for Tutsis in the executive, legislature, and judiciary while Twas are co-opted.[33] These constitutional ethnic quotas representation in organs of the state have attracted criticisms and viewed as wrong design because the ethnic composition in Burundi is 85 per cent Hutus, 14 per cent Tutsis and 1 per cent Twas. Similarly, the ethnic quotas in the military of 50 for Hutus and 50 for Tutsis[34] with the exclusion of Twas have proven to be unjust in the Burundian constitutional arrangements.

- The APRA did not clearly address the issue of presidential term limits. Had it done so, Burundi would not have been exposed to political uproar in 2015 that nearly took it back to the pre-APRA era.[35]

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[30] See articles 1–8 of Protocol I of the APRA.

[31] Ndimurwimo LA "Law, development and responsible governance in the post-conflict Burundi" in Strydom H & Botha J (eds) *Essays on governance and accountability issues in public law* (2020) at 117–118.

[32] See Daley P "The Burundi peace negotiations: An African experience of peace-making" (2007) *Review of African Political Economy* 333.

[33] Article 164 of the Constitution of Burundi of 2005.

[34] Article 14 of Protocol III of the APRA, on peace and security for all.

[35] Ndimurwimo (2020) at 117–118. This justifies a call to limit the outrages of the ongoing armed conflicts in Burundi by pointing out the flaws of the constitutional provisions and APRA, which have proven to be incompatible.

The issues above are among the obstacles to an effective transitional justice model for Burundi. To take presidential term limits as an example, in the case of *East African Civil Society Organizations' Forum* (*EACSOF v Attorney General of Burundi,*[36] the Constitutional Court of Burundi (CCB) and East African Court of Justice (EACJ) dealt with the critical issue of interpreting the presidential limits set out under article 7(3) of Protocol II of the APRA and articles 96 and 302 of the Constitution of 2005. The *EACSOF* case is a controversial one that underlined, inter alia, the weaknesses of the transitional justice model that was adopted by way of the APRA and the Constitution. Article 96 of the Constitution provides that "the President of the Republic is elected by universal direct suffrage for a mandate of five years renewable one time", whereas article 302 stipulates that "exceptionally, the first President of the Republic of the post-transition period is elected by the National Assembly and the elected Senate convened in Congress, with a majority of two-thirds of members..." The ambiguities created by these two articles allowed President Nkurunziza to capitalise on them in the 2015 elections because he maintained that his first presidential term, from 2005 to 2010, did not count since he was not elected through universal suffrage in the context of article 96. The legal issues which were raised in the *EACSOF* justify, among others, the flaws of Burundi's transitional justice model.

Likewise, the Batwa ethnic group is a marginalised minority whose rights have been protected neither by the military regimes of the past nor the governments of post-conflict Burundi. Their survival depends on hunting, gathering, and pottery, and they are under-rated in the most scholarly debates on land tenure and restitution. Although the Constitution recognises the Batwa's political rights as envisaged in Lijphart's model of consociational representation in government structures, this legal-theoretical assurance has little impact on the ordinary Batwas' everyday life. Transitional justice initiatives in Burundi, which are based on the APRA and reaffirmed in the Constitution, consider the broader framework of the concepts of truth-telling, national reconciliation, and reconstruction. This means that transitional justice should have been more than just a compromise among political elites and instead entailed engagement with the root causes of conflict and systemic, institutional reform for preventing their reoccurrence. This resonates with the view of Taylor, who contends that lack of reform in the political, social, legal, and institutional spheres hinders transitional justice initiatives and prevents meaningful conversation to flourish in a post-conflict society that has already suffered a cycle of violent conflicts, social exclusion, corruption, and impunity.[37] The absence of reform, in short, means that transitional justice in Burundi remains hollow.

2.2 Comparative analysis: South Africa and Chile

2.2.1 Chile

[36] This case was an appeal to the East African Court of Justice, Appeal No. 4 of 2016, the judgment for which was handed down on 24 May 2018.

[37] Taylor D "Transitional justice and the TRC in Burundi: Avoiding inconsequential chatter?" (2014) 17(2) *Contemporary Justice Review* 196.

Transitional justice is a key concept in human rights and international law. It focuses on addressing past injustices through mechanisms such as truth-telling, TRCs, criminal prosecutions, reparations, and institutional reform. This article refers to the transitional justice models of other jurisdictions and compares them with Burundi's. One of the models that has been mentioned is that of Chile, which is regarded as comprehensive in its approach. Unlike Burundi, Chile made significant strides in dealing with the excesses of its former military regime. The Rettig Commission Report of 1991 played an important role in diagnosing the criminal responsibility and civil liability of state officials for their actions under Pinochet's regime. The report identified 2,298 victims of politically motivated killings, 2,130 victims of human rights violations, 168 victims of political violence, 979 disappeared detainees, and 634 cases for which no satisfactory conclusion was reached.[38] This comprehensive account of past atrocities was a crucial step in the Chilean transitional justice process. It helped to identify the victims and their families and held perpetrators accountable for their wrongdoings. It addressed the injustices of the past through, inter alia, reparations and criminal accountability measures.[39] Financial reparations, including through the provision of pensions, social assistance, and educational support, formed part of the country's measures for addressing the social injustices of the past.

Importantly, the political will of Chile's post-conflict democratic regimes to address the crimes of the previous military regime can be attributed to a desire for true reconciliation. The Commission's findings provided a basis for the reparations programmes introduced by the Ayelwin and Frei administrations. Symbolic reparations, such as public apologies and the memorialisation of victims, were among the country's means of acknowledging the suffering of victims and ensuring that their memories are preserved.[40] Legal and administrative reforms, such as repealing laws that provided immunity to perpetrators or establishing mechanisms for investigating human rights violations, were adopted to ensure accountability and prevent the recurrence of abuses. The Chilean approach to reparations was comprehensive and holistic. The state under new political regimes allowed the more investigation of new cases to be carried out which were not covered by the Commission's findings and the whereabouts of disappeared victims. This provided closure and justice to families who had been searching for their loved ones for years. Unlike Chile, however, Burundi has had no political will to prioritise reparations programmes to address the needs of victims and promote lasting peace and reconciliation.

2.2.2 South Africa

[38] Lira E "The reparations policy for human rights violations in Chile" in De Greiff P (ed) *The handbook of reparations* (2006) at 59.

[39] See United States Institute of Peace "Truth Commission: Chile" available at http://www.usip.org/publications/truth-commission-chile-90 (accessed 19 February 2024).

[40] See United States Institute of Peace.

The policy of apartheid adopted by the National Party in South Africa in 1948 was a dark chapter in the country's history. Like the military regimes of Burundi, the apartheid regime adopted a series of laws to enforce segregation and discrimination. These were used to criminalise forms of conduct deemed subversive to the regime.[41] Non-whites were systematically discriminated against in every aspect of their lives. They were denied access to quality education, employment opportunities, and basic services. The Group Areas Act of 1950 and the Prohibition of Mixed Marriages Act of 1949, for example, enforced residential separation and prohibited inter-racial marriage, perpetuating divisions among South Africans. As in Burundi, the apartheid regime employed systematic inter-racial armed violence, killings, torture, and forced disappearances. The white minority, who held political and economic power, imposed their dominance through land dispossession and forced displacements, and categorised citizens on the basis of race and ethnicity.

With the advent of constitutional democracy, the legal framework acknowledged the gross and systematic violations of human rights committed by the apartheid state.[42] Addressing the injustices of the past and building a more inclusive and equitable society was an indispensable part of South African transitional justice towards negotiated peace, reconciliation, and reconstruction. The TRC, established in 1995, provided a platform for victims of the apartheid regime to share their painful stories and seek justice. Perpetrators were allowed to confess and seek amnesty, which was granted in exchange for full disclosure of their wrongdoings. The TRC played a crucial role in uncovering the truth about gross human rights violations in the apartheid era.[43] It shed light on atrocities and helped to bring closure to victims and their families. Similarly, land restitution programmes were established to address the forced removals and land dispossession of the apartheid era. Efforts were made to empower previously disadvantaged communities and promote social and economic inclusion.

The scars of apartheid still linger today because although the TRC recommended reparations for victims, post-conflict governments have been slow to fulfil these obligations. Yet, unlike Burundi's, South Africa's transitional justice model has shown remarkable resilience in building a more inclusive and democratic society to heal the wounds of the past and lay the foundation for a more just and equitable future.

3 THE CVR AND OTHER INSTITUTIONS

Since the conclusion of the APRA in 2000, the pressing issues of upholding multiparty democracy and integrating refugees and IDPs ought to have been resolved and presidential term limits, clarified. This is due to the fact that the process leading to the

[41] See, for example, the cases of *S v McBride* 1988 (4) SA 10 (A) unreported at 1–21, and *AZAPO and others v Truth and Reconciliation Commission and Others* 1996 (8) BCLR 1015 (CC).

[42] Postamble to the Interim Constitution, 1993; Preamble to the Constitution of the Republic of South Africa, 1996; Promotion of National Unity and Reconciliation Act of 1995.

[43] See Truth and Reconciliation Commission (TRC) of South Africa *Final Report* (1998) available at https://www.nelsonmandela.org/uploads/files/TRC-Report-1998.pdf (accessed 6 February 2023).

establishment of the CVR was rooted in peace agreements concluded between 2000 and 2009. These agreements included the following:

- The APRA was signed on 28 August 2000 between the military-led government of President Pierre Buyoya, the National Assembly, and 17 political parties, excluding the two main Hutu liberation movements, the CNND-FDD and *Parti Pour la Liberation du Peuple Hutu – Forces National de Libération* (PALIPEHUTU-FNL).

- The Pretoria Protocol on Political, Defence, Security and Power-Sharing in Burundi was signed on 16 September 2003 between the transitional government of President Domitien Ndayizeye and the CNND-FDD of Pierre Nkurunziza while it was still a liberation movement. The Pretoria Protocol focused on political, and power-sharing outstanding issues which were not covered by the APRA relating to the armed forces and technical agreement.

- The Dar es-Salaam Comprehensive Ceasefire and Peace Agreement of 2006 was signed on 7 September 2006 between the post-transition government of Pierre Nkurunziza and the PALIPEHUTU-FNL of Agathon Rwasa. The agreement related to principles for working towards peace, security and stability.

- The Magaliesburg Agreement of 2008, a declaration on the peace process between the post-transition government and the PALIPEHUTU-FNL, was signed on 10 June 2008.

- The Bujumbura Agreement of 2009 was a declaration on the implementation of joint decisions pursuant to the Declaration of the Summit of the Heads of State and Government of the Great Lakes Region on the Burundi Peace Process.

Despite all these efforts, the implementation of the transitional justice provisions of the APRA and subsequent agreements has been slow. For example, legislation on the establishment of the national, non-judicial CVR was adopted in 2004 but never implemented. In response to a request by the transitional government of Domitien Ndayizeye for the establishment of an international judicial commission of inquiry for Burundi, the UN sent an assessment mission to investigate further. The mission compiled a report[44] which called for negotiations with the government of Burundi pursuant to UN Security Council Resolution 1606 of 20 June 2005 on the establishment of dual judicial (tribunal) and non-judicial (CVR) mechanisms that would include national and international experts. Negotiations between the UN and the government of Nkurunziza were held in 2006 and 2007 but failed, except for yielding an agreement on the organisation of national consultations on transitional justice, the findings of which were released in 2010.[45]

[44] Letter from the Secretary-General Addressed to the President of the Security Council, UN Document S/2005/158 (11 March 2005).

[45] Vandeginste S "Burundi's Truth and Reconciliation Commission: How to shed light on the past while standing in the dark shadow of politics?" (2012) 6(2) *International Journal of Transitional Justice* 356.

The reason for this failure related to the UN's request that the proposed special tribunal's prosecutor be impartial and act independently of both the government and the CVR. The government insisted that only cases referred by the CVR should be investigated and prosecuted by the tribunal. Furthermore, the ruling party, the CNND-FDD, maintained that the tribunal should be established only on the basis of the CVR's recommendation.[46]

An explanation of the CVR's timing requires an understanding of Burundi's political-transition context, in particular the peace process, the power-sharing modality of the transition, and the involvement of international actors in Burundi's transitional justice process. Dynamics relating to political interests and strategies explained why the delays took place. Although the second post-conflict elections were held in 2010 and Nkurunziza became President, the envisioned CVR was likely to face challenges and risks that remained linked to the interests and strategies of political elites. In his address to the nation on 1 January, President Nkurunziza announced that 2012 would be marked by the creation of the CVR. This announcement came shortly after a technical committee in charge of preparing the establishment of transitional justice mechanisms submitted its report[47] with recommendations on the mandate, composition, powers, and functioning of the CVR. Eventually, the CVR was established in 2014.

The delays in establishing the CVR had negative effects on the transitional justice initiatives. It took 15 years for the post-conflict government to establish the CVR, which began its work only in 2020 and presented its findings in 2021.[48] These delays have stood in the way of securing truth and accountability by ensuring that those responsible for crimes committed during the country's turbulent history are prosecuted. Owing to this, the CVR has faced numerous challenges.

Apart from the delays in its establishment, its mandate was limited because it was empowered to investigate crimes committed from 1962 to 2000.[49] This hindered the investigation of crimes committed before independence and reinforced a culture of impunity for crimes committed by executive and military officials from 2000 to date. In 2018, the CVR's mandate was extended to investigate crimes committed during colonial rule; however, the investigations never took place. This is contrary to article 2 of Protocol I of the APRA, which recognises that colonial regimes under Germany and

[46] CNDD-FDD, *"Mémorandum du Parti CNDD-FDD sur la Commission Vérité et Réconciliation et le Tribunal Spécial pour le Burundi"* (5 May 2007).

[47] See Comité Technique *Chargé de la Préparation de la Mise en Place de la Commission Vérité et Réconciliation, Rapport final* (October 2011).

[48] Tasamba J "Burundian survivors welcome report on 1972 massacres: Truth and Reconciliation Commission concludes that 1972–1973 killings constitute genocide" available at https://www.aa.com.tr/en/africa/burundian-survivors-welcome-report-on-1972-massacres/2455218 (accessed 14 June 2023).

[49] See article 2(2) and (3) of the APRA. These subclauses state that colonial regimes used to divide and rule by fostering prejudice and using identity cards that indicated ethnic origin, thereby reinforcing ethnic awareness to the detriment of national awareness. This enabled the colonisers to treat each ethnic group differently to the others.

Belgium played a pivotal role in heightening the ethnic divisions that led to political tensions.

The CVR identified at least 692 mass graves and exhumed 190 in which the remains of 19,897 victims were found, but other mass graves were concealed so as to hide evidence. Moreover, it is not easy to obtain all the evidence required because most potential witnesses are either no longer alive or do not wish to participate, while others yet are still in exile; in addition, it is likely that certain evidence has been tampered with. The CVR also laboured under financial and other resource constraints that prevented it from conducting investigations on the scale seen in Chile, for example. What is commendable, though, is the fact that the CVR report concluded that there were serious, massive and systematic violations of human rights in the mass killings of 1972.

Likewise, the Land Commission, or *Commission Nationale des Terres et Autres Biens* (CNTB), created in 2006, and the Special Court on Land and Other Assets, or *Cour Spéciale des Terres et autres Biens* (CSTB), created in 2019, have not (as explained below) completed their task of reparation and land restitution. The integration of refugees and IDPs remains problematic to date because it is often associated with land disputes. The land dispossession that took place when refugees went into exile and IDPs were permanently displaced has led to a significant number of land disputes, which the CNTB and CSTB are unable to resolve entirely.[50]

4 ACCOUNTABILITY AS A KEY COMPONENT OF TRANSITIONAL JUSTICE

Accountability is a pillar and inherent requirement of rule of law and democracy; the rule of law is in turn a core principle of and precondition for respect for other fundamental values of democracy and human rights. The rule of law and human rights are thus interlinked, and in any strong democratic society it is vital to protect the rights of citizens from arbitrary and excessive executive powers that interfere with freedoms and liberties. As such, the rule of law promotes democracy and seeks to ensure the accountability of those exercising executive power. It is imperative that accountability consider the individuals' right to have effective remedies and prosecutorial agencies must have the necessary skills to conduct proper investigations and keep auditable records that can be subject to scrutiny and pave way for reparation for the victims of gross violations of human rights.[51]

4.1 Executive interference and one-party dominance

[50] Tchatchoua-Djomo T & Van Dijk H "Ambiguous outcomes of returnees' land dispute resolution and restitution in war-torn Burundi" (2022) 11(2) *Land* 8 available at https://doi.org/10.3390/land11020191 (accessed 14 March 2023).

[51] See the Chilean Rettig Commission Report, which President Aylwin fully endorsed. He presented the report to the nation and apologised to victims and their families on behalf of the state and executive leaders of the previous armed forces, who criticised its findings.

Burundi is no longer under military rule; however, the legacy of its previous regimes has affected the implementation of Lijphart's model of transitional justice. For example, the excessive powers are vested in the President, these executive powers not only affect the executive organ of the state but also the legislative and judicial organs and often viewed as a hindrance to transitional justice.

Also, one-party domination is slowly creeping into Burundi's political landscape. For example, in the 2010 legislative elections, the CNDD-FDD won 81 out of 106 seats, making it possible for it to pass any law without the consent of other political parties. The party also won in both the 2015 and 2020 elections. These electoral victories in essence violated the spirit of the grand coalition and the proportionality components of the transitional justice model, thereby preventing peace and democracy from flourishing. When there is one-party state domination, it is inevitable that the interests of other political parties will be ignored. Likewise, excessive executive powers and one-party domination have resulted in pervasive corruption, marginalisation, intimidation and harassment of civilians, armed violence, arbitrary arrest and detention, limitations of the right of freedom of expression, and concerns about insufficient progress in the fight against impunity.[52]

Two schools of thought seem predominant in the debate around transitional justice in Burundi.[53] The first believes that there can be no peace and reconciliation without the criminal justice component that ensures accountability.[54] It is believed that impunity for crimes committed in the past has contributed to malpractice in the country's governance. In so doing, impunity has intensified the country's ongoing armed violence and recurring political disorder.[55] Another school holds the view that the peculiar situation of post-transition Burundi is built on the previous regimes' weaknesses that call for inter-community reconciliation and compel the current CNDD-FDD government to explore transitional justice mechanisms that are less likely to compromise the country's fragile peace. For that reason, transitional justice cannot be complete if it lacks retributive[56] and restorative components.

Restorative and retributive justice are contrasting concepts. Whilst restorative justice focuses on repairing the harm caused by criminal behaviour and promoting healing and reconciliation, retributive justice emphasises the punishment of offenders as a means of deterrence and of upholding justice. Supporters of restorative justice believe that

[52] United Nations Security Council *Report of the Security Council mission to the Central African Republic, Ethiopia and Burundi, including the African Union* (2015) at para 42 available at https://digitallibrary.un.org/record/798403?ln=en (accessed 16 March 2023).

[53] Rubli S "(Re)making the social world: The politics of transitional justice in Burundi" (2013) *Africa Spectrum* 48(1) 3 available at https://doi.org/10.1177/000203971304800101 (accessed 19 March 2023).

[54] IRIN (2014) "Burundi's troubled peace and reconciliation process" (17 July 2014) available at https://www.refworld.org/docid/53ce30a017.html (accessed 6 February 2023).

[55] One of them was a tendency for one-party domination in the legislature.

[56] "Retributive justice" refers to an approach to justice that ensures accountability through criminal punishment, rather than rehabilitation, for crimes and wrongdoing.

punishment alone is not enough to address the complex issues surrounding crimes and that restorative justice is a humane and effective alternative.[57] However, both groups share a belief in restorative justice and recognise the value of retributive justice.

Transitional justice mechanisms in Burundi ought to ensure that the culture of impunity is eradicated and that perpetrators of violations of human rights are brought to justice and held accountable for their actions in accordance with the rule of law and standards of human rights. Establishing a comprehensive transitional justice model that investigates the wrongs of the past in Burundi remains imperative. As Sarkin has observed, making perpetrators of heinous crimes accountable for their criminal actions enhances respect for democracy, human rights, and the rule of law.[58] Accountability in needs to be understood broadly and in a practical sense, such that, for example, it includes reparations, restitution, or compensation for harm suffered, as well as rehabilitative measures.[59]

The Burundian case is an important one as it illustrates the effects of flaws of a transitional justice model that fails to prioritise accountability for crimes committed and reparations of victims of gross violation of human rights and restoration of their dignity. Gross violations of human rights – such as mass killings akin to genocide, sexual violence, abductions, assassinations, and forced disappearances – that occurred in past armed conflicts and post-electoral violence in 1965, 1972–1973, 1988, 1993–2005, and 2015 have caused enormous long-term displacement of Burundian citizens.[60] These issues have not been addressed properly by post-conflict regimes since 2005, with transitional justice mechanisms unable to guarantee the prevention of their reoccurrence, as demonstrated by the political unrest of 2015. For that reason, ongoing armed conflict and repression remain among the challenges Burundi that grapples with.

As rightly contended by Egbai and Chimakonam, the main challenge in the country's transitional justice arrangements is that the rule of law can easily be ignored when certain types of amnesty are included so as to shield perpetrators from prosecution.[61]

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[57] Louw D and van Wyk L "The perspectives of South African legal professionals on restorative justice: An explorative qualitative study" 2016 52(4) *Social Work/Maatskaplike Werk* 399; Skelton A and Batley M "Restorative justice: A contemporary South African review" 2008 21(3) *Acta Criminologica* 49; Conway O "Beyond binary thinking: Addressing the biases that threaten the progressive prosecution movement" 21 *Ohio State Journal of Criminal Law* 2.

[58] Sarkin (2014) at 528.

[59] Atuahene B & Sibanda S "From reparations to dignity restoration: The story of the Popela community" (2018) 8 *African Human Rights Law Journal* 657.

[60] United Nations Economic Commission for Africa (UNECA) "Country profile: Burundi 2016" (2016) available at https://repository.uneca.org/handle/10855/23672 (accessed 16 March 2023); International Crisis Group (ICG) *Refugees and displaced in Burundi (I): Defusing the land time-bomb* (2003) available at https://www.crisisgroup.org/africa/central-africa/burundi/refugees-and-displaced-persons-burundi-defusing-land-time-bomb (accessed 10 March 2023).

[61] Egbai UO & Chimakonam JO "Protecting the rights of victims in transitional justice: An interrogation of amnesty" (2019) 19 *African Human Rights Law Journal* 609.

This contention appears to be true: broad-based amnesties, such as blanket and self-granted amnesties, impair the rule of law and impede the course of justice; as a result, political dominance, unresolved historical injustices, social and economic exclusion, inequality in job opportunities, and unequal distribution of resources continue to hinder the advancement of transitional justice in post-conflict Burundi.

Transformative justice mechanisms that recognise social, economic, political, and institutional structures reforms to bridge the gaps between the past and present, while aiming for long-term structural, institutional, socio-economic, and political advancement remains ideal. The transitional justice model in Burundi is a complex and multifaceted issue that has deep roots in the ongoing armed violence, lack of accountability, and effects of colonialism. The transition from conflict to peace after many years of political unrest is a problem that requires a compromise between warring parties in addressing past atrocities, ensuring accountability, fostering reconciliation among divided communities, rebuilding trust in institutions, and laying the foundation for a just and equitable society. However, this transition is hindered by the lingering legacy of colonialism and by post-conflict regimes that perpetuate violence and consolidate power rather than promote true reconciliation and institutional reform.

Accountability for past wrongs, and reparations and restitution to victims must be prioritised. Corporate accountability for complicity in past crimes is a rapidly growing area of interest in transitional justice. Therefore, addressing such violations and their role in fuelling armed conflict and repression is now recognised as a key component of post-conflict societies' efforts to come to terms with the past, and importantly, create the conditions for the non-recurrence of violence and human rights violations.[62] That is why the findings of the CVR's report of 2021 should not be ignored: it has shed light on the beginning of accountability in Burundi through fair, legitimate, and effective prosecutions. Vandeginste is of the view that Burundi is an interesting case that has attracted both national and international attention.[63] Formal retributive justice, for example, was strongly favoured by a majority of political elites and other role-players who participated in the peace and reconciliation negotiations. However, in actuality, there has been a complete failure to establish effective transitional justice mechanisms in Burundi to deal with accountability for past violations of human rights, with restitution to victims, and with meaningful national healing and reconciliation.

4.2 Land restitution

The genesis of land dispossession lay in the colonial era but it intensified in the 1970s when it was legalised under the Micombero regime as a punishment for individuals who were deemed to have participated in the Hutu insurgency.[64] From 1972–1974, land and

[62] Van der Merwe H & Lykes MB "Transitional justice and corporate accountability: Introducing new players and new theoretical challenges" (2022) 16(3) *International Journal of Transitional Justice* 291.

[63] Vandeginste S "Transitional justice for Burundi: A long and winding road" in Ambos K, Large J & Wierda M (eds) *Building a future on peace and justice* (2009) 393.

[64] Tchatchoua-Djomo & Van Dijk (2022) at 4. See also Mbazumutima T "Land restitution in post-conflict Burundi" (2021) 15(1) *International Journal of Transitional Justice* 66.

other assets, such as the bank accounts of the deceased, detainees and refugees, were illegally grabbed and redistributed to army officers of the then ruling party UPRONA (*Union pour le Progrès National),* their supporters, and government authorities at the local, provincial and national levels.[65] A law incorporating customary land within the state land domain was promulgated in 1976, institutionalising statutory authority over land customary tenure. In the following year, the National Commission for the Rehabilitation of Returnees (*Commission Nationale pour la Réhabilitation des Rapatriés),* known as the Mandi Commission,[66] was established to address refugees' land claims. However, it was criticised because it legally converted refugees' vacated customarily owned land into state land and thus reinforced refugees' land dispossession.

In 1991, the president of a military regimes, Pierre Buyoya (1987–1993 and 1996–2003), created the National Commission in charge of the Return, Reception and Reinsertion of Burundian Refugees (*Commission Nationale chargée du Retour, de l'Accueil et de l'Insertion des Réfugiés Burundais*),[67] which was responsible for resolving returnees' land disputes and resettling them on state land whenever possible. However, this commission also failed to return the land of the majority of returnees, land which had been taken, formalised and legalised into so-called state developmental projects while leaving little or no room to accommodate returnees, who were mostly Hutus. Moreover, the law removed the powers of customary leaders in dispute resolution and entrusted judicial authorities with the task of dealing with customary land disputes. For that reason, secondary and illegal landowners were given greater power, recognition, and approval at the expense of original returnee land ownership and claims. This is a problem that persists today, especially in the southern parts of Burundi, where the mass killings of 1972 largely took place.

During the APRA negotiations, the returnees' land question was among the pressing issues that led to the creation of another commission, the National Commission for Rehabilitating War Victims, known as *Commission Nationale pour la Réhabilitation des Sinistrés* (CNRS). A new law was enacted[68] which mandated the CNRS to resolve land disputes through mediation, with a formal written agreement between the original landowners (returnees and illegal owners). Yet the CNRS could not resolve the land disputes and was criticised as a political compromise that did not fully protect the rights of returnees.

The remnants of the Hutus were purposefully excluded from the civil service, military forces, and universities. Along with mass killings, especially by the Hutu ethnic group in

[65] Tchatchoua-Djomo & Van Dijk (2022) at 4.

[66] Article 2 of Decree-Law No. 1/21 of 30 June 1977. The law aimed to reintegrate Burundian refugees and protect their rights following the mass killings of 1972 and 1973. It created the Mandi Commission, named after its chairperson, Stanislas Mandi, a Tutsi army officer on UPRONA's military council.

[67] Article 1(b) and (c) of Decree-Law No. 1/01 of 22 January 1991,

[68] The 1986 Land Code.

the 1970s and 1980s, land dispossession revived ethnic and political tension.[69] Furthermore, rigorous agrarian law reforms promoted refugees' land dispossession and state control not only of resources but also citizens. In the period from 1973 to the 1980s, land redistribution or dispossession was effected through laws that allowed the establishment of state-owned palm oil projects, as well as other projects such as the Imbo Development Regional Company in 1973, the Nyanza-Lac Development Project in 1977, the Rumonge Integrated Rural Development Project in 1978, and the Rumonge Regional Development Corporation in 1980, entities still in existence today,[70] at the expense of privately owned land, especially land owned by refugees who were in exile. Additionally, a Land Code was passed in 1986, while other changes in legislation contributed to the intensification of state land dispossession. In a corresponding process, the land and properties of refugees who fled Burundi, especially in 1972, were taken by remaining community members, relatives, local authorities, and early returnees, who used them as coping mechanisms to respond to their socio-economic challenges.[71]

In 2005, the post-conflict government under President Nkurunziza introduced major land reforms. Being a Hutu himself, a 1972 refugee and leader of the ruling CNDD-FDD, one of the first reforms of his government was to suspend the activities of the CNRS and overrule its decisions relating to returnees' land disputes. In 2006, the CNRS was replaced by the CNTB,[72] but the 1986 Land Code has never been repealed.

It is against this background that the CNTB was established and empowered to have jurisdiction over land disputes concerning IDPs and refugees as well as state disputes relating to land wrongly allocated by the previous military regimes.[73] Redressing land dispossession in the aftermath of armed conflicts is a complex process because returnees (refugees and IDPs) are expected to get back their land back upon their return to their original places of habitual residence. However, they face land and other property disputes which were illegally dispossessed by illegal owners during military regimes as stated above. Also, officials of the CNTB and CSTB are appointed by the President, which can be viewed as executive interference. Although land restitution has been among the CNTB's mandates, the CNTB has been criticised for its poor coordination with existing land tenure systems and for not providing the means to formalise recovered property rights, such as by providing title deeds to successful land claimants.

[69] Kamungi PM, Oketch JS & Huggins C "Land access and the return and resettlement of IDPs and refugees in Burundi" in Huggins C & Clover J (eds) (2005) *Land rights, conflict and peace in sub-Saharan Africa* 215.

[70] Tchatchoua-Djomo & Van Dijk (2022) at 4–6.

[71] Mbazumutima (2021) at 68.

[72] CNTB Law No. 1/18 of 4 May 2006.

[73] Bangerezako H "Politics of indigeneity: Land restitution in Burundi" (2015) *Makerere Institute of Social Research* 2.

The APRA provided for alternative restorative means such as the restitution of equivalent land and monetary compensation when the restitution of the claimed property was not possible, for instance in the case of land which had been dispossessed and encroached upon for public use. However, the lack of sufficient funds made it practically impossible for the government to offer monetary compensation.[74] The law was amended in 2009, 2011, 2014, 2016, and 2019 with a view to restraining political and institutional encroachment and empowering the CNTB with extended jurisdiction over land governance. In addition, a new law endorsing the creation of the Special Court on Land and other Assets, or *Cour Spéciale des Terres et autres Biens* (CSTB), was adopted in 2014 and later revised in 2019.

Yet the CNTB and CSTB face a number of challenges, one of which is the President's power over these institutions. Other challenges are the exclusion of judicial officials from the CNTB's provincial boards, the annulment of land-sharing arrangements in favour of full restitution, and the endorsement of the CSTB as the supreme court responsible for dealing with appeals against CNTB decisions. Moreover, the revision of the definition of "war victims" and "other assets" has increased the jurisdiction of the CNTB over more social groups, creating new forms of restitution claims, such as those involving orphans, widows and widowers, bank-account holders, corporate shares, and inheritance rights. March 2021 was set as the deadline by which applicants had to file their land disputes with the CNTB and CSTB, after which all applications were to be taken to the ordinary courts. Lastly, land dispute appeals were reduced from two months to one month. Together, these challenges have been impediments to dealing with restitution-related disputes.

Tchatchoua-Djomo and van Dijk note that, considering the significance of land and property to people's livelihoods and poverty reduction, it is clear to grasp why land and property are a focal point for competition, disputes, and tensions.[75] For example, land in Burundi is largely owned under African customary tenure systems, and thus restitution should be effected in line with African customary law. However, there have been drastic changes in land laws and policies that were reinforced through political transitions from authoritarian military regimes to quasi-democratic rule of 1966 to 2003. As a result, the African customary land tenure has been replaced with a new Westernised land system which have increased the land disputes. The improved political and human security conditions in the post-APRA era paved the way for a significant number of refugees to return to Burundi. In 2012, about 800,000 returned and instituted land claim applications,[76] which ignited further conflicts that affected citizens and land governance. Land-related conflicts and restitution have become critical issues in the

[74] Tchatchoua-Djomo & Van Dijk (2022) at 4–6.

[75] Tchatchoua-Djomo & Van Dijk (2022) at 8–10.

[76] International Crisis Group *Fields of bitterness (II): Restitution and reconciliation in Burundi* (2014) available at https://reliefweb.int/report/burundi/fields-bitterness-ii-restitution-and-reconciliation-burundi (accessed 14 March 2023).

current Burundian political landscape.[77] Following the 2015 post-electoral violence, more than 300,000 people fled, yet only some 55,000 have returned.[78] This new wave of returnees has led to increased land disputes; the latter remain a threat to sustainable peace and the effective reintegration of returnees, and in turn they are seen as impediments to national stability and economic development.[79]

The numerous land restitution institutions that were established by successive post-conflict governments have failed to address the returnees' land issue in a comprehensive manner, especially in the southern parts of Burundi, where a majority of Burundians fled the country amidst the mass killings of 1965, 1972–1973, 1988, and 1993–2005.[80] Even though there have been land reforms that seek to enforce the rights of returnees over their dispossessed land and property, these have borne little fruit. For example, the CNTB and CSTB were empowered to resolve land disputes among the returnees, but often failed to reconcile the parties due to the complexities of land ownership under the Micombero, Bagaza and Buyoya military regimes. Also, the Batwa ethnic group mentioned above does not feature in land restitution programmes. Batwa land rights are weaker and less secure than those of their Tutsi and Hutu counterparts. The Batwas have long been subjected to institutionalised land dispossession and socio-political exclusion, which has left them landless and in poverty. The land restitution for the land which dispossessed during colonialism and military regimes and reinforced through discriminatory laws is another aspect that was largely ignored in the transitional justice arrangements of Burundi.

4.3 Integration refugees, returnees and IDPs

In the late 1990s, as part of a military strategy against Hutu rebel groups, the second government of Buyoya twice ordered the relocation of hundreds of thousands of civilians into what were known as "*regroupment* camps".[81] The number of IDPs in 1999 rose to more than 800,000, or almost 12 per cent of the population.[82] Many of these IDPs never returned to their original places of residence. The reintegration of exiles and IDPs in Burundi should have been guided by the AU Convention on the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention) of 2009, a regional instrument that binds governments to provide for the legal protection and well-being of persons forced to flee inside their home countries due to conflict, violence,

[77] International Crisis Group (2014).

[78] United Nations High Commissioner for Refugees *Burundi regional refugee response Plan: January 2019 – December 2020* (2020) at 8 available at https://reporting.unhcr.org/sites/default/files/Burundi%202020%20RRRP%20-%20February%202020_0.pdf (accessed 15 March 2023).

[79] Tchatchoua-Djomo & Van Dijk (2022) at 8–10.

[80] See Bangerezako (2015) at 2–13; Ndimurwimo (2020) at 247–253.

[81] Kamungi, Oketch and Huggins (2005) at 213; Ndimurwimo (2020) at 256.

[82] Ndimurwimo (2020) at 256.

natural disasters, or developmental projects.[83] While Burundi is a party to the Kampala Convention, it has failed to comply with its binding obligations.

The Constitutional Court of South Africa, in *Mkontwana v Nelson Mandela Metropolitan Municipality and Others*,[84] stated that the social injustices of the past must be addressed and reversed. O'Regan J observed:

[T]he law which allowed arbitrary deprivation of property must be interpreted in a manner that seeks to establish a balance between the need to protect private property and to ensure that the property serves the public interest in the inequities of land distribution resulting from colonial and Apartheid dispossession.[85]

In the light of the requirements of international law and the persuasive reasoning of the Constitutional Court of South Africa in the *Mkontwana* case, there is an obligation on Burundi's post-conflict government to protect property rights and provide compensation or reparation and restitution to the victims of land dispossession. Addressing land ownership disparities and issues of restitution in a manner consistent with the Constitution is among the solutions to Burundi's transitional justice flaws. Arguably, finding durable solutions for returnees' challenges should be a primary objective of not only the Government of Burundi but, in view of the international transitional justice agenda, the international community at large.[86] IDPs and refugees who return to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist should be assured of their safety and the restoration of their dignity.[87] Returnees should be able to choose either to return to their homes and reintegrate locally or to resettle elsewhere, in each case with their participating fully in integration processes.[88]

5 THE ROLE OF INTERNATIONAL ACTORS

Following the conclusion of the APRA and the adoption of the Constitution, it is through the constitutional framework that the issues attributable to Burundi's current transitional justice deficits ought to be addressed. However, delays in the establishment of the CVR as well as the Special International Tribunal, both of which should have been

[83] See articles 2–7 of the Kampala Convention.

[84] *Mkontwana v Nelson Mandela Metropolitan Municipality and Others* 2005 (1) SA 530 (CC).

[85] *Mkontwana* (2005) at para 81.

[86] Subotić J "The transformation of international transitional justice advocacy" (2012) 6(1) *International Journal of Transitional Justice* 106. International transitional justice has expanded its objectives. Initially, it focused on mechanisms that required post-conflict societies to address past human rights violations; currently, it deals with broader issues that go beyond mere adherence to peace agreements and relate to long-term goals such as respecting democracy and the rule of law and protecting and promoting human rights.

[87] Adeola R, Viljoen F & Muhindo TM "A commentary on the African Commission's General Comment on the Right to Freedom of Movement and Residence under Article 12(1) of the African Charter on Human and Peoples' Rights" (2021) 65(1) *Journal of African Law* at 146.

[88] Adeola et al. (2021) at 146.

established in 2005 immediately after the attainment of constitutional democracy pursuant to UN Security Council Resolution 1606 of 2005, have hampered accountability, reparations, and land restitution. In addition, international actors have failed to comprehensively support Burundi's transitional justice initiatives. This is contrary to the view of Kofi Annan, who holds that the focus must be on how international institutions such as the UN support national transitional justice mechanisms through measures such as capacity-building and national institutional reform; such measures should include the facilitation of consultation on justice reform and transitional justice models, with a view to filling the gaps that are evident in the consolidation of rule of law in post-conflict societies like Burundi.[89]

As mentioned, the APRA envisaged that an International Judicial Commission of Inquiry (IJCI) would be created to investigate and establish the facts relating to the commission of crimes of genocide, war crimes, and crimes against humanity. On the basis of its findings, an international criminal tribunal would be created to prosecute and punish those responsible for committing these international crimes.[90] The CVR and IJCI were planned to be established in the transitional period immediately after the signing of the APRA.[91] However, neither the CVR nor IJCI was established in the transitional period (2001–2005) as per the APRA provisions. Instead, the government requested that the UN send an international assessment mission to evaluate the feasibility of the IJCI, with the findings of the mission having been documented in what is known as the Kalomoh Report of 2005.[92]

Ironically, the Kalomoh Report proposed a review of the APRA in regard to the composition of the CVR, IJCI, and, potentially, an International Criminal Tribunal. It also proposed a dual transitional justice model consisting of the CVR and a Special Chamber under Burundi's national court system. For that reason, further negotiations between the UN and the post-conflict government of Burundi took place in 2006 and 2007 on the implementation of the Kalomoh Report's recommendations, with the establishment of the Special Chamber being favoured.[93] Clearly, these were tactics to delay the APRA's implementation. This became apparent when focal issues of amnesty for war crimes, crimes against humanity, and genocide which ought to be investigated were ignored. Likewise, the independence of the proposed Special Tribunal and the effectiveness of the CVR and the Special Tribunal are questionable because they have not advanced effectively the APRA agenda of accountability, reparations and land restitution. The post-conflict government in Burundi ought to convince international partners, such as the East African Community, African Union, UN, European Union and international financial institutions, to adopt a transitional justice model in Burundi that takes into

[89] Annan (2004) at 1.

[90] Article 6 of Protocol I of the APRA.

[91] Article 18 of Protocol II of the APRA.

[92] Rubli (2011) at 26.

[93] Rubli (2011) at 26.

account the country's transitional justice dilemmas. Such partnerships remain essential for dealing with the unfinished business of transitional justice in Burundi.

Generally, TRCs include economic violations in their mandates, and corporate actors have been the focus of a number of high-profile cases. Civil claims and criminal prosecution under national law appear to offer limited redress. Nonetheless, there has been a normative paradigm shift in transitional justice towards combining both national and international transitional justice models. Civil society's contribution in demanding that corporate actors be held to account and contribute to reparations remains imperative. In some cases, the amounts that corporate actors can compensate in terms of financial contribution to support the post-conflict governments' initiatives of reparations is a demonstration that it is not just their potential financial contribution to transitional justice, but also their acknowledgment of collective liability and accountability for past wrongdoings. In instances where forced deprivations have been exacted for the public benefit, such as for building schools or health facilities, the state should be required to pay fair or just compensation; however, post-conflict governments in Burundi have been unable to compensate victims in full due to a lack of funds and other resources. To this end, international actors could assist with financial and technical support.

6 CONCLUSION

This article critically analysed the establishment of transitional justice in Burundi and examined the negotiations that led to the APRA. As noted, the aim of establishing transitional justice mechanisms in post-conflict societies is to recognise wrongs committed in the past against victims, build citizens' trust in state institutions, and promote respect for human rights and the rule of law. These are often viewed as stepping stones towards achieving meaningful reconciliation and preventing the recurrence of human rights violations. Unlike transitional justice initiatives in other countries such as South Africa, Chile and Cambodia – which were referred to in this article as examples of transitional justice models in terms of truth-telling, reconciliation, reparation, and national reconstruction – there have been unnecessary delays in the establishment of effective transitional justice mechanisms in Burundi.

In this regard, Burundi should have followed examples from other jurisdictions such as Rwanda, Sierra Leone, the Democratic Republic of Congo, Djibouti, Gambia, East Timor, Chile, Argentina, Guyana, and Guatemala in terms of criminal responsibility for serious international crimes committed by past regimes. These jurisdictions have demonstrated that past wrongs do not always go unpunished and have shown that transitional justice is a crucial tool in building a more just and peaceful society.

It is an indisputable fact that there are unresolved issues relating to accountability for the crimes committed during Burundi's dark history. For example, reparations, and land restitutions remain issues that need legal clarification. In addition, the CVR has revealed that the mass killings of 1972 amount to the crime of genocide, but there is no clarity on whether these events are recognised and confirmed under national and international

laws as genocide. The CVR report has not been made available for public scrutiny at either the national or international level, as was the case in South Africa, and its mandate is limited to a certain period. It is important to point out that at the outset the APRA stated under article 8(1) that the CVR was not a competent organ to investigate the crimes of genocide, crimes against humanity, and war crimes. However, it provided that upon completion of its investigations, the CVR was supposed to establish competent institutions, or adopt measures, which are likely to promote reconciliation and forgiveness, order compensation or restoration of the disputed property, or propose any political, social, or other measures, however the proposed institutions and measures remain in pipedream. In the same vein, the transitional national assembly was urged to pass laws that would provide a framework for granting amnesty for political crimes committed as deemed appropriate. Likewise, the CNTB and CSTB's mandates are limited and have not resolved disputes, especially those involving returnees.

It is argued that an effective transitional justice model should be in place to allow victims and their next of kin to obtain remedies. There is a need for political will at the national and international level to repair the damage that occurred in Burundi. Reparations, for example, must be interpreted broadly to include restoration that considers the dignity of the victims. It is the duty of the post-conflict government of Burundi to ensure adequate and effective investigation of violations of human rights and keep an auditable record of such investigations in line with international standards of transitional justice. Effective transitional justice therefore must include the promotion of fair, effective, impartial, and efficient prosecution that promotes the high standards and principles required in the administration of justice.

This is because the ultimate goal of the transitional justice model is to end the culture of impunity and bring the perpetrators of gross human rights violations to book, holding them accountable for their actions in accordance with the rule of law and universal standards. This can restore public order and safeguard confidence in the in post-conflict Burundi's administration of justice. Furthermore, as Van der Merwe and Lykes have observed, corporate accountability for participation in gross violations of human rights is a rapidly growing area of interest in transitional justice.[94]

Accountability in Burundi must be seen as one way of solving the current flaws of transitional justice that hinder attainment of Aspiration 4 of the AU Agenda 2063. The theme of "The Africa We Want" inspired the AU in 2015 to adopt the goals and priority areas of Agenda 2063. The goals under Aspiration 4, for example, are to preserve peace, security, and stability,[95] have a stable and peaceful continent,[96] with practical peace and security designs.[97] It was imperative that the AU include Aspiration 4 in its Agenda 2063 in view of ongoing armed conflicts, including military coups, which have negative effects on the continent's sustainable socio-economic development. Achieving Aspiration 4 of

[94] Van der Merwe & Lykes (2022).

[95] Goal 13.

[96] Goal 14.

[97] Goal 15.

the AU Agenda 2063 requires a multifaceted approach that involves strong monitoring and evaluation mechanisms, effective reporting systems, stakeholder engagement, capacity-building, and partnership or collaboration with various stakeholders.

By implementing these mechanisms, African countries, including Burundi, can ensure that they are on track to create a united Africa with a strong cultural identity, common heritage, and shared values and ethics. The achievement of Aspiration 4 would contribute to a peaceful, prosperous, and inclusive Africa now and for future generations.

The case of Burundi is important in that it illustrates the effects of a transitional justice model that fails to move the country from accountability to the remedial action of reparation and restitution and the restoration of human dignity, the rule of law, good governance, and sustainable development. It is imperative to note that if gross human rights violations are not investigated thoroughly, they can play a major role in escalating conflict and repression. Effective transitional justice is a key component of efforts in post-conflict Burundi to come to terms with the past and create an environment where armed conflicts and human rights abuses do not recur.

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