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**HUMAN RIGHTS IN NEGOTIATING PEACE AGREEMENTS:
BURUNDI**

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GENERAL: CONTEXT AND BACKGROUND

What peace agreements were produced in the country you are considering? Which agreement provided the main framework for how peace would be achieved? In summary what did it provide for (see more detailed questions below)?

1. The Burundi process has been negotiated in stages, and has produced several agreements. The major ones include:
2. The Arusha Peace and Reconciliation Agreement for Burundi, signed on 28 August 2000 in Tanzania, provides the main roadmap to peace. Preceded by several failed power-sharing arrangements between some of the conflicting parties, this agreement was reached through internal consultations, and with the occasional help of the UN Special Representative of the Secretary General, Ahmedou Ould Abdallah. The Arusha agreement was followed by smaller but connected agreements on power sharing during the transition (July 2001), and in the post elections constitution (August 2004).
3. The text of the Arusha Peace Accord is the first attempt in the country's history to provide a real solution to the events that have torn it apart since independence. It consists of five protocols, five annexes and two appendices. In particular it provides for the following: (1) an undertaking by the parties to lead Burundians towards reconciliation by determining the truth about the origin and nature of the conflict, (2) a proposed institutional framework for the transition which will bring about conditions for a democratic renewal by fair power-sharing, (3) the end of hostilities and the establishment of security guarantees for all citizens, principally through a reform of the army, (4) a blueprint for the country's economic and social revival and its stabilization based on the return of refugees who have fled since the beginning of the Seventies and lastly, (5) international guarantees ensuring that the Arusha resolutions are credible and can be implemented.

4. The other main agreement of the Burundi Peace Process is the Pretoria Protocol on Political, Defense and Security Power-Sharing in Burundi, which provided for a cease-fire between the Burundi military and the main rebel group, the Forces for the Defense of Democracy (FDD) and a program to fully integrate the Burundi army and reform the security sector. The final version was signed on November 16, 2003, between the transitional government and the FDD, the party of Jean-Pierre Nkurunziza. This complemented the ceasefire reached earlier in 2002 with two minor rebel groups (the CNDD-FDD faction led by Jean-Bosco Ndayikengurukiye and the PALIPEHUTU-FNL faction led by Alain Mugabarabona). Following the agreement, the African union deployed south African, Ethiopian and Mozambican troops in the spring of 2003, which, a year later, were replaced by a UN peace keeping force, ONUB, authorized on June 1, 2004.

What was the background to this agreement being produced?

5. On 21 October 1993, army officers assassinated Melchior Ndadaye, the first Hutu president in the history of Burundi to be elected by universal suffrage, along with parts of his government. The president's assassination gave rise to a terrible outbreak of violence in the country, beginning with large scale Hutu massacres of the minority Tutsi and followed soon after by the Tutsi-dominated army's bloody retaliation against the Hutu population. In January 1994, a power-sharing arrangement was negotiated between the two main parties, UPRONA (the Tutsi-dominated party in power since independence) and FRODEBU (the Hutu-dominated party winner of the 1993 elections), which led to the election by Parliament of Cyprien Ntaryamira, a Hutu member of the FRODEBU party. Cyprien Ntaryamira was killed in the plane crash with the Rwandan president Juvénal Habyarimana on 6 April 1994.
6. New internal negotiations produced the Convention of Government, signed by twelve political parties in September 1994. This agreement gave the presidency to the FRODEBU party, and Prime Ministership to UPRONA party. The veto system resulting from this arrangement led to a complete paralysis of presidential and parliamentary power and loss of control of the army by the government. Critical of the power sharing arrangement and frustrated by the impotence of the civilian government in the face of the Tutsi parties and the army, Leonard Nyangoma, a Hutu leader, decided to create the CNDD (Council for the Defense of Democracy), which soon became the main armed Hutu group. FROLINA (National Liberation Front) and PALIPEHUTU (Hutu People's Liberation Front) were smaller rebel groups created in the 1980's in refugee camps in Tanzania.
7. CNDD based itself in Eastern Congo, where they found support in the post genocide Rwandan Hutu refugee camps, and increased its military capacity dramatically between 1994 and 1996. The army responded to the growing threat of guerrilla infiltration in the country by employing terror campaigns against the Hutu civilian population. Moreover, Tutsi youth militias multiplied and launched ethnic cleansing actions in the capital Bujumbura.
8. This climate of violence led regional leaders to gather in Cairo in November 1995 and Tunis in March 1996 under the auspices of Jimmy Carter, and to appoint Julius Nyerere the former President of Tanzania, as the principal Facilitator in the conflict. Nyerere conducted two rounds of consultations in Mwanza, Tanzania, and organized a regional summit in Arusha, at which the government of Burundi requested a regional military intervention to restore peace and security. The regional leaders agreed to send a force that was to include Tanzanian, Ugandan, and Ethiopian forces.

9. This was the situation on 25 July 1996 when Major Pierre Buyoya, who had previously been in power between 1987 and 1993, overthrew the then President Sylvestre Ntibantunganya to become Head of State.
10. The *coup d'Etat* in July 1996 led the other countries in the region, Tanzania, Kenya, Uganda, Rwanda, Zaire and Ethiopia, to impose sanctions on Burundi. They demanded that certain conditions be met in order for the sanctions to be lifted: 1) the end of suspension of the Parliament 2) the restitution of political parties and 3) the start of immediate and unconditional negotiations between all parties in the conflict. The regional position was supported by the OAU and the UN Security Council.
11. After two years of tension over the implementation of regional sanctions and over accusations that the Tanzanian government was training rebels in the refugee camps on its territory, another round of negotiations were launched in Arusha in June 1998. When Buyoya finally agreed to come to the negotiation table, he had formalized an Internal Partnership for Peace with the National Assembly, led by FRODEBU Leonce Ngendakumana, which led to the prolongation of the mandate of the National Assembly but also its expansion from 81 to 121 members. The “partners”, both short on legitimacy, presented a united face in June 1998 in Arusha.
12. The talks, which included 19 parties but excluded the main rebel groups, the FDD and the FNL, lasted for two years. They were started under the auspices of Julius Nyerere and were concluded in August 2000, under the mediation of Nelson Mandela, after Nyerere’s death in October 1999.

What were the main human rights problems prior to the agreement being signed? To what extent were these being addressed locally and internationally prior to the agreement being signed?

13. Burundi has experienced massive human rights abuses of political and ethnic nature. Burundi is said to have the same ethnic mix as Rwanda, a population of 85% Hutu and 15% Tutsi.¹ The country was colonized by the Germans in the late 19th century and mandated to Belgium at the end of the First World War. At that time, the country comprised four ethnic groups (Ganwa, Tutsi, Hutu, Twa) but was essentially ruled by clans. Administrative reforms undertaken by the Belgians in 1925 profoundly ethnicized Burundi and promoted Tutsi rule. Waves of both state and ethnic violence hit the country in 1965, 1969, 1972, 1991, 1993, and during the civil war from 1993 to the present.
14. For more than 30 years (since 1966), Burundi has been governed by a small group of Tutsi elite from a single region (Bururi) and a single clan (Hima). The successive regimes (Micombero, Bagaza, Buyoya) all used violent and discriminatory tactics to monopolize economic, political and military power. In 1972 educated Hutu were targeted by the regime, a campaign justified by the fact that they represented a political challenge for the minority Tutsi elite; Over 100,000 Hutu died and 300 000 refugees fled into Tanzania. At the time, the international community did not react strongly to the news. It is only in 1985 that a UN report on prevention and punishment of genocide made reference to the “selective genocide against Hutu elite”.
15. During the 1980s, President Bagaza put in place education policies to ensure his Tutsi supporters access to education, which opened the door to high-level military and political positions, and blatant discriminations against the Hutu masses. Military financial networks were established to ensure that those in power maintained their hold on state resources. These policies were blindly supported by international donors; until the late 1980s, the grants and loans were disbursed with few conditions.

¹ These numbers have not been verified by any recent census.

16. As the Cold War ended, donors began to react more strongly to human rights abuses in Burundi. In 1988, 15,000 people were killed in 1988 as a result of ethnic strife and subsequent repression by the army. For the first time the international community threatened to withdraw financial assistance if substantial political and military reforms were not implemented. Buyoya immediately announced a policy of national unity and appointed a Hutu Prime Minister.
17. After 1991, donors supported a pseudo democratization process without paying enough attention to the human rights and security issues that majoritarian elections would pose in a divided society like Burundi. They simultaneously attempted to liberalize Burundi's closed economy.
18. In June 1993, the Hutu party FRODEBU won the elections, and some 50,000 refugees from 1972 returned spontaneously from Tanzania. Their arrival was handled badly by the newly installed government, which was trapped between the necessity of returning to the refugees what the former regime had stolen from them and the fear of the Tutsis that they would be the losers. It was, in part, the frustrations of expropriated Tutsi families and the fear of the Tutsi elite to see the end of its privileges that led to the *coup d'Etat* and the assassination of President Ndadaye on 21 October 1993 by Tutsi army officers.
19. The death of the president triggered anger and fear of a repeat of the 1972 events in the Hutu population. Encouraged by FRODEBU leaders and the clandestine guerrilla networks of PALIPEHUTU, the Hutu killed 30,000 Tutsi civilians in a few weeks. The Burundi military engaged in massive repression, killing many Hutu civilians and leading to the flight of 300,000 refugees into neighbouring countries. This was the start of the civil war, in which more than 300,000 people are believed to have died. An OAU observer mission was sent and a Special Representative of the UN Secretary General was appointed for Burundi (Ahmedou Ould Abdallah).
20. Six months later, the Rwandan genocide took place, killing up to 800,000 Tutsis and moderate Hutus. At the end of 1994, the eyes of the international community suddenly shifted to Burundi and its guilt feeling from failing to prevent the genocide in Rwanda precipitated fears of making the same mistake in Burundi.
21. Several reports, which were commissioned to investigate the events of 1993, came to different conclusions. NGOs published a joint report in 1994, which rejected the idea of genocide against the Tutsi. A commission appointed by the UN conducted an inquiry in 1996, and concluded that evidence was sufficient to establish that "acts of genocide" had been committed in 1993 "at the instigation and with the participation of FRODEBU functionaries and leaders". The conclusions of the UN report created a huge controversy and were shelved to avoid disturbing the fragile peace process by disqualifying FRODEBU from the Arusha talks.
22. During the ten years civil war, the military, the political parties' militias and the rebels all committed atrocities against civilians: the military led terror campaigns, forcible displacement of populations massive arbitrary arrests and torture; the government suspended and harassed political parties, and restricted freedom of expression; the political parties and their militias organized *villes mortes*, sought assassinations of Hutu politicians (more than 25 FRODEBU MPs were assassinated), and ethnic cleansing of some neighbourhoods in the capital; rebels also led terrorist attacks on the roads, abducted people and extorted money from the population through a parallel administration. Most of these crimes have been committed in total impunity.

To what extent was human rights law considered to apply? Were treaties ratified, were derogations entered? To what extent was international humanitarian law considered to

apply?

23. The 1992 Constitution, and the transitional arrangements that followed referred to all the major human rights conventions, which were ratified by Burundi. Burundi ratified the Rome treaty in 2003.

Can you provide a short overview of the human rights issues included in the agreement?

24. Protocol I of the Arusha agreement focuses on the nature of the conflict, problems of genocide and of exclusion since independence, and enunciates the commitments of all parties to prevent genocide and social injustice. Protocol II deals with democracy and good governance issues. It lays out the principles guiding the organization of the transition and those to be included in the Constitution post transition. The principles guarantee a democratic system with an ethnically balanced representation in all institutions in order to correct the disadvantage of the minority in the electoral system. Protocol IV focuses on reconstruction and established principles governing the return, reinstatement and reinsertion of refugees; it created a national Commission for the Rehabilitation of victims and a National Victims Fund.
25. The agreement on the transitional arrangement and the cease fire agreement offer temporary immunity to both politicians and combatants.

Who were the main proponents, and opponents of, inclusion of human rights references in the peace agreement during the negotiations, and why?

26. Most Tutsi and Hutu-dominated parties in Burundi have been both victims and perpetrators of human rights abuses since the 1960's and thus the Arusha talks were overwhelmingly dominated by political statements about the violations committed against each community. No party had a principled opposition to the inclusion of human rights in the peace agreement, provided the agreement would focus principally on **their** own rights. The challenges for the mediators was to push the parties to set up mechanisms that will allow them to face their own responsibility later.
27. Committee I on the nature of the conflict was set up at the request of the Burundian parties themselves. They insisted on having a forum to express their view of history, vindicate the opposing parties and justify why they should be disqualified from the talks. The Tutsi believed that the 1993 massacres confirmed the existence of a genocide ideology against the minority, imported from Rwanda, and that it justified a strong military regime dominated by the Tutsi. The Hutu, who have been excluded from power since independence but who have won the 1993 elections, demanded adequate representation in the military, government, administration, and state enterprises and the return to constitutional rule.
28. During the talks, some Tutsi parties, including the government, insisted on strengthening minority rights in government institutions and government forces. Others want to negotiate a consociationalist system, with two separate sets of ethnic based institutions. All were reluctant to accept the rights of the majority and more specifically, to agree to the one man-one vote electoral system. Simultaneously, pseudo civil society organizations and lobby groups dominated by Tutsi were claiming to be against any negotiations with the Hutu "genocidaires."
29. The civil society delegation that came to the talks was very politicized and aligned with the government's positions. Tutsi dominated civil society organizations were more vocal in Bujumbura, but they only played an indirect role in the talks, as explained below.

CURRENT PROTECTION ISSUES IN THE PEACE AGREEMENT

What human rights provisions in the peace agreement were aimed at current protection?

Were broad statements of support for human rights, or principles of human rights asserted to be relevant?

30. Yes. Statements on principles and measures against exclusion relating to public administration, defence forces, education, justice, and statements about prevention and eradication of genocide, war crimes and crimes against humanity can be found in each Protocol. Protocol II is based on a Charter of Fundamental Rights (Art 3).

Did the peace agreement provide for any human rights standards or rights frameworks to be applied, such as bills of rights, lists of rights, or incorporation of, or commitments to international treaties? Where were these rights drawn from?

31. Yes. Art 3 of Protocol II says that “the rights and duties proclaimed and guaranteed inter alia by the Universal Declaration of Human Rights, the International Covenants on Human Rights, the Convention on the Elimination of All Forms of Discrimination against women and the Convention on the Rights of the Child shall form an integral part of the Constitution of the Republic of Burundi”.
32. Art 8 of Protocol III refers to the Universal Declaration of Human Rights and the international conventions to which Burundi is party and asserts that it is the Duty of the State to protect the inalienable rights of the human person.

Did the peace agreement provide for any mechanisms to enforce these rights, or processes to produce such mechanisms? For example, constitutional courts, ombudspersons, national institutions?

33. Yes. Protocol II states that the Constitution shall provide for a Supreme Court, including a National Department for Public Prosecutions; a Court of Appeal, High Courts, Resident Magistrates courts; Ubushingantaye Council (traditional justice at the local level); a Judicial Service Commission, that is the highest disciplinary body in the Magistracy; a Constitutional Court; and an Ombudsperson created by the Constitution.

Were these human rights provisions implemented, and did enforcement mechanisms begin their adjudicatory functions?

34. A few laws were passed and some of the Arusha Implementation Commissions were established but most have not started functioning due to the fragile transitional context. (see below).

Were reforms to institutions of justice provided for in the peace agreement? If so, what were they? Criminal justice reform? Reform of the judiciary? Reform of policing?

35. The reform program include the following: promulgation of legislation to suppress and punish the crimes of genocide, war crimes and crimes against humanity; establishment of a National Observatory for the prevention of genocide; reform of the judiciary at all levels, with a view of correcting ethnic and gender imbalances where they exist; reform of the Judicial Commission; amendments of the Criminal Code, Code of Criminal procedure, Civil Code (or civil code) and other laws; organization of a judicial training program through the establishment of a National

School for the magistracy; promotion of gender and ethnic balance in the Burundian judicial sector; taking measures to combat corruption; provision of the necessary resources; and promotion of international cooperation and recruitment of foreign jurists in reforming the system.

36. The reform of the police and gendarmerie is a very important element of the reform of the security forces agreed upon in the 2003 Pretoria Cease-Fire agreement.

To what extent were these reforms implemented?

37. A few laws were passed, but little attention was paid to the modalities of implementation and most legal reforms included in the agreement have been delayed:

- In May 2003, the Law on Suppression of the Crime of Genocide, Crimes against Humanity, and War Crimes entrusts the International Commission of Enquiry and the International Tribunal for Burundi, with their investigation and prosecution mandate;
- In September 2003, the Law establishing the National Observatory for the Prevention and Eradication of the Crime of Genocide;
- In September 2003, the Law attributing Criminal Jurisdiction to the High Courts decentralized the criminal jurisdiction of the appeals courts and empowered the High Courts and allowed the promotion from the Magistrates courts to the High courts of 70 Hutu judges;
- In June 2003, the Law regarding the organizational structures and functions of the Judicial Service Commission.

38. The state of the Burundi judiciary today has not improved much since the Arusha agreement. The system remains weak and dysfunctional. Most Burundians have no confidence in the ability of the judiciary to bring justice and ensure protection.

39. Financial, material and logistical resources are little and the infrastructure is minimal. In the magistracy, judges are few, ill trained and poorly remunerated. The judiciary also lacks independence from the Executive and the Legislature. Finally, the judicial sector is still dominated by Tutsis, partly due to the unequal access to education, and partly to the killings of Hutu members of the legal profession in 1972.

40. The Burundi judiciary has used double standards to punish those responsible for mass (murders). Nobody has been arrested for the killing of almost a hundred thousand (Hutus in 1972 or for war crimes since 1993, but large scale arrests have been carried out in the aftermath of the 1993 coup d'Etat and the massacres against the Tutsi. The judiciary doesn't have the capacity to deal with cases involving genocide, crimes against humanity, and war crimes.

Was provision made for economic and social rights in the peace agreement? Did policies address socio-economic issues?

41. Chapter III of Protocol VI exclusively focuses on Economic and Social Development and recommends that the government corrects the imbalances in distribution of the country's limited resources and embarks on a path of sustainable growth with equity by " increasing rural and urban household income; providing all children with primary and secondary education at least to the age of 16; reducing infant mortality rate by at least half; giving the entire population access to health care; improving the well being of the population in all areas."

42. The government has produced annual development plans but has never implemented the program of economic and social reforms included in the Arusha agreement partly because of the paralysis of the transition and partly due to the lack of money.

Did the donor community fund any of these programs?

43. Despite pledges made at the donor conference organized at the request of Nelson Mandela in 2000, the donor community has constantly demanded progress in the Arusha implementation and in the cease – fire negotiations to release reconstruction aid. The EU, the World Bank, the Belgians, UNDP, Germany, Austria, France and the US are now funding humanitarian assistance, reintegration and reinsertion activities, rural development, agriculture, and support to civil society activities.

SPECIFIC PROTECTION ISSUES

Was specific provision made for women and women's rights?

44. Gender balance and promotion of women is mentioned throughout the agreement, including in the preamble of the guarantees on implementation of Protocol V. Initiation of actions for the advancement of women is one of the pillars of political reconstruction and development guidelines.
45. According to the negotiators, the right of women to land created one of the most heated discussions.

Was specific provision made for children and children's rights?

46. Children and children headed families are cited as part of the most vulnerable groups in need of urgent assistance. Property rights are also guaranteed for “all men, women, and children” returning from exile by Protocol IV.
47. Specific provision was made to provide all children with primary and secondary education at least to the age of 16. (Art 15, Protocol IV).

Was provision made for the return of refugees and displaced persons?

48. Chapter I of Protocol IV focuses on “rehabilitation and resettlement of refugees and sinistrés” (designating all displaced, regrouped, and dispersed persons and returnees). Article 2 enunciates the principles governing return, resettlement, and reintegration, including the right to voluntary and safe return, and the right to have property restored. Article 3 lists the preparatory activities that the government should undertake. It includes the establishment of a National Commission for the rehabilitation of the sinistrés (CNRS), which has the task of organizing and co-ordinating the repatriation, the return, reinsertion and reinstallation of refugees and other victims. The CNRS shall consist of representatives of the transitional government and the participating parties.
49. Other preparatory activities include the conduct of a census of all sinistrés, including the 1972 refugee caseload, the convening of the Tripartite Commission, and the set up of reception committees. Article 4 and 5 outlines the guidelines for reconstruction and aid to resettlement.

Were human rights matters relevant to ensuring the protection of returning refugees and displaced persons included?

50. There is only one mention of safe return in Protocol VI. Article 7 also demands that the government allows unrestricted access of international personnel to all returnees and sinistrés. However, no specific human rights monitoring for returnees is provided for in the agreement.

To what extent were refugees and displaced persons able to return in practice?

51. Burundi has produced two main waves of refugees. The first was in 1972, when genocidal acts of the army against the Hutu elite led approximately 300,000 people to flee, mostly to Tanzania. In 1993 the assassination of President Ndadaye and the massacres that followed started another round of flight and displacement. After ten years of war, over 500,000 persons were estimated to be in the refugee camps in western Tanzania. Another 300,000 persons are thought to be dispersed across Tanzania. There are approximately 280,000 permanently displaced persons in Burundi itself, living in 226 registered places.
52. About 150, 000 refugees have been able to return. The 800, 000 still outside the country are likely to come back after the first elections and the closure of the Tanzanian refugee camps.

Were there tensions between the right to return and peace making? What were they, how were they dealt with?

53. The right to return is a pillar of the peace agreement. However, the memory of the mistakes that were made when refugees massively returned in 1993 and -overshadowed the negotiations and consensus was reached on the fact that that the return should be handled very carefully.
54. To one degree or another all refugees and displaced persons have been victims of land expropriation. The 1972 Hutu refugees were deprived virtually systematically of their goods and lands in the fertile Imbo plain by the Micombero and Bagaza regimes. The 1993 refugees were less often the victims of expropriation - but this does not mean that their return will be any easier. As with displaced Tutsis currently living on the edges of the cities, many were victims of profiteers who benefited from the absence, or death, of the legal owners either to seize land or to sell it at a profit. War-profiteers have also manipulated and encouraged rampant administrative and political corruption to appropriate the estates that could have been used to help with the resettlement of refugees.

If relevant, was the issue of return of property addressed in the peace agreement?

55. Protocol IV creates a sub-committee of the CNRS to deal with issues related to land and with a mandate to ensure that the following principles are enforced: the right to land for all, men, women and children; the right to recover their property; fair and just compensation in the event of expropriation or impossibility of recuperating assets/land; and the fair settlement of disputes in a spirit of reconciliation. At the same time the land-tenure law shall be revised as well as legislation on succession and the policy for the management and allocation of state-owned land. A register of rural land shall be set up.

Was this implemented in practice? What issues arose and how were they resolved?

56. The CNRS was created in March 2003. However, the March 2003 Law contradicts the principle of independence of the Commission as established in Arusha and puts it under the authority of the Ministry of Reinsertion, Rehabilitation and Reconstruction. This conflict of competence has not been solved until now and the Commission's work remains paralyzed, and as a consequence, under funded.
57. A permanent suspension of hostilities in Burundi and the prospect of elections carry the risk that a great many people who were uprooted will rush home to a country not yet prepared to receive them. Only by means of completing thorough advance preparations will it be possible to repatriate approximately one million Burundians. Both the transitional government and the international community however have paid too little attention to the land question that this repatriation involves.
58. Significant disputes have already arisen around the question of land use and ownership in the repatriation process. UNHCR saw it as a major constraint and sponsored the "legal clinic program", operated jointly with some local NGOs, with World Bank funding to support the refugee repatriation process from Tanzania, and to provide legal counselling and mediation services to communities on all manner of disputes (even though 70% of the cases revolved around land).
59. However, what has been done is not enough and the resettlement issue (with varying degrees of intensity depending on the areas) will be an ongoing source of tension. There is scope for both Hutus and Tutsis to engage in a political war over the restitution of land to refugees and displaced persons and over payment of reparations and compensation to expropriated or resettled families.

If not already addressed, how were the property rights of returnees balanced with the rights of those who held the property post-conflict?

Were other issues of current protection addressed in the peace agreement?

60. The Chapter I of Protocol III analyses the causes and nature of insecurity, the persons responsible for and agents of insecurity, its manifestations, consequences, and victims. It mentions protection of ethnic communities as one of the basic principles for peace and security.

Were other issues of reparations for human rights or humanitarian law violations addressed in the peace agreement?

61. The issue of the release of political prisoners came up after the signing of Arusha and became part of the cease-fire negotiations with the FDD. Nelson Mandela, the mediator, supported the FDD demands that Buyoya's government should free all political prisoners regardless of their crimes. At the time, in May 2000, more than 6500 prisoners were awaiting trial. For many, the mere suspicion of having been involved in the massacres or of being a sympathizer of armed rebellion, have proven sufficient for their arrest or long pre- trial detention.

DEALING WITH THE PAST

How was the past dealt with in the peace agreement?

62. Protocol I of the Arusha agreement recommends the establishment of an International Judicial Enquiry Commission (IJEC) into war crimes, crimes against humanity and acts of genocide committed in the country since independence, as well as of a National Truth and Reconciliation Commission on the other political crimes committed during that period. Following completion of the IJEC report, the government of Burundi may also request the establishment of an International Criminal Tribunal.
63. The agreement on these two mechanisms was hard to reach as no parties in Burundi were seriously committed to accountability. They had spent a lot of energy vindicating the others but demonstrated no willingness to face the past and investigate their own responsibility. All sides wanted an international Commission of Inquiry, but with different objectives in mind. Tutsi organizations wanted it to validate the conclusions of the 1996 UN Commission that had called massacres against Tutsis in 1993 “acts of genocide” while Hutus believed it could prove how UPRONA planned repression policies since independence and the 1993 putsch against President Ndadaye. In the end they decided to delegate that task to the international community, which was to qualify the crimes of genocide and punish those responsible.
64. The mediators knew that the report of the 1996 Commission had created a huge controversy when it came out and that the UN would not agree to create an International Tribunal for Burundi. Furthermore, by 1998, the ICTR had already shown its limitations, and there was no appetite to repeat the experience. The mediation’s choice to support a Commission of Inquiry was therefore conditioned by the debates existing within the UN.
65. The same story applies to the TRC. The parties saw in the TRC the possibility of advancing “truth”-at least their own version thereof- but not reconciliation. The Facilitation, and in particular the South Africans, thought that they should also encourage the Burundians to face their past and find solutions to their own problems. The TRC was created to 1) encourage national responsibility 2) create accountability for the elites to the people of Burundi 3) force the Burundians to think creatively about their own problems 4) find a way for civil society organizations to be consulted and included in this elite driven process. In the absence of short-term prospect of accountability, the TRC became the mechanism of accountability by default.

Were amnesties provided for? If so, what was the nature of these amnesties?

66. The Arusha agreement provides that the National Assembly shall adopt legislation as is necessary for the granting of temporary immunity to leaders returning from exile. In the 23 July 2001 agreement on transitional arrangements, one of the commitments of the government to prepare for the establishment of the transitional institutions was to pass a Law on Provisional Immunity from Prosecution of Political leaders. The Law covers crimes committed between 1962 and 2001 and is limited to the transitional period. The Pretoria Protocol extends the scope of the amnesty to all leaders and combatants of the CNDD-FDD and the security forces of the Government of Burundi, but the duration in time was not limited.
67. Temporary immunity cannot be used as a reason to refuse to appear before the TRC or be excluded from the investigation of the International Judicial Commission.

What was the reaction of the population at large and of civil society organizations vis-à-vis such amnesties?

68. Civil society is nascent in Burundi, and few organizations are politically neutral. Throughout the process, some Tutsi dominated organizations based in the capital have protested about preventing the “Hutu genocidaires” from sharing power with the Buyoya government. These organizations do represent an urban Tutsi constituency considered “extremist,” but they have also been at times manipulated and artificially activated by the government, when there was a need to obtain more concessions from the Hutu parties during the peace process.
69. The general population was not well informed of developments of the peace process and did not really have a say in the negotiation process.

Were mechanisms for accountability provided for? What crimes/abuses did these cover?

70. Protocol I's most tangible result is that it obtained the establishment of an International Judicial Enquiry Commission (IJEC) into war crimes, crimes against humanity and acts of genocide committed in the country since independence as well as of a National Truth and Reconciliation Commission on the other political crimes. Arusha also gives the possibility to the government of Burundi to request the establishment of an International Tribunal upon the completion of the International Commission of Inquiry report. The conflict was also quite rightly identified as 'a political conflict with major ethnic dimensions' and not as a purely ethnic conflict between two communities which are unable to co-exist.

Were these then implemented?

71. The Law on the National Truth and Reconciliation Commission was passed on 27 December 2004, but none of the members have been appointed yet. Its mission will be to a) investigate violence committed in Burundi since 1962 and identify the perpetrators and victims of those acts. 2) suggest means of promoting reconciliation and reparations for the victims. 3) clarify history for the Burundians.² Its mandate will last for two years and can be extended for one extra year if the government finds it necessary.
72. It will be composed of 25 members, to be selected according to criteria of morality and integrity, and appointed by the President of the Republic, after consultation of the government and approval by Parliament, but without consultation by civil society. The Law stipulates that the Commission members will receive a salary. The Presidency has opened the competition for applications to political parties, civil society, women and church organizations, and independent citizens. Applications should be submitted by 24 February 2005.
73. Compared to the Arusha timeframe, the establishment of the TRC comes three years late. (It should have been set up six months after the beginning of the transition). Furthermore the recent Law represents a major step backwards from the draft law that was first adopted by the transitional National Assembly in April 2003, after consultation of the Senate, and which was subsequently withdrawn by the government. The flaws of the law include:
74. Imprecise definition of complementarities between the mandates of the TRC and the IJCE; both commissions are supposed to investigate events from 1962. What would happen if their findings conflict?

² Law n 1/018 in appendix.

- Lack of independence of the Commission members. The members will be appointed by the President, with no exclusions of persons in positions of responsibility during cycles of massacres and repression;
 - The TRC has a very short time (2 years) to achieve its very ambitious mandate;
 - The Law includes no provision for protection of witnesses, but threatens them with harsh punishment if they give false testimonies;
 - The Law doesn't anticipate the dissemination of the report or any follow-up activities;
 - The Commission focuses on crimes (that are not crimes against humanity or genocide) that may have been committed more than 20 years ago, which is the legal time beyond which these crimes are no longer enforceable;
 - The law suggests no precise policy for reparations to victims.
75. The UN sent a commission of experts in May 2004 to assess the advisability and feasibility of the creation of the International Judicial Commission of Inquiry. It concluded that the establishment of two commissions in parallel envisaged under the Arusha agreement would create the risk of overlapping jurisdictions, contradictory findings, and waste of resources. It proposed the establishment of the International Truth Commission, preceded by a broad based process of consultation, and the creation of a Special Chamber within the court system in Burundi that would have the competence to prosecute those bearing the greatest responsibility for the crime of genocide, crimes against humanity and war crimes committed in Burundi. Its jurisdiction would be limited to specific phases of the conflict.
76. The report has been officially made public in April 2005, and the propositions of the UN experts have already been met with suspicion. The experts' opinion in this report are accused of double standards. Some Tutsi extremists are saying that the UN don't want to recognize that genocide has happened in Burundi, and that the response is not as satisfactory as the ones given to the Rwandan genocide or crimes committed in Darfur. Others are saying that the reinterpretation of the Arusha agreement is not acceptable.
77. The report has several advantages and disadvantages. On the one hand, it is the result of another externally driven assessment process and has not been the result of a large consultation of the Burundi population; secondly, the option of a war chamber is likely to be explained by financial considerations. On the other hand it could spark a real debate within Burundi society about transitional justice and give the opportunity to freeze the national TRC, which is likely to be politicized if set up at a time of electoral competition. The Burundi situation is too fragile yet for serious prosecutions for crimes against humanity and there is a lot of groundwork to be done before transitional justice mechanisms could be put in place. Almost the entire population is still poorly informed about the contents of the new constitution and the procedures for holding elections, as well about transitional justice and reform process. The peace process remains an elite- and Bujumbura-driven process, while more than 90% of the population is rural.
78. Right now, the question of justice seems to be absent from the agenda and the concerns of the political leaders. It can be predicted that the national TRC will be weak and manipulated for two main reasons. First, the transitional power-sharing settlement, reached by the very leaders who accused each other of crimes against humanity in Arusha, is based on the minimum common objective that their government position would guarantee them temporary immunity. Secondly, most of these leaders fear being disqualified from elections if truth is heard before they get elected. The current period is a time of intensified competition and pursuit of winner-takes-all and the revelation of involvement in crimes is the last thing any leaders wants during an electoral campaign. Trust remains minimal, which explains why the parties have kept their arms thus far, and other have threatened to create new militias.

79. The elections are likely to bring about a regime change, with a victory of FDD or possibly FRODEBU, but they are unlikely to improve the chances for new political will to deal with the past. The likely winner will certainly not want a TRC to expose the crimes committed during the civil war and de-legitimize its new power.
80. Also a government of party and faction leaders who have themselves committed war crimes limits any possibility of indictment and genuine truth telling during the transition. If the TRC were to start its hearings now, it is likely that it would design a heavily negotiated truth rather than an honest account of guilt for past crimes. As long as basic issues like security and disarmament have not been resolved, and as long as the perpetrators of the crimes are in power, victims and witnesses will fear to expose crimes.
81. Moreover, the FNL are still fighting, and remain outside the process. Yet their views, which do represent those of some of the population especially in rural Bujumbura, must be factored into a sustainable peace. In particular it would be a mistake to ignore their view on justice and rehabilitation of the victims of the 1972 massacre, which echoes that of many Hutus.

If not provided in the agreement, did any mechanisms for dealing with the past, or issues of amnesty, or provision for victims' rights later emerge (or had they existed previously outside of the agreement)?

82. Not yet.

To what extent was the question of international requirements of accountability a controversial issue, perceived to be in conflict with the requirements of peace making?

83. In the end justice wasn't perceived to be a "deal killer" because it was delayed and delegated to the international community. Also, it should be underlined that both parties having been guilty of crimes against humanity, had a mutual interest in focusing on power sharing instead of justice. It is clear however that credible threats of punishment for the 1993 putsch or the 1993 killings would have frozen any progress in the talks. Some individuals expressed fears of justice during the negotiations. Certainly UPRONA members, the party in power, while they have always refused to negotiate their future, have put up as much brakes as they could to the peace process and the implementation of the agreement. They know that regime change could also mean a witch hunt against the old regime.

To what extent were victims' rights provided for in the peace agreement?

84. The notion of 'victims' was not broached by the Burundians, but became gradually part of the vocabulary as the process moved along. In this respect Arusha became an educating process for all parties, who finally realized that their ideas about what the political agreement should look like were not so far apart. (All, up to now, do not recognize or accept the fact that other communities also had victims).

- **To what extent were these measures implemented?**
- **If not provided for in the peace agreement, were victims rights addressed elsewhere in the process?**

RELATIONSHIP BETWEEN HUMAN RIGHTS AND THE PEACE AGREEMENT

Were other human rights issues addressed in the peace agreement? Was it later felt that other human rights issues which could usefully have been addressed in the agreement? When human rights issues were not addressed in the agreement, but came to be addressed subsequently, what difference, if any, did it make that the agreement did not address these issues?

85. The issue of political prisoners became in the post Arusha bilateral negotiations between FDD and the government, and was resolved as part of a political process. It could not have come earlier, as it was a concern that was brought specifically by the rebel movement.

Can the peace agreement be considered successful? Please use your own measure of success – you may consider it relevant for example whether violence was reduced, reforms implemented, or past problems addressed with some success.

86. The peace agreement in Arusha was only a step in a long, difficult and painful process. It did not stop the violence and negotiations continued until the end of 2003 to reach a cease-fire. Violence was reduced dramatically after January 2004, although one group, the FNL, active in the province of Bujumbura-rural, is still excluded from the talks. At this stage, no serious reforms have been implemented beyond simple power sharing in the institutions nor have the root causes of the conflict been addressed.
87. However, Burundi analysts agree that this fragile staged peace process is slowly becoming irreversible, mainly because both sides have accepted that they will not defeat each other on the battlefield. They understand that the competition has to shift towards electoral politics. The armed parties have not disarmed yet but the perspective of elections has encouraged Hutu parties to compete politically, and the negotiations of constitutional and power-sharing guarantees for the minority has pushed Tutsi to make alliances with other parties.
88. The attention should now be focused on how to organize peaceful elections without excessive ethnic mobilization, and on setting up monitoring and conflict prevention mechanisms for the situation after the elections.

To what extent did the human rights dimensions included in the agreement contribute to the agreement's success?

89. As mentioned above, there was a need for a safe forum for both parties to express their grievances and fears and vindicate the other. Committee I in Arusha provided that forum for two years, without letting these accusations and counter accusations paralyze progress in the talks. The inclusion of statements against both genocide and exclusion in the agreements signed was key to its success. At the same time the mediators succeeded in persuading the parties to put aside the factual dispute and to agree on a mutually acceptable solution, without determining the right and wrong. The fact that these debates were covered by Burundian and international media, allowed the parties to scapegoat the mediators for what would be seen by part of their constituencies as compromises on principled positions (of not negotiating with killers).
90. The law and provisions on temporary immunity, as well as the provision of bodyguards by South Africa also allowed all Hutu leaders to go back to Burundi. From 1996 to 2001, the debates about the future of the country took place outside of Burundi and it was time for all leaders to

become more accountable to their constituencies.

91. However implementation of reforms has not happened yet and it is too early to know whether the inclusion of principles in the agreement will open the door to establishing serious and credible accountability mechanisms.

To what extent did limitations in the human rights provisions of the agreement impact negatively on the agreement's success? Was it claimed that human rights measures undermined peace making? Were the claims founded?

92. No, but as mentioned above, serious considerations of justice would have stopped the process.

To what extent did the agreement enable civic society and human rights NGOs to promote and protect human rights, and what problems did they encounter?

93. The Arusha agreement allowed NGOs to get a little more funding for good governance and human rights projects, but had little impact on their effectiveness. Although there are a few human rights organizations that are doing good work, overall civil society is weak and divided. Moreover, the weakness of institutions that it seeks to influence, such as the Parliament and government, as well as the necessity for the Burundian political parties to conclude political negotiations on the timing of justice have strayed their activities further from the desired effect.
94. Since the signing of the comprehensive ceasefire agreement between the transitional government and CNDD-FDD rebels headed by Jean-Pierre Nkurunziza, both sides have demonstrated total respect for the cessation of hostilities. The cease-fire has allowed some NGOs to expand their activities in new provinces and to consider training local observers for the upcoming elections.

Would you identify other matters relevant to the discussion? In your own view, how useful or important are human rights provisions to the value of integrity or sustainability of peace agreements?

95. Human Rights provisions are not essential to bringing peace in the short/medium term. During post settlement transitions, peace depends on the willingness of the parties to give up military means. Furthermore, it is unrealistic to expect that war leaders will suddenly become spokesmen for human rights, truth telling and good governance.
96. However, in the long term, the inclusion of human rights provisions in peace agreements sets a standard for future vetting procedures and selection of candidates for elections. The stigma associated with being a war criminal will hopefully lead to the marginalization of key perpetrators from politics, ideally by their own constituency.
97. The inclusion of human rights provisions is also based on a recognition of the victims' suffering and will hopefully contribute to recognition of their rights and possibly, reconciliation.
98. Finally, their inclusion is key to mobilizing the necessary international resources for a successful peace dividend strategy.