

‘Home at last?’ Land Conflicts in Burundi and the Right of Victims to Reparations

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Introduction

Your land is the place where your umbilical cord dropped off and where your ancestors are buried.¹

The historical trajectory of conflicts over land in Burundi and how to resolve the issue of tenure is a significant challenge facing the country. When a major refugee camp in Tanzania closed down in December 2012, tens of thousands of Burundian refugees who returned to their country began claiming land that once was theirs. Burundi has never before had to contend with such a large number of returnees in such a short period of time.² In addition to the returnees, almost 80 000 internally displaced persons (IDPs) are in need of sustainable resettlement, as a joint profiling report by the Burundian government, UN agencies and NGOs has shown. Since June 2012, the tense situation has further been intensified by an increasing flow of refugees and asylum-seekers into the country, mainly from the Democratic Republic of Congo amid growing armed insurgency in the provinces of Kivu and Katanga.

The problem moreover is situated within a complex socio-political context. Three years after the contentious presidential election of 2010, the situation in Burundi is fragile. Political violence has been a recurring feature in the country and is a threat to stability. However, there is some scope for optimism as some opposition leaders have recently announced their intention to return from exile and enter formal national politics.³ In addition to the challenges of promoting inclusive governance, reducing human rights violations and the high level of poverty, access to land constitutes one of the most sensitive issues in Burundi.

Given the history of dispossession, landlessness and, for many, exile, and the conflicting claims to land that have resulted, the policy of reparations might be useful in redressing the legacy of displacement. Reparations are both retrospective – recognising the loss and pain of victims due to past human rights violations – and productive, providing material and symbolic means of moving forward.

This Policy Brief will assess whether reparations as a form of redress for historical injustice can be utilised to address the grievances of Burundian victims of land expropriation. The Policy Brief begins by describing the legacy of conflict and the challenges of repatriations and land claims. It then outlines some of the difficulties of the present land dispute resolution mechanisms. In this context, it then proposes potential policy prescriptions for reparations to victims of land dispossession, drawing on the United Nations General Assembly Resolution 60/147 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.⁴ It concludes with a number of policy recommendations on how to address the contesting land claims within the broader framework of Burundi's commitment to transitional justice, reconciliation and sustainable peace.

The historical legacy of conflict and the repatriation of Burundian refugees

Burundi's history is complex due to the legacy of a divisive, colonial administration prior to independence in 1962 and the ethnicisation of politics that followed. More recently, there has been cyclical violence and conflict notably during the years of 1965, 1972, 1988 and 1993. There has been a significant flight of refugees involving both main ethnic groups – the majority Hutu and the minority Tutsi. The crisis in 1972 was especially severe, prompting between 200 000 and 300 000 people to flee Burundi. The civil war that began in 1993 caused untold carnage and destruction as well as generating a flow of refugees out of the country and IDPs within the country. The 1993 crisis resulted in approximately 400 000 people leaving the country, most to Tanzania.⁵

The signing of the 2000 Arusha Peace and Reconciliation Agreement provided the opportunity for the establishment of a transitional government which paved the way for democratic elections in 2004. After the signing of the Arusha Peace and Reconciliation Agreement and the establishment of a transitional government, refugees began to repatriate, some spontaneously, others since 2002 through the facilitation of the UNHCR. On arrival in Burundi, they have started to claim back their land, which some of them left over 35 years ago.

In the past 11 years, more than half a million refugees have returned to Burundi.⁶ In recent months, approximately 40 000 Burundian nationals have returned, according to the United Nations High Commissioner for Refugees (UNHCR).⁷ Around 34 000 arrived from the Mtabila refugee camp in Tanzania, following its closure, and the rest from the Democratic Republic of Congo. Access to land, according to the UNHCR, 'remains the most sensitive issue with regard to the reintegration of returnees.'⁸

Land tenure in Burundi

On arrival back in Burundi, returnees have had to deal with many issues, one of the most basic being the reclaiming of their land. Land in Burundi is a limited commodity, according to Jenny Theron, who notes that approximately 90 per cent of Burundians are to some extent dependent on the land, earning their

living either through agriculture or livestock.⁹ Because of the limited opportunities for non-land based work, particularly in rural areas, land is vital for survival for most Burundians. In addition, a high population density and an agriculture-based economy can easily lead to an over-exploitation of land, and with that soil degradation and crop disease.¹⁰ Amid the food insecurity that results from such pressure on the land, reclaiming one's land has been extremely difficult for returnees or other vulnerable groups, such as IDPs. Moreover, land holds meanings embedded in culture and tradition which further intensifies the conflicts. These social meanings to land will be explored later.

The Arusha Peace and Reconciliation Agreement acknowledged in Article 8 that all refugees must be able to recover their property, in particular their land. In cases where recovery is not possible, everyone with an entitlement should, according to the Arusha Peace and Reconciliation Agreement, receive fair compensation. Thus, the emphases of the agreement are clearly on restitution, or more precisely, re-appropriation, and compensation. In reality, there are several difficulties for returnees when attempting to claim back their land.

Even though international customary law prohibits dispossessing political fugitives of their property after their departure, the Burundian state itself claimed the right to do so, in accordance with the old Burundi Land Code of 1986.¹¹ The Land Code determined that if land was owned (or occupied) by someone for longer than 30 years, the new owner or occupant then became the legal owner of the land. The Burundian state had, at various times, used this law to expropriate unused land from Burundians who had gone into exile, thereafter selling it to new owners.¹² Thus, over time two groups of legitimate owners were created. In many cases, the two owners had come from different ethnic groups and the competing land claims thus risked fuelling a renewal of old conflicts.

In addition to the Land Code, another obstacle for reclaiming land has been a lack of witnesses.¹³ Few witnesses remain to verify or contradict that the land had belonged to the returnees before they fled the country. Such witnesses are all the more vital in terms of their presence when, amid the mayhem of war, documentation may have been lost, destroyed or stolen. Furthermore, the returnees, who left the country in the most recent wave, in 1993, face the problem that those who now occupy the land were often neighbours known to them, which also makes claiming back the land highly conflictual. Due to the shorter time difference, these recent cases tend to be less complicated than the cases from the 1972 returnees.

Finally, an additional major obstacle is experienced by women returnees. Many among them return as heads of households, having lost their husbands or fathers to the violent conflicts. When women seek to claim land previously owned by their families, they face obstacles linked to the absence of inheritance rights of women and traditional patriarchal social views.

The limits of land dispute resolution mechanisms

There are several institutions that are responsible for land disputes, each of which has limitations:¹⁴ Burundian courts, the National Commission on Land and other Properties (CNTB), the Bashingantahe (traditional adjudicating bodies, generally comprising men of established seniority in the community) and non-governmental organisations (NGOs) in the field of mediation, which will be described below.¹⁵

An estimated 90 per cent of the cases in courts and tribunals are related to land issues.¹⁶ One obvious advantage of going to court is that the decision is legally binding. However, the costs of going to court are considered to be a major obstacle for many Burundians, as the majority of the population survives on less than US\$1 per day.¹⁷ In addition, it is a time-consuming procedure, in part because of the legal and political complexity of the cases as well as the sheer number of cases, which inevitably slows down individual claims. Courtrooms and legal professionals alike are over-tasked and frequently unavailable for long periods. Many claimants therefore feel excluded from access to the judicial institutions of the government because the legal process is beyond their time and financial resources. Furthermore, the independence of the Burundian judiciary is widely viewed as precarious.¹⁸

Another mechanism for addressing land dispossession is the National Commission on Land and other Properties (Commission Nationale des Terres et autres Biens: CNTB), established in 2006, which is responsible for identifying and redistributing illegally occupied land. Currently, the CNTB has about 10 000 unresolved disputes on its books. This shows one of the main challenges: the lack of resources in comparison to the needs on the ground. The CNTB services are free of charge, and have been widely used by refugees. However, it is often much more time-consuming than anticipated. The CNTB is composed of three commissions, each tasked with mediating conflicting claims: communal, provincial and national. Using the CNTB for mediation, the government of Burundi has recommended splitting individual plots between the new owners and the returnees.¹⁹ While this may seem fair, the resulting plots are too small to enable the owners to use them to generate enough food for their families. Further, the CNTB has the power to make recommendations to the Burundian government to compensate a person. Cases in which individuals can be compensated include situations in which the land they claim was taken illegally by a local administration. The commission has the right to arbitrate conflicts in cases where mediation fails. However, the CNTB has some of its own challenges which will be raised continually in the course of this paper.

A third mechanism for land disputes is the traditional adjudicating bodies, the Bashingantahe, comprising men of established seniority in the community. The Bashingantahe is well-known, accessible, and provides free and fast verdicts. After a case has been submitted, the Bashingantahe will invite the other party to the conflict to present their case. After the conclusion of the case, the solution is written on paper and signed by the parties involved. However, the decisions are not legally binding and if one party later decides to renege on the agreement, they can then revert to the courts. The Bashingantahe's significance has been weakened by its marginalisation during the colonial time and the crises of the post-colonial period. Corruption is apparently a further problem.²⁰

Submitting their cases to mediation, offered by NGOs, constitutes an additional mechanism for refugees and IDPs. Various NGOs offer mediation services to returnees to solve land disputes. Mediation is considered less time-consuming, easily accessible, and these mediation processes are free of charge. Whereas arbitration, as a form of dispute resolution, is based on a prior agreement between conflicting parties to accept the decision of the arbitration, mediation is a longer process that entails facilitating consent among stakeholders. The outcome of mediation is therefore more sustainable, since it involves the agreement of the parties involved. Mediation also lays a more effective foundation for reconciliation because the conflict parties reach a hard-won, mutually acceptable, agreement. However, such mediation processes are generally problematic in Burundi, particularly when it comes to land disputes: whatever the history, the outcome will invariably entail the loss of a piece of the land under discussion, by one or both parties.

Generally, the four land dispute mechanisms attempt to work in alignment with each other. All four face a greater number of cases than they can process. None of the mechanisms have produced outcomes that could be described as thoroughly transformative of the conflicts over land. The situation in Burundi in terms of land conflicts remains unsatisfactory and even dangerous for the outbreak of new violence. There is a clear need for rethinking the existing approaches and considering alternative options. This Policy Brief examines one alternative option, namely reparations.

Reparations for human rights violations: United Nations General Assembly Resolution 60/147

In order to consolidate peace in Burundi, past human rights violations, not least land expropriation, must be addressed openly and thoroughly, and a reparation policy put in place. These reparation measures must necessarily be – and be perceived to be – formulated in terms of a human rights-based approach – equitable and universal in application, and just, if they are to make a meaningful contribution to reconciliation in Burundi. Ignoring the needs that have resulted from violations can be fatal for a society trying to emerge from conflict. An unaddressed or unfairly addressed grievance is often the trigger for the re-escalation of violent hostilities in the future. From the standpoint of the victims, reparations thus occupy a special place in any transition out of conflict.

Historically, reparations exist as a legal concept and refer to measures a court can require from a person who has caused damages in order to help repair those damages. Before the emergence in the mid-1990s of the field today known as transitional justice, those measures mainly meant pay-outs: damages usually took the form of money. The term reparations developed new meanings as truth and reconciliation commissions sought to respond to the many testimonies victims brought to them. For instance, tracing the fate of disappeared family members and finding out where their remains had been buried began to be considered a form of reparation, and a basis for other restorative measures such as the issuing of a death certificate, which would enable the family to then draw a state pension.

As transitional justice initiatives began to develop an explicit orientation towards victims, the United Nations sought to establish consensus internationally on the concept of reparations, tasking two experts to formulate options: Theo von Boven, UN's Special Rapporteur on the Right to Reparation to Victims of Gross Violations of Human Rights from 1986 to 1991, and later Mahmoud Cherif Bassiouni, Independent Expert for the Commission on Human Rights on the Rights to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms from 1998 to 2000. In 2005, the United Nations General Assembly adopted Resolution 60/147 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (hereinafter referred to as UN's Basic Principles and Guidelines on Reparations) which recognises reparations as a right and describes several forms of reparations.²¹

Pablo de Greiff, in his 2006 *Handbook of Reparations*, emphasises that, for some victims, 'reparations are the most tangible manifestation of the efforts by the state to remedy the harms they suffered.'²² Criminal justice procedures focus on the accused because a victim's participation in such proceedings is generally limited to giving testimony. Formal justice processes do not provide room for direct, active participation by the victim and allow no interactive processes at the personal level.²³ Instead, they focus on denouncement, punishment and deterrence. Because of their direct, potential impact on victims, reparations play an important role among peace-building measures.

While not exhaustive, the UN's Basic Principles and Guidelines on Reparations usefully identifies five forms of reparations: restitution, compensation, rehabilitation, victim satisfaction and guarantees of non-repetition. These five forms of reparations will each be examined in turn, providing a definition and discussing the situation in Burundi. First, however, a brief introduction to reparations in Burundi and the prospective Truth and Reconciliation Commission is needed.

Reparations and Burundi's prospective Truth and Reconciliation Commission

With regard to a future reparations programme in Burundi, it is necessary to recognise that reparations policies are generally the result of recommendations ensuing from the work of a truth commission. Attempts to provide reparations without a 'truth-base', a body of facts, verified, shared and recognised by all major parties to the conflict and citizens in general, has in several situations proved disastrous: processes in Colombia and Nepal, for example, have been widely denounced for their political bias and for having re-escalated tensions between parties to the conflict. In this context, the prospective law on the Truth and Reconciliation Commission (TRC) in Burundi is crucial for any possible reparations programme.

In October 2011, the technical committee appointed by the government to advise on the legislation for the Truth and Reconciliation Commission delivered its report to the president, including a draft law for the TRC. This followed a series of consultations that the technical committee convened, including an exchange of views with the Institute for Justice and Reconciliation in September 2011. By the end of November 2012, a new draft of the law had been compiled, and a subsequent draft was submitted to parliament in December 2012. This draft law on the Truth and Reconciliation Commission includes provisions for the commission to order immediate reparations during its activities as well as to propose a reparations programme in its recommendations. Cases of land and other property, however, are not mentioned in the draft law. A key challenge that is not adequately addressed by the draft law is that the

definition of victims is limited. Only persons who suffered direct violence and/or their relatives would qualify as victims under the criteria established by the Burundian TRC. According to this definition, victims of land expropriation would most likely not qualify as victims and would therefore be excluded from the TRC process and thus, also, from a reparations programme.

In an earlier version of the draft law, cases of reparations for land and other property issues were to be referred to the National Commission for Land and other Properties (CNTB), invoking its mandate in this area. Due to the challenges that confront the CNTB, this solution may not yield results acceptable for victims. Amid the lack of clarity regarding what will happen with victims of land dispossession, the five forms of reparations outlined in the UN's Basic Principles and Guidelines on Reparations will be assessed below with a view to developing a vision of reparations for victims of land expropriation in Burundi.

Restitution of land in Burundi: Return of what has been illegally taken?

Restitution is the first form of the reparations outlined in the UN's Basic Principles and Guidelines on Reparations. As highlighted by Tyrone Savage, former Reparations Policy Adviser for the Office of the Human Rights Commissioner (OHCHR), restitution is the most basic form of reparations and roughly translates into the principle: what has been illegally taken must be returned.²⁴ The UN's Basic Principles and Guidelines on Reparations describe restitution more fully as follows:

Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.

In a study that laid the legal basis for the UN's Basic Principles and Guidelines on Reparations, Theo van Boven emphasises the role of restitution in responding to acts of dispossession.²⁵ Offenders, Van Boven notes, are responsible both for returning what has been seized and for reimbursing expenses that the victim has incurred as a result of the deprivation. Further, Van Boven affirms the role of the government in reviewing practices, regulations and laws, advocating the use of restitution as a complement to other, more usual, criminal sanctions.

In Burundi, some restitution measures have been established. The Arusha Peace and Reconciliation Agreement establishes restitution as the option of first recourse when dealing with land and property dispossession. Measures have included, at least on paper, options for restitution of land and other property to returning refugees and IDPs.²⁶ However, the combination of several challenges – among others, scarcity of land, high population density and the subsistence-based economy in Burundi's rural areas – makes restitution of land now in use by a second 'owner' a problematic option. The CNTB's practice of settling land disputes by splitting individual plots between the most recent owner and the returnee represents a sort of partial restitution. It is, however, unsatisfactory to stakeholders. For example, the significantly reduced plots do not enable land owners to generate sufficient food. Dividing the property may appear to be an equitable solution, but in terms of what people look to the land to provide – a means of food supply – it is neither satisfactory nor sustainable.

Another more general question is whether restitution is actually possible in cases of land expropriation. Restitution is the most logical and easily applied form of reparations, but can the loss of land, with all that it may mean to people, ever be completely restored?²⁷ Returnees who spent several decades outside the country could not, for example, raise their children on the land that for them was home. Those lost years cannot be restored – even if all returnees receive back their entire land. Restitution, even fully applied, is not enough. Land, as an economic commodity and as home – the place where one can enjoy a sense of belonging – challenges restitution as a concept. Further reparation measures are necessary.

Compensation for the land lost: Money instead of land?

The second form of reparations affirmed in the UN's Basic Principles and Guidelines on Reparations is compensation. Compensation is a well-established means of making indemnifications for a wrong done and for which restitution is, for practical reasons, impossible. It is another basic form of reparations and can be translated, as Savage argues, into the following: If what has been illegally taken cannot be returned, then the rightful owner must be appropriately compensated to the fullest extent possible.²⁸ The UN's Basic Principles and Guidelines on Reparations outline compensation as follows:²⁹

Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

- a) Physical or mental harm;
- b) Lost opportunities, including employment, education and social benefits;
- c) Material damages and loss of earnings, including loss of earning potential;
- d) Moral damage;
- e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

The opening line establishes a crucial limitation to compensation: compensation applies only to economically assessable damage – for damage to which a price tag can be pinned.

Turning to Burundi, everyone with an entitlement should, in principle, receive fair compensation when recovery of land and property is not possible and this is, inevitably, a basic expectation among stakeholders. This obligation is affirmed in the Arusha Peace and Reconciliation Agreement, as well as in the Pact on Security, Stability and Development in the Great Lakes Region, which Burundi ratified in 2008. The latter includes a protocol which obliges member states to assist returnees to recover their property or to compensate the loss of property when land cannot be restituted.

As mentioned previously, the CNTB is responsible for assisting vulnerable people to obtain compensation where their land and/or other properties have been destroyed. The CNTB is thus mandated to make recommendations to the government of Burundi to provide compensation to specific persons. However, there have been criticisms. Above all, as Search for Common Ground has noted, there is little clarity on compensation for land expropriated by the state itself.³⁰ According to a study supported by the Swedish International Development Cooperation Agency (Sida) and the Danish Refugee Council, undertaken by the local NGO, Rema Ministries, some compensation has been given in situations where land was taken directly by the state for the construction of schools and other infrastructure. Questions have, however, often ensued about whether the amount was adequate.³¹

Moreover, in the above mentioned division of land parcels, losses have not been compensated either by the state or by individuals who occupy the land. The Burundian government has indicated that it does not have adequate funds available to compensate returnees, and has informally raised the possibility of rather providing 'symbolic compensation'. Whatever 'symbolic compensation' would look like, doubts exist whether this, as the only reparative measure, i.e., unaccompanied by measures that pursue restitution or compensation measures, could change the feelings of loss and betrayal experienced by the returnees with regard to both the economic impacts and the injustice of their loss.

Even if there were political will as well as adequate funding for compensation, there are a significant number of questions regarding the provision of compensation. In particular, how are claims to be assessed? How should interest be calculated for the period dating from the act of dispossession until the present? How are the different modalities for compensation and the role of the international community to be defined? Ultimately, an important question would be whether monetary compensation could fully satisfy the needs of the returnees. In Burundi, land is not only critical for livelihood, it also has

an essential cultural and identity-giving value. Land is handed down from father to the son and this has traditional importance.³² Returnees feel entitled to their ancestors' land and, for example, are not willing to accept another piece of land to replace it or to have their birthright 'split'. They want the land where their ancestors have been buried. They want a satisfactory response from the state that failed to protect them against dispossession.

Between 2009 and 2010, national consultations on the future transitional mechanisms for Burundi were undertaken by a steering committee composed of representatives from the Burundian government, civil society and the United Nations.³³ They were a result of the negotiations between the Burundian government and the United Nations on the prospect of a Truth and Reconciliation Commission and a Special Tribunal for Burundi. The final report of the consultations gives a two-fold picture of personal material compensation, without specifying for what type of human rights violations compensation should be paid. Only 61 per cent of the interviewed persons were in favour of personal material compensation; 9 per cent of the persons questioned were against any such provisions, whereas 29 per cent said they had no opinion. Some interviewees noted it would be impossible to compensate everyone because of the high numbers of victims. Many of those without an opinion said that this question was too difficult to answer and that they would therefore prefer collective and symbolic reparations.

These findings underline the need to use compensation judiciously. With regard to the dispossession of land, a policy is needed for compensation, specifically for the economic damage resulting from dispossession. It needs to be a policy that is equitable towards all citizens, and feasible in terms of funding. However, due to the cultural and identity-giving value of land in Burundi, envisaging additional complementary reparative measures is necessary, if reparations are to contribute to peaceful co-existence, and moreover a sense of belonging, for all citizens of Burundi.

Rehabilitation: Provision of legal and social services?

A third form of reparations, outlined in the UN's Basic Principles and Guidelines on Reparations, is rehabilitation: *Rehabilitation should include medical and psychological care as well as legal and social services.*³⁴ Given the importance of rehabilitation, it is clear that victims should be entitled to receive the necessary material, medical, psychological, legal and social assistance and support they need.³⁵ A distinction should be made between money paid by way of compensation and money provided for rehabilitation purposes, such as medical or psychological care for physically disabled or traumatised survivors of gross violations of human rights, or education grants for children (for example, of people forcibly disappeared) or legal or social services. Earmarking funds for rehabilitation, as distinct from compensation, not only ensures the funds are used as intended, it also implies recognition of the legitimate special needs of victims.

In Burundi, the international community and the government of Burundi have invested a lot of money, time and energy in addressing the urgent material needs of returnees, such as the need for shelter. Nevertheless, there are few resources for the non-economic dimensions of reintegration, such as psychosocial, political and social needs.³⁶ Rehabilitation, in the sense articulated in the UN's Basic Principles and Guidelines on Reparations, has not been offered by the government to victims of land dispossession. On the contrary, returnees have reported feeling discriminated against, as well as economically and geographically marginalised – second-class citizens who have not received a fair deal in terms of restitution of land, access to justice and several other issues.³⁷

In such a context, rehabilitation measures are urgently needed. Legal services would be a useful start to ensure at least access to justice. The provision of legal services for all victims of land dispossession would guarantee that they become aware of their rights and possibilities within the legal system. Besides legal services, social services are needed in order to find the funds for legal procedures.

One cautionary note is needed: psychological care as a rehabilitation measure should be handled with a high degree of sensitivity with regard to land. Psychosocial counselling cannot solve the injustices that the returnees are experiencing and rehabilitation, in the form of psychosocial counselling or community

healing projects, should not be established as a substitute for justice but as a complement, as a means of helping people to work through the emotions relating to land dispossession and the lost years. Rehabilitation measures are needed as a basic complement to other reparative measures; they are not a replacement for restitution, compensation or the other measures, to which we now turn.

Victim satisfaction: Accountability, truth-seeking and symbolic reparations

Victim satisfaction represents the fourth form of reparations and covers a wide range of non-monetary measures. The first is self-evident in that violations need to be terminated if they are ongoing. The other seven measures may be grouped in three categories: truth-seeking, accountability, and symbolic reparations:

- Truth-seeking, including *verification of the facts and full and public disclosure of the truth*;
- Accountability, including *judicial and administrative sanctions against persons liable for violations*;
- Symbolic reparations, such as *public apology, including acknowledgment of the facts and acceptance of responsibility; commemorations and tributes to the victims*.³⁸

These non-monetary measures contribute to the broader and longer-term restorative aims of reparations.

Truth-seeking pertains to an 'obligation [on the state] to disclose to the victims and to society all that can be reliably known about the circumstances of the crime, including the identity of the perpetrators and instigators'.³⁹ For victims, it is generally important that human rights violations are uncovered and that people believe in their narratives. Bringing events into the open avoids not only further harm or danger for victims and their families, but can contribute also to the restoration of the individual's sense of identity and dignity.⁴⁰ The victim's right to know the truth is often as important to victims as making the perpetrators accountable. Satisfaction can be offered to victims through establishing the facts, stating acknowledgement of the violations, followed by an expression of regret, and even a formal apology. For example, in Chile, President Aylwin, in his capacity as head of state, apologised to the victims and outlined the need for forgiveness after the release of the report by the National Truth and Reconciliation Commission.⁴¹

In Burundi, the course of the current truth-seeking process is still uncertain because there have been several drafts of the law for the Burundian Truth and Reconciliation Commission but there is still no consensus on the publication of this brief. Moreover, as Impunity Watch has observed, the trend within the drafting process represents a growing rejection of international norms and standards – particularly with regard to the protection of the rights of victims to legal remedy.⁴²

Other critical points are the extent to which the commission will have political independence and the degree to which the definition of victims is sufficiently comprehensive. There is a potential risk that victims of land dispossession would be excluded altogether, which would have major implications for the future stability of Burundi.

Why is truth-seeking important for victims of land dispossession? An accurate public record is needed for victims of land dispossession in order to establish a clear picture of what happened in terms of land and property in Burundi. This public account is necessary for practical reasons, with regard to ownership and owners' rights before the law, but also for emotional reasons, such as having the legitimacy of grievances recognised publicly within communities and among neighbours, as well as within the national narrative. Establishing the truth creates a basis for state acknowledgement of the past violations and for further reparative measures, such as measures to prevent repetition, to which we turn shortly. Thus, the principle of inclusion of all victims of human rights violations has to be applied also to land issues. Due to the importance of land and the present unsatisfactory situation, the exclusion of this group of victims could undermine the prospects for sustainable peace and reconciliation.

Another element of victim satisfaction is to ensure accountability for past violations. In Burundi, accountability is a difficult topic. Burundi's judiciary is perceived to be plagued by questions around

transparency⁴³ and impartiality.⁴⁴ The perceptions of the justice system also differ between residents and returnees according to the previously mentioned study supported by the Swedish International Development Cooperation Agency (Sida) and the Danish Refugee Council, undertaken by the local NGO, Rema Ministries. Apparently local residents who are often wealthy and have long-established personal relationships with several decision-makers in these institutions seem to be systematically favoured by them. As has been noted, the courts are not only too expensive for the majority of the Burundian population, but also over-burdened with cases around land and many other issues.⁴⁵ Generally, the capacity of the courts needs massive reinforcement through exposure to international norms and standards, as well as to best practices from contexts facing similar changes.

Symbolic reparations, as a further element of victim satisfaction, are generally designed to complement material forms of reparation, such as restitution and compensation. More psychosocial in their approach, symbolic reparations deal with victims' emotional response to violations. Symbolic reparations are about recognising the assault they have suffered on their human dignity. When planning and implementing symbolic reparations, it is crucial that victims and their relatives are integrally involved in the process. They need to be 'asked' what kind of symbolic reparations they wish for and enabled to participate in the implementation. Only then will the symbolic reparations be recognised as such by the victims and their relatives. Symbolic reparations are needed as a complement to other forms of reparations and should never be used as a replacement for restitution or compensation.

In the case of Burundi, the Arusha Peace and Reconciliation Agreement identified the need for memory initiatives, including the building of a national monument, the inauguration of a national day of remembrance, the identification of mass graves and the re-writing of the entire Burundian history.⁴⁶ A few monuments and commemorations have been established in Burundi, even though vastly disproportionate to the number of human rights violations. In 2010, the Burundian government constructed a national monument for all victims of violence. Of real concern, however, is that these initiatives have tended to be state-directed and top-down, rather than the product of state-facilitated dialogue in which victims take ownership of the process – from design to delivery – and of the product. Moreover, emerging local memory initiatives are, according to Impunity Watch, hampered by the reluctance of the government to recognise victims' associations or new commemorative events.⁴⁷

The results of the national consultations on transitional justice mechanisms in Burundi illustrate a demand for symbolic reparations. For example, the construction of monuments in the centre of every community or province was indicated as a form of symbolic reparations that was highly appreciated, along with official apologies by the state and by the perpetrators.

Guarantees of non-repetition: No land dispossession anymore?

The last form of reparations in the UN's Basic Principles and Guidelines on Reparations is guarantees of non-repetition, which comprises numerous measures designed to promote, reform and restructure the society in order to prevent repetition. The following four measures have the greatest significance to the land conflicts in Burundi, and will be discussed:⁴⁸

- *Strengthening the independence of the judiciary;*
- *Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;*
- *Promoting mechanisms for preventing and monitoring social conflicts and their resolution;*
- *Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.*

Guarantees of non-repetition are a form of redress for a past act, but also serve a preventive function in a post-conflict society's efforts to reconstitute itself and move forward. Their logic as a form of reparations lies in the recognition they imply of the wrongfulness and seriousness of the act, and in a determination to make the necessary changes to prevent recurrence. A broad and deep growth of a

culture of and respect for fundamental human rights needs to be developed to such an extent that it becomes entrenched in the life of a nation.⁴⁹

A strong and independent judiciary is crucial to growing a general culture of respect for fundamental rights and, as such, represents the cornerstone to any efforts to prevent the repetition of violations.⁵⁰ The *United Nations Basic Principles on the Independence of the Judiciary* provides a useful elaboration of the principle of judicial independence.⁵¹ It contains a number of criteria, such as the constitutional guarantee of the judiciary's independence from other branches of the state and jurisdictional exclusivity over all issues of a judicial nature. Furthermore, a transparent and representative system of appointments and independence in the performance of professional duties is outlined.

In Burundi, the separation of powers and the independence of the judiciary are proclaimed in the Burundian constitution⁵² and in other legal instruments. Despite this, judicial independence is widely viewed as precarious in practice and lacking translation into practice.⁵³ The 2009 *Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Burundi* highlights ways in which the justice sector exercises limited independence.⁵⁴ Recruitment examinations for magistrates are not held. The Ministry of Justice appoints magistrates without consulting the Superior Council of the Magistracy. Judges have allegedly been transferred in contradiction of constitutionally established procedures, and threats have been issued against judges handling politically sensitive cases. There is a strong need to strengthen the practical translation of the independence of the judiciary in Burundi, if future human rights violations are to be prevented. Since the majority of the cases before court are land related, the lack of independence of the judiciary is keenly felt in this area.

The observance of codes of conduct and ethical norms by public servants, another measure within the guarantees of non-repetition, is also vital for the prevention of further human rights violations. The state has the duty to promote this observance which should focus on international standards as a primary reference. The UN has developed a series of codes of conduct and minimum standards, such as the Code of Conduct for Law Enforcement Officials.⁵⁵ Article 7 affirms that law enforcement officials shall not commit any act of corruption. According to Transparency International, Burundi's public sector is amongst the most corrupt in the world.⁵⁶ Besides the Burundian judiciary, the administration of land has also proven to be a very sensitive sector for corruption during the last decades, as highlighted in a paper for the Annual World Bank Conference on Land and Poverty in 2012.⁵⁷ Massive efforts would be needed to address this issue in Burundi.

The promotion of mechanisms for monitoring and resolving social conflicts is another important measure of guarantees of non-repetition: after a period of violence on a large scale, social conflicts are likely to escalate, lead to waves of violence and, with that, to new violations of human rights. With regard to land, many returnees feel discriminated against and denied their rights.

According to the afore-mentioned study by the local NGO, Rema Ministries, some Burundian returnees feel a strong bias within the land dispute resolution system, accusing the institutions of politicisation.⁵⁸ The same study points out that the returnees do not have an equal voice to that of local residents who often have the advantage of a longer period of residence in the country and a better understanding of how to leverage the relevant institutions to pursue their interests. These findings give an indication of how easily this frustration could turn into renewed violence and how important careful monitoring of the events is as they unfold in the country.

Reviewing and reforming laws that have, effectively, allowed violations is another essential measure within the guarantee of non-repetition. In order to prevent the repetition of human rights violations, it is imperative that a state brings its domestic legal framework in line with hard-won international norms and standards in comparable situations elsewhere. Much effort has gone into pursuing this in Burundi and in 2009, a new criminal code was established. The code noted that a reform of the land management system has been under way since 2007, funded by USAID and different European donors.⁵⁹ The objective of the reform is the creation of decentralised municipal land services as the number of registered land plots is still insignificant (in 2008, barely more than 1% of the country's surface area). Subsequently, a new national land policy was adopted and a revised law was promulgated. This

new Land Code of 26 April 2011, which replaces the code of 1986, revokes the governor's authority to allocate state land and introduces land certificates and decentralised land administration. The delimitation of public land, the protection of parks and forests, and payment of compensation in the case of land expropriation, will be regulated by the upcoming 'Code d'aménagement du territoire'.⁶⁰

Burundian law, it must be noted, does not recognise the inheritance rights of women: wives and daughters are not granted rights under formal law to inherit land. Although Burundi has signed and ratified most of the international instruments regarding gender equality and included them into its constitution,⁶¹ women are still excluded from land ownership. Thus, women returnees face serious hardship.⁶² Whereas land rights and access to land may not bring an end to violations against women, not having these rights exacerbates their vulnerability. Addressing the situation would be a step towards guaranteeing non-repetition of the historical injustices of the past.

Recommendations

To the government of Burundi:

- Address the level of frustration about the existing land solving mechanisms to deal with land conflicts and the risk this frustration poses for the outbreak of new violence.
- Together with civil society and international partners, urgently develop ideas to integrate victims of land dispossession in the processes of truth-seeking and reparations; it might be possible to create a sub-commission for land dispossession within the envisaged Truth and Reconciliation Commission in order to assess the situation and to develop measures in addition to the existing National Commission on Land and other Properties (CNTB).
- Consider all forms of reparations for victims of land expropriation: restitution, compensation, rehabilitation, victim satisfaction, and guarantees of non-repetition.
- Develop a formula for compensation specifically for the economic damage resulting from land dispossession that is equitable towards all citizens, and feasible in terms of funding.
- Fulfil past promises to pay compensation and, together with other stakeholders, urgently establish ways of funding it; the form and modalities of the compensation should be discussed with the victims.
- Provide legal and social services for victims of land dispossession in order to guarantee their access to justice, as rehabilitative measures.
- Establish symbolic reparations for and with victims of land dispossession.
- Enhance and improve the independence of the Burundian judiciary.
- Ensure land rights for women and develop accompanying conflict de-escalating measures on the ground for the coming into force of this law.
- Carefully develop, manage and implement a reparations programme and let victims participate in its formulation and implementation.
- Plan and confirm the budget for the reparations programme as soon as possible, with the support and contribution of international partners.

To the International Community:

- Support the full and public disclosure of the facts about land expropriation.
- Support the formulation and implementation of a comprehensive reparations programme for victims of land expropriation by presenting good practices and lessons learnt from other countries.
- Support the Burundian government on a strategy to finance a reparations programme.
- Together with the Burundian government and civil society, carefully monitor social conflicts, especially those linked to land and the up-coming election in 2015.

To Civil Society:

- Encourage the disclosure of the truth, reparations for victims, and judicial and administrative sanctions against persons who committed human rights violations.
- Make suggestions for submission to the government and the international partners on how victims of land dispossession can be integrated into the truth-seeking and reparations process.

- Call for a comprehensive approach to reparations for all victims of land dispossession to create reconciliation and sustainable peace in Burundi.

Conclusion

For many Burundian returnees, the question of land is one of justice and reconciliation. Inevitably, many returnees classify those who have occupied the land they formerly owned as 'perpetrators' and themselves as 'victims'.⁶³ Current land-sharing practices are for many returnees unjust and an obstacle to reconciliation with those who took their land. In their view, those occupying their land are committing an injustice with the support of the central government and institutions such as the Bashingantahe. The debate over land in Burundi, as this brief has shown, can be reformulated to allow for the many possible forms of reparation. There is an urgent need to not only fulfil the economic promises – restitution or compensation – but also to take into account the socio-political history and deeply embedded cultural meaning of the land. The Burundian state has an obligation to provide victims with additional reparative measures, including rehabilitation, victim satisfaction and guarantees of non-repetition. Given the frustration of the returnees about the existing land dispute system, land issues cannot be solved through the CNTB's practice of dividing the land plots. There is evidence that returnees, who now have to share their land or have seen neither their land nor compensation, will contest it sooner or later by administrative, legal or other (violent) means. To leave the situation as it is would undermine the prospects for genuine reconciliation. Land has always been a source of inter-group tensions in Burundi and will remain a danger for sustainable peace as long as it is not appropriately addressed within the framework of reparations.

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