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Office for Conflict Research in Developing Countries

To promote Justice and Democracy in Burundi

An evaluation report of RCN's programme activities carried out
for the Burundi-Office of the Réseau des Citoyens/Citizen's Network
(RCN Justice & Democracy)
Ave Brugmann 76, B-1190 Bruxelles

written by

Dr. Markus Weilenmann,
Office for Conflict Research in Developing Countries,
Alpenstr. 25, CH-8803 Rüschlikon

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Content

Summary

The report opens the floor with a brief description of three selected *Problem Fields* that characterize Burundi's national conflict profile (**part 1**). Starting with *the difficulty of establishing the rule of law in Burundi* the report first outlines the end of the precolonial monarchy in order to stress some typical difficulties that the main colonial power, Belgium, had in establishing a new legal order in Burundi, the so-called "legislation congolaise" and how this legal power structure has fed Burundi's state administration since the post-colonial era. Then it shifts to Burundi's Ethnicity and the ongoing tendency of *conflict denial*, expressed in multiple attempts either to block public debates on crucial political issues and to make the bloody history of genocides a highly contested taboo subject or to push forward processes of the "pardon" without any serious attempt to clear the heritage of Burundi's bloody political history. Then the report comes back to Burundi's critical state/society interface and tables *the multiple constructions of civil society* and how they are linked to the basic need of the various political leaders to create political legitimacy. And finally is the question in the focus whether the social networks left behind by the former political party of national unity UPRONA have a decisive impact on the construction of the "new" civil society in Burundi and how RCN's interventions interact with that structuring pattern. The data-basis of this part is composed of historical, juridical and social scientific literature as well as of some quotations the author got during his talks with the staff of RCN-Burundi. RCN's programme rationale is understood then as an institutionally organised answer to these three Problem Fields.

In **part 2** attention will thus be paid to *RCN's programme in terms of content.* Hence, the report discusses – on the background of the aforementioned prolemfields – the *rationale of the Civil Society Programme* (chapter 1) as well as the one of the *Justice Programme Burundi* (chapter 2). Starting from general comments on the two programme proposals the author refers to his first hand data, collected during his stay in Burundi, and discusses the various project activities both programme units are actually realising in Burundi and how they are perceived by its own project staff. Both chapter close with some strategic comments that question inter alia the ways how RCN expects to respond to the discrepancy between the two state models, the feudalistic and the bureaucratic one and how both programme units bridge the gap between a sense of justice that is nationally valid and a socio-cultural one.

Part 3 discusses the results of the impact studies. It opens the floor with a critical discussion on the logical framework (chapter 1) of both programme units and outlines the results of the statistical investigations (chapter 2). All four impact indicators are interpreted against the background of the earlier statistical research data, the author already collected during the 1980s. This way, RCN's contribution can be incorporated into the historical development of Burundi's judiciary and the risk of coming up with too subjective advices can be minimised.

The results clearly indicate a great implementation problem. In Burundi, there are many courts, particularly in the corelands of the former kingdom that did since 2001 not implement any single court case – nor in criminal law, nor in civil law and neither in customary law matters! Striking is, that the corelands of the former kingdom are since the late 1960s also the showplace of many ethnic massacres and according to the research data do these showplaces still closely correlate with the non-execution of legal decisions. Unfortunately, the data give thus reason to question RCN's problem identification: Is it reasonable to emphasize the „access to court question" in contexts and countries where the litigation rate can be qualified as unproblematic? Is it worth the trouble to stress the appeal behaviour (the statistical results prove that the rates were and still are within an unproblematic margin)? Does a process time that is generally below one year constitute a „problem"? Is it wise to target

mainly the „Tribunaux de Résidence“ (TRs) in institutional settings where their efficiency largely depends also from the work of the „Tribunaux de Grande Instance“(TGIs)? Unfortunately also, the wide spread assumption that deep going structural changes such as a doubling of the population density as it can be observed in certain districts of the north east of Burundi would automatically entail a multiplication of land conflicts cannot be confirmed. The same plays for the general assumption that the ethnic identity (tutsi) as well as the gender identity (male) would have a negative impact on the litigation rate (that people would not have gone to court and that now, since these parameters have changed, the litigation rate would climb up). Also this hypothesis must be rejected. The contrary is the case! And on the other hand: What kind of steps did RCN already initiate in order to handle the long lasting problem of the non-implementation of legal decisions? Is the non-implementation of legal decisions just a technical problem? Can we in African societies, where the positive law is only linked to the organisation of power of the unjust military regimes and to the history of colonial suppression, limit our legal support to the modernisation of that law? What role do we attribute to the old judges of the former monarchy of Burundi, the abashingantahe? Do we accept, that in the actual state constitution their role is completely neglected? And what is our approach towards the inapplicability of many laws that are hindering any legal progress? And how to deal with the growing legal pluralism? In such contexts, what role should the local associations play? What is the contribution of the theatre „si ayo guhora“? And what is the potential of the „elogy of upright actions“ and of the radio sessions?
The report thus stresses in **part 4** the necessity to focus on the implementation problem in a much broader sense and to readjust RCN's actual ZIP („Zone d'intervention privilégié). In addition, it is important

a) to widen the scope and to include also the work of the TGIs into the programmes;
b) to train for each hill („colline“) one bailiff so that the problem could be solved without a too mechanical infrastructure (cars; fuel); to train also the other court personnel;
c) to continue with the logistic support for the courts;
d) to carry out the IT-project for the prosecution services;
e) to improve the communicative link between the legislative branch (parliament), the administration of justice and the abashingantahe in order to make the difficulties of implementing legal decisions within the public adminsitration negotiable;
f) to focus particularly on the critical interface state law/customary law and to launch a public debate on problems of legal pluralism;
g) to develop regional groupings of critical state courts in order to clarify 1) the different local and regional variations of the non-implementation of legal decisions and 2) the question whether particular regional or local conflict types or conflict configuartions remain aggravating;
h) in public discourses to link the non-implementation of legal decisions with Burundi's ethnicity and the discourse order on conflict denial and to reposition the work of the troop of performers within RCN's global programme structure;
i) to develop an enclosing structure for the postprocessing phase of the theatre „si ayo guhora“;
j) to reposition the local associations (i.e. clarifying the existing links to the old UPRONA structure) and to orient their contribution to the implementation problem;
k) to use the radio transmissions as inspiring platform for discussing the gap between a sense of justice that is nationally valid and a socio-cultural one and to improve a more participative approach of the radio journalists;
l) to relaunch the work with the „elogy of upright actions“.

0 Introduction

The NGO „RCN Justice & Democracy" (RCN[1]) is a Belgian implementing organisation. RCN is engaged in institutional matters and in emergency aid, it defends the right of an equal access to justice and insists on the requirements and needs to maintain the rule of law as a pillar of the nation-building in society. Funded by the Swedish International Development Cooperation Agency (SIDA), the Austrian Development Agency (ADA), the Intergovernmental Agency of the Francophones (IAF), the Belgian General Direction of Development Cooperation (DGCD) and the European Union's Programme for the Rehabilitation of Burundi (PREBU) RCN runs in Burundi a country office of its own. In accordance with the general mandate, RCN's Burundi programme refers to a twofold approach aiming at the promotion of justice and civil society matters.

0.1 The Task

This report refers to a field trip in Burundi carried out for RCN from Monday 9th May to Tuesday 31st May 2005. The overall purpose of the Consultant was

- to evaluate RCN's three year programme, named "For an equal protection vis-à-vis the law" ("pour une égale protection devant la loi"), ending this year and
- to identify the needs and prioritise the lines of intervention for the coming three year programme 2006-2007-2008

More specifically, the report has to prioritse the needs and lacks of the two branches of RCN's Burundi programme, the so-called „justice-appraoch" as well as the so-called „civil-society-approach" and, with respect to RCN's overall goal to improve the rule of law, to arrive at a clear understanding of the social impact of its programme activities by discussing the positive and the critical points[2].

0.2 Procedure and course of the mission

In order to identify the needs and lacks of RCN's programme structure, I modified *firstly* an evaluation matrix I had already used for other development projects[3]. The grid contains 12 critical topics, each one substantiated by several prinicipal questions[4]. Referring to RCN's two programme-units, I thus had several stimulating discussions with Anne-Aël Pohu, Sylvestre Barancira, Janouk Belanger and Sophie Mareschal (all from RCN). Taking their comments into consideration, I then tried to figure out what the concept and the target system of the

[1] RCN = Réseau des Citoyens/Citizens Network
[2] The Terms of References are in Appendix 1
[3] The utility of the grid of this matrix was checked during the evaluation of a human rights and justice programme in Rwanda (for the Swiss Agency for Development and Cooperation (SDC) and a Good Governance programme of the German GTZ in Ethiopia.
[4] For details see Appendix 2

programme-units consisted of, and how they fit into Burundi's conflict profile. For reasons of the positioning of RCN's approach within the development community I subsequently had some talks with RCN's partner structure as well as with some representatives of other development agencies, acting in the same domains as RCN does[5].
On field trips to Ngozi, Mwaro-Kayokwe, Kirundo and Rutana I entered in contact with RCN's target groups and evaluated RCN's input to the functioning of the basic courts (the so-called "Tribunaux de Résidence" and the "Tribunaux de Grande Instance") as well as to the project activities in the civil-society domain. Both programme units were thus analysed on the bases of four impact indicators which refer to the accessibility and the assertiveness of the state courts. Thereby it is about the litigation rate, the process time, the appeals and the implementation rate. During the field trips I investigated two "Tribunaux de Grande Instance" – the TGI Kirundo and the TGI Mwaro – and two basic courts, the "Trbunaux de Résidence" Makamba (Commune Rusaka) and Kirundo (Commune Kirundo). The gathered information however remained ambiguous. In particular, they indicated some weaknesses in respect to the significance of the collected process data (process time, appeal rate) and a serious implementation problem. I ordered thus an additional survey of **all** TGIs so that I could now evaluate for the time frame between January 2001 and June 2005 each 10th case, that has been inscribed at one of Burundi's TGIs. Along with an inspection on site, substantial discussions with the project personnel and some conversations with the justice personnel the indicators allowed thus a meaningful interpretation.

0.3 Structure

The report opens the floor with a brief description of three selected *Problem Fields* that characterize Burundi's national conflict profile (**part 1**). Starting with *the difficulty of establishing the rule of law in Burundi* I first outline the end of the precolonial monarchy in order to stress some typical difficulties that the main colonial power, Belgium, had in establishing a new legal order in Burundi, the so-called "legislation congolaise" and how this legal power structure has fed Burundi's state administration since the post-colonial era. Then I shift to Burundi's Ethnicity and the ongoing tendency of *conflict denial*, expressed in multiple attempts either to block public debates on crucial political issues and to make the bloody history of genocides a highly contested taboo subject or to push forward processes of the "pardon" without any serious attempt to clear the heritage of Burundi's bloody political history. And finally I come back to Burundi's critical state/society interface and table *the multiple constructions of civil society* and how they are linked to the basic need of the various political leaders to create political legitimacy. The data-basis of this part is composed of historical, juridical and social scientific literature as well as of some quotations I got during the talks with the staff of RCN-Burundi.
RCN's programme rationale I understand then as an institutionally organised answer to these three Problem Fields. In **part 2** attention will thus be paid to *RCN's programme in*

[5] The list of the discussion partners is in Appendix 3

terms of content. Hence, I discuss – on the background of the aforementioned prolemfields – the *rationale of the Civil Society Programme* (chapter 1) as well as the one of the *Justice Programme Burundi* (chapter 2). Starting from general comments on the two programme proposals I refer to my first hand data, collected during my stay in Burundi, and discuss the various project activities both programme units are actually realising in Burundi and how they are perceived by its own project staff. Both chapter will be closed with some strategic comments. **Part 3** discusses the results of my impact studies in Burundi. It opens the floor with a critical discussion on RCN's logical framework (chapter 1), outlines in addition the results of my statistical investigations (chapter 2). All four impact indicators are interpreted against the background of my earlier statistical results, I already collected during the 1980s. This way, RCN's contribution can be incorporated into the historical development of Burundi's judiciary and the risk of coming up with too subjective advices and conclusions can be minimised. In **Part 4** finally I summarize the key-points of my statements and propose some recommendations for a future RCN programme in Burundi.

Before going into details I would like to emphasize two points. There is firstly my positive impression I got from RCN's pragmatic approach. RCN is a very committed NGO and its staff displays an impressive industriousness. For me, it is furthermore the first time I have evaluated a development programme with such a low degree of ideological implications. With regard to the particular context of Burundi's society such a pragmatic approach is for all actors highly recommended. However, I need to stress that all development political interventions are also marked by many behavioural demands and other so-called "ought to be – statements" that refer to general visions of a "better world". And the crux here is, that all "better world – visions" in the end determine both the problem perception and its manifold descriptions. RCN's programme activities are not exempt from this process. No development agency, even if it applies a very pragmatic approach, can slip away from this problem. That does however not mean that the critique is irrelevant. According to Rottenburg (2002:92-93), one can on the contrary observe a very peculiar mechanism: During the processes of problem definition western societies and their organisational forms, as for instance their legal bodies, often become idealistic models. These models then contour the problems of developing countries. But what is in the beginning just a figure of thought, shifts in the course of time to an objectified assumption. In the end one believes that the idealistic models of Euro-America such as "civil society", "good governance" or "the rule of law" exist somewhere in the west as concrete realities and that the observed discrepancies in developing countries can just be explained by catchwords referring to all sorts of deficiencies such as "poverty", "war" or the "lack of education/training". One of the dangers emanating from such an approach is its unhistorical understanding of complex social processes and its corresponding supposition that "the solution" lies just around the corner. This can also entail a hyperactivity within development agencies and a missionary eagerness of some of its agents. All the more important therefore is the attempt to insist in this report on the historical dimensions of the social contexts in which RCN operates.

Burundi is secondly a very difficult and complex country and an international NGO, which comes to term with the instable basic conditions of Burundi's political decision-making and which is patient enough to cross the ethnical borders, to strengthen the social networking within Burundi's civil society and to improve the working of the judiciary at the most neglected first instance level, deserves our recognition. Having said this, I need to add that several of my comments and considerations aim at a challenge and it is up to the programme management to judge what is useful and what not.

Part 1 Burundi – an assessment of selected Problem Fields

For reasons, that will be of certain importance for the analysis of RCN's approach in terms of content, it is important to stress the interactive relationships between the history of the rule of law, the ethnic ideology and the manifold ways, Burundi's civil society has been implicated in national politics.

1 Problem Field I – the history of the rule of law

Burundi's history with the rule of law is anything but straightforward. As an agrarian state with a feudalistic past, Burundi's bureaucratic state power has to refer its own political directives at least to two cultures and two states, each alien to the other. There is the precolonial order left behind by an abolished sacred kingdom, characterised by its clientele structure, its oral culture, its agrarian economy and its feudalistic value system and there is the bureaucratic state model, imported by the colonial powers Germany and Belgium, aiming at the administering of indigenous culture by instructions of western law. Both models would have nothing to do which each other but for a history of violence (colonialization). But unlike all the other African countries and unlike most of all developing countries, Burundi (as Rwanda) already was before colonialization a homogeneous and culturally well rooted nation state which kept its country's frontiers till nowadays (see Laely, 1995; Müller, 1999; Weilenmann, 1997). In Burundi (and Rwanda) the colonial powers therefore had no need to launch a process of state-building. Rather, they first had to *destroy* a homogeneous nation state in order to build up (their) new one. Therefore, today two states got stuck into each other and the ethnisation of the political stage is a typical outcom of that problem, since it allows the personalisation of complex structural conflicts and the construction of a theory of scapegoats that reduces the whole mess to the „tutsis" and the „hutus" (see Weilenmann, 2000). Crucial is, that the two models of governance that constitute the background of such a change in state style, refer to two completely different paradigms of power. While the precolonial power center attached a great deal to the daily reproduction of loyality to the different authorities, expressed in a complex system of gifts, the *"ubegerêrwa"* and the *"ubugabíre"*, the colonial powers Germany and Belgium wanted pass to a policy of industrialization. The claim

to power, still centrally organized, was thus to be shifted from the former control over relations for the purpose of controlling objects to the control of objects such as the estates and the output capacity, which meant first an agricultural administration anxious for *"efficiency"* and *"straight executive power"* and second the relief of the subsistant economy to the monetised economy. But since the cultural identity of the Abarundi was always bound up with a state organisation, such a change in state style meant a cultural upheaval too. Although the western bureaucratic state model is today woven into the self-definition of the Abarundi, it never destroyed the cultural inheritance reflected in language and history. And the monarchical-feudalistic mentality, which is continually oriented towards blood relationships and is hierarchical, cannot rely any more on a state model that would correspond to this way of thinking. Burundi's history of the rule of law is thus not a history of a continuing development of legal regulations but mainly a history of destruction, suppression and reconfiguration. To show this, which has a decisive impact on the problem identification and on the corresponding solutions for development strategies, I have to go back to the pre-colonial times and to outline the change of law.

1.1 Law, power and control in pre-colonial Burundi

The Burundi of the end of the 19th century already showed very distinct characteristics. There was a clear structure of classes, there existed means of repression and organized forms for the absorption of resources, as there were taxes, compulsory labour, service in the troops for defense and others. Towards the end of the 19th century Burundi's organization of the state had therefore been untied from ideological forces and had put itself in the service of the control of power (see Laely, 1995; Weilenmann, 1997). In the centre was the control over persons with the purpose to obtain control over objects. This concept based not upon the hutu/tutsi – dichotomy, as so often suggested but on the notions *igihugu, uburundi* and *ingabo*. Typically, all three notions have a reference to the subordinates.

The notion *igihugu* has two components; it refers to the subordinates and it designates the area of domination as territory: So the spoliation of the inhabitants is called *kurya igihugu* (Rodegem, 1970:175). The term *uburundi* refers on the one side to Burundi as nation, on the other side it points to the population living in it: *„This expression designates mainly the mass of the Barundi, the population, the people, the ant-hill of Burundi"*(1970:376). And the root of the word uburundi - *rund* - comes from the verb *kurunda*: *„Heap up, pile up, store up, accumulate". Kurunda ubugwi: „be onwardly ripe"*(1970:375). The expressions *igihugu* and *uburundi* contain thus power- and moral-connotations and refer to the key conception of the precolonial power model, *ingabo*: *„army, troop* (1970:96), but also *„protection shields"*(Laely, 1995:57). *„The real meaning of the word becomes intelligible, if we (derive) it from the verb kugaba, which has a double sense namely "give" and "order/lead [have in one's dependence, own"]* (same publ., translated form the German by MW). Tied up in hierarchic relations that steadily refer to "top" and "down": Give and live in dependence on a third this already gives some idea of the situation of life at that time. The distinction in uburundi and igihugu makes it further clear, that the area of domination does not necessarily

correspond with the nation state even if the country is still very small. Burundi had at all times different centres of power which were arranged in groups around the royal residence(s) and which, especially in the 19th century - were permanently feuding with each other (Botte, 1982).

The social position of the *Bashingantahe* (i.e. the judges of pre-colonial state law), and their legal competence did **not** result from their aristocratic identity[6]. It emanated first of all from the local order, namely from the question where, in which sphere of political influence, in which enclave they lived and their social position depended only secondly on their legal competence to settle conflicts. Together with all the other farmers, the *Bashingantahe* lived at the beginning at a specific hill and therefore had an excellent local knowledge. After their nomination as *abanyarurimbi (i.e. bashingantahe of the king)* they had, together with the political authorities, however to wander around in the whole country. Thus, the *abanyarurimbi* passed through the same ritual as any other *Mushingantahe* of any hill ("colline"). Their name, *abanyarurimbi* is not deduced from the social position but from the special function as legal counsels of the king. At all levels of society, the *Bashingantahe* represented the general and the concrete law, they testified all legal norms, were considered as important moral instances and established the standards of decision-making to be applied for the concrete case. The judgement to be pronounced, which had as well a moral-normative as well as a normative-executive side, was neither an exclusive matter of the *Bashingantahe* nor was it exclusively in the hands of the political power holders. The question was rather, whether the *Mushingantahe's* ability to assert his legal-moral arguments persuaded the executive branch or whether political considerations prevailed. For the implementation of the legal decisions however, the king, respectively his political representatives were responsible.

1.2 The colonial regime: Splitting of law, legal reconfigurations and the formation of legal pluralism

With the colonial take-over of power, Burundi's legal structure became subject of a vertical and a horizontal split.

1.2.1 Vertical Splitting

Two parallel hierarchies were established, one for criminal cases and therefore subject to the European state law and a second one for questions of civil law matters, which settled conflicts according to Burundi's „customary law"[7] and was at the beginning retained under

[6] It is thus not a „tutsi-story" as today suggested by some political opinion leaders.

[7] I put Burundi's pre-colonial „customary law" in quotation marks since this law, though based on an oral culture, was state law. It achieved a very sophisiticated degree of formalisation and has not much to do with what is generally understood as customary law without quotation marks. To name Burundi's pre-colonial state law as customary law without quotation marks indicates an internalisation of the western state law ideology. According to this ideology all competing legal concepts of developing countries are qualified as „customary" in order to legitimate the claimed superiority of western legal standards.

control of the indigenous power structures. The legal order of April 27, 1917 served as a basis: *"Every judgment condemning to a penal sanction is subject to be revised through the representative (of the Resident/MW)"*(Rapport, 1925:69). *"The indigenous courts (...) are in the first place called to deal with conflicts under civil law. (...) The activity of the indigenous courts does not yet inspire enough confidence that it would be possible to grant them the right to pronounce penal sanctions of some importance"*(Rapport, 1929:50). The immediate goal of the *"ordre publique"* was then to compete and control the old Burundian state law, the so-called „customary law": *"The indigenous jurisdiction must by the way remain subject to a close and vigilant supervision through the personnel of the territorial service"* (same publ.). Two corrections were applied: first the *"ordre publique"* paid attention to the compliance with the new procedural rules which were codified subsequently. Second the contents of the statements inherent to the „customary law" were trimmed in so far as the *"ordre publique"* punished infractions of public institutions. It further regulated all personal rights (questions of identity, slavery, witchcraft, polygamy, affiliation cases, divorces etc.), which are summarized today in the *"Code des Personnes et de la Famille".*

1.2.2 Horizontal Splitting

The question of legal sovereignty depended on the position within the political hierarchy. The *„mwami"* (king), the *„baganwa"* (the chiefs of provinces) and *„batware"* (the chiefs of district) respectively *„ivyariho"* were subject to the European continental law. Conflicts of the local authorities, the *"chiefs of hill"*, as well as of the heads of family, the *„samuragwa"* respectively the *„urubanza rw'umuryango"* and conflicts within the family e.g. conflicts for lands and succession rights, conflicts which did neither refer to personal rights nor to penal cases, were settled according to the provisions of „customary law", which however, through these limitations, gradually suffered a loss of sense. *While the vertical split – known in the literature as the „dual legal system" – ended formally upon independence*[8]*, the horizontal split remained in the judicial system in Burundi.* This is evident in the heartland of Burundi, where the *bashingantahe* were increasingly rendered incapacitated and marginalized, but remained for the state judicial system irreplaceable depositories of knowledge about the pre-colonial legal order of the country.

1.2.3 Colonial formation of enclaves

Contrary to its own intentions to simplify the political structures the colonial power created new legal enclaves, the so-called "camps belges". These *new urban centres* were exempt from this splitting of law and subject throughout the country to the European continental law. The land in these urban centres was then parcelled (Barras, 1982). So there were two different courts for civil conflicts, the "tribunaux coutumier" and the "tribunaux extra-coutumier".

[8] See chapter 1.3

1.2.4 Procedure of appeal, instances of court and separation of powers.

Procedures of appeal, as far as they referred to a specific type of conflict subject to pre-colonial state law, remained further in the competence of the remodelled traditional jurisdiction. At the same time all judgments of all instances of court could be quashed through the European jurisdiction on the basis of the *"ordre publique"*. The traditional courts for neo-traditional customary law, the courts of the Bashingantahe on the level of the Batware, of the Baganwa and of the Mwami were suppressed. The location of the court was centralized and the traditional judges, the Bashingantahe were deprived of power. Belgium followed the current authoritative definition of law, common practice at that time also within legal anthropology, and designated the holders of the sanction power, the political authorities as the „real" judges[9]. The *"tribunaux indigènes de territoire"* (indigenous courts of territory) were the courts of first instance. Moreover there was a *"tribunal d'appel"* also called *"Tribunal du Mwami"*[10]. This court was presided over according to the relevant jurisdiction through the Mwami or the 'Resident'[11]. Later a further change in law started and improved this simple hierarchy. In addition the local jurisdiction according to „customary law" was competed by the one according to European continental law. In civil matters a Murundi was free to choose the official jurisdiction he wanted to address for a settlement. He thus could directly address the colonial courts in case he was unsatisfied with the neotraditional jurisdiction. Then the colonial courts applied valid European law to judge the case.

These are the elements of today's legal pluralism, which complicated Burundi's jurisdiction in many decisive ways, since this structural competition also undermined the credibility of any legal norm. Moreover the proclaimed partition of duties between the Belgian administration and the indigenous authorities remained unclear, it was at least subject to an utterly dubious arrangement: *"The administrator of the territory was entitled to take the place of the indigenous judge, when the court was held at the place of the administration; when the court was held elsewhere presiding through the European official was compulsory even if the official was not judge"*[12] (Reyntjens, 1985:151). This arrangement however introduces suddenly the place of court as criteria for the question, who presides the court and not the question of legal expertise. In addition this arrangement implicated a disregard of principles

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[9] *"Every delegate of the 'Resident' establishes for his judicial district a list of the chiefs and sub-chiefs called to act as judges and assessors in the indiginous court. He also appoints and at all events dismisses the clerk and assistant clerk. A turn is established between the chiefs and the sub-chiefs who are holding court on the basis of one chief in its quality as judge and five sub-chiefs as assessors"* (Rapport, 1925:68-69).

[10] This court, in spite of its name as "Tribunal du Mwami", cannot be compared any more with the former royal court of justice.

[11] *"The Resident, his assistant or a delegate specially designated by the Resident can take the place of the judge. This court has to do in appeal with judgments pronounced through the 'tribunaux de territoire'. When a judgement in appeal has been rendered by a court presided by a European judge then the court of appeal can only hold court when it is presided through the 'Resident' or an official designated by him"* (1925:69).

[12] The functions of the "administrateur de territoire" were highly manifold. *"He was in particular judge, officier of the ministry public, officer of the judicial police, bailiff, prison guard, notary delegate, civil officer, head of department of the public forces, propagandist for agricultural development, collector of taxes and tributes, officer of the census, territorial bookkeeper, trustee of credits, surveyor and cartographer, inspector of cemeteries, master builder, social promoter"*(Reyntjens, 1985:164).

of the separation of powers between judiciary and executive, a disregard the pre-colonial state never achieved.

1.2.5 To the development of the colonial legal system

After the second world war the European jurisdiction became more subtle. The organigram, valid as from 1948 (*"Décret loi du 5 juillet 1948"*) shows, that the primacy of the jurisdiction still remained the stabilization of the colonial domination and not so much, as often suggested, the formation of the rule of law or any other endeavour to control the political power in the name of a superior idea of justice. *"Indeed no distinction is made between magistrates in charge of administering justice and examining magistrates. The judicial inquiry was assured through the examining magistrates. There even existed courts with the name of 'Parquet' and 'Police' (courts of the prosecutor and police courts/MW)"* (Rozier, 1973:407f).

1.3 Postcolonial changes of law

Since independence an increasing penetration of the rural living space through the new bureaucratic state power is to be noticed. The postcolonial change of law may illustrate this process pretty well.

1.3.1 Instances: Reorganization of the jurisdiction

As a first step Burundi cancelled the duality of the colonial jurisdiction (Article 85 and 94 of the I. Constitution, Bellon et Delfosse, 1970), the partition in an "indigenous jurisdiction" ("juridiction indigène") and a "jurisdiction of the common law" ("juridiction du droit commun"). With this step, the formal basis for a homogeneous jurisdiction was achieved. However, this step was based upon a de-facto adoption of the old colonial legal order, which now was to be expanded to all rural living spaces. Herewith the new political rulers, the abahimatutsi-circles around Micombero, Bagaza and Buyoya, only slipped into the former colonial role of the white man. These facts were however hidden via a denouncement of the "indigenous jurisdiction", which was said to be based in its principle on the separation of the races and thus a very bad derivative of the colonial jurisdiction. But the formal basis of a homogeneous jurisdiction had only the effect that since that time the same court and the same persons apply two different legal conceptions, namely the codified state law of the former colonial power and the non-codified parts of Burundi's "customary law". And since nobody had no longer a monopoly on the interpretation of „customary law", it split again in two, into a "lawyers law" based on the lawyers interpretation of local „customary law", and into a "folk law" based on local interpretations of other interest and power groups.

1.3.2 Norms: Processes of codification

The codification of „customary law“ encountered huge difficulties, especially in the field of the rural usufruct all the more as the lands outside of the commercial centres are not parcelled and the rural usufructs are derived from the local history of relationship (see Gatunange et all, 2005). Consequently, the codification process started with the provisions for the personal rights. In 1980 for instance the family law was codified, which now ought to regulate the status of the persons and the multiple relations of the family members. With the ongoing massacres and the war, that unfortunately started after the murder of Melchior Ndadaye in October 1993, the codification process came to a temporarily end and was only relaunched after the signing of the “Arusha Accord”.

1.3.3 Rule of law: the separation of powers

The previously noted disregard of the separation of powers, that characterised the former colonial state law, was also a very typical mark of the republican regimes. Until the beginning of the democratisation process in the early 90s, there was a continuous increase of executive powers, thus in fact the expansion of the old colonial power strategy. At the time of constitutional monarchy (1962-1965) the different normative interferences are to be understood as „legislative acts” *“taken collectively through the king and the Parliament of Burundi”* (Bellon & Delfosse, 1970:X), whilst with the takeover of power by the first republican regime (Micombero) in 1966, the legislative orders became an exclusive matter of the President. Since until the signing of the „Arusha Accord“ they are classed as *“decree of law: legislative acts issued by the President of the Republic”* or as *“presidential decree: act of order or execution issued by the President of the Republic”* (1970:X). Bellon & Piron already insisted in a *“National Report”* in 1972 on the dominance of the executive branch over the judicial and legislative powers: *“The predominance of the executive has increased since the installation of the presidential regime. The president of the Republic, Head of executive power, also exercises the legislative power. In the absence of a basic law on judiciary, the independence of the judges is only guaranteed by an ordinary law, the Decree-Law of 1 April 1970 on the Status of Magistrates (BOB, 1970, 113)”*(1972:B-91).
Until the takeover of power by Melchior Ndadaye (6.93-10.93) the presidential politics led step by step to a nearly absolute composition of all important public appointments with Abahima-tutsi. After his murder till nowadays this constellation is subject to many polemics and corresponding political manoeuvres, ending in a brutal ethnic war with hundreds of thousands of dead. But hopefully the so-called *„Arusha Accord“*, signed in August 2000, might be a turning point in the most recent legal history of Burundi. In accordance with the second protocol of accord, the *first Arusha protocol* claims for instance in Article 7, paragraph 18, section b a full reform of the whole judiciary, containing a correction of all sorts of imbalances in respect to ethnic and gender questions. And section d requires a reform of the „Conseil supérieur de la magistrature“ in view of a long time looked-for independence of the judiciary. Actually, some slight changes as for instance a much more balanced politics of the

public officials are under way. However, this process is still full of ambivalences: While article 18 of the new state constitution for instance stipulates the respect of the government vis-à-vis the separation of powers and the rule of law, Article 209 assigns, like in precolonial times, the role as principal guarantor of the independency of the judiciary to the President of the Republic (i.e. the mwami) and not to the constitution, as is characteristic for a constitutional state. In addition, there are no corresponding implementation rules.

1.3.4 Bushingantahe

Since colonialization the bashingantahe lost their old judicial authority to render a judgment or anything like that. In the forefront were their witness functions and arbitration of emerging family quarrels. Their local knowledge of social references and particularly their legal-*moral* position became as a result more important. In the course of new governance relationships they functioned more as go-betweens: They were supposed to educate the superior authorities set over them about local conflicts that arose and disseminate as favorable an image of the prevailing regent as possible among the local people. This role was ascribed to them up to the end of the First Republic (1966-1976). During the Second Republic (1976-1987) the Bashingantahe were even more marginalised and this function was turned over to the local Party Committees, which were branches of Burundi's former single party UPRONA. In line with the already described increase of executive powers, these local Party committees replaced the bashingantahe and met *„every Thursday at the place of the old bashingantahe and at which all local problems are laid bare"* (Laely, 1991:243). They represented at the local level ('zone', 'hill') the "Communal Administrator" (Decree-Law No. 1/10 of 24 July 1987, Art. 2) and were obliged *"to assure public order, security, peace and health of the population"* (Decree-Law No. 1/26 of 30 July 1977, Art. 11). Most important was hearing all local disputes, which, as a rule, are tried to be settled by arbitration. If arbitration was not successful, then the committee was obliged to send the matter to the competent instance. They did not have any further legal competencies and could, like the bashingantahe, not render a legal judgment.

With the democratisation process that started in the early 90s and ended with the murder of President Ndadaye, the *bushingantahe* experienced a first, unexpected revival[13] that even got consolidated during the wartime that reigned since 1993. Though many *bashingantahe* got also involved in the ethnic massacres, some humanitarian development agencies started to wonder why specific regions such as the province of Mwaro remained exempt from such slaughters until today. UNDP finally made an investigation and figured out that at least one third of all the 34'000 enthroned *bashingantahe* are actually living in the province of Mwaro (see Centre of Humanitarian Dialogue, 2005). In Article 1 of the Arusha Accord, the *bushingantahe* is thus explicitly mentioned as one of the most important unifying powers, which would or could favour Burundi's social cohesion and Article 7, paragraph 27 calls for a reha-

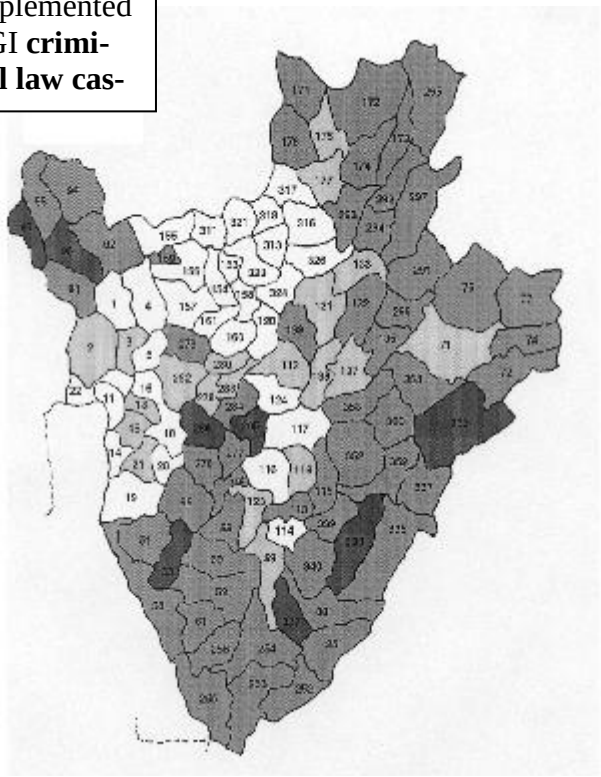
[13] Burundi's state constitution of 1992 stipulates in article 178 that the election of the political organs of the community would refer to the *Ubushingantahe*: „La commune est administrée par l'assemblée communale, le conseil communal et l'administrateur communal élu par l'assemblé communale. Ces institutions sont élues dans les conditions prévues par la loi. L'élection de ces organes se fonde sur l'Ubushingantahe."

bilitation of this old institution. But also this approach still remains ambivalent. In the actual constitution (02. 2005), the *bushingantahe* sink again in silence and the new law on the organisation of the judiciary (03.2005) delegates their former role as lay judges and assessors to the clerks. Of course, this process again entails a lot of frustration and anger on the side of the *bashingantahe*[14] and all those, who still remain so much attached to Burundi's history loaded traditions.

1.4 Consequences: Limited capacities to implement legal decisions

An important element of Burundi's history of the rule of law concerns the implementation capacity of state courts. With my own research on the functioning of Burundi's „Tribunaux de Grand Instance" I was inter alia able to draw a geography of Burundi's court-use and to map the implementation (in-)capacity of these courts during the second and at the outset of the third Republic of Burundi (see Weilenmann, 1997:159f)[15]. The landscape of all implemented criminal cases for this period looks as follows:

Map of all implemented TGI **criminal law cas-**



[14] see the transcipt of a talk with Jacques Manilakizwa, Président du Conseil Provincial des Bashingantahe, appendix 4

[15] The charts are basing on a data-body of more than 20'000 court cases that are referring to a complete inventory count of all cases registered at all TGIs in the years 1979-1988.

If we focus in addition also on the spatial implementation capacity of the customary law and the codified civil law, we can easily identify that Burundi's bureaucratic organised military regime was only able to implement its legal decisions mainly along the Tanzanian border, in Burundi's south, where most of all governmental staff was coming from, and in the north-west-strip of the country.

Map of all implemented TGI cases on **customary law** (1979-1988)

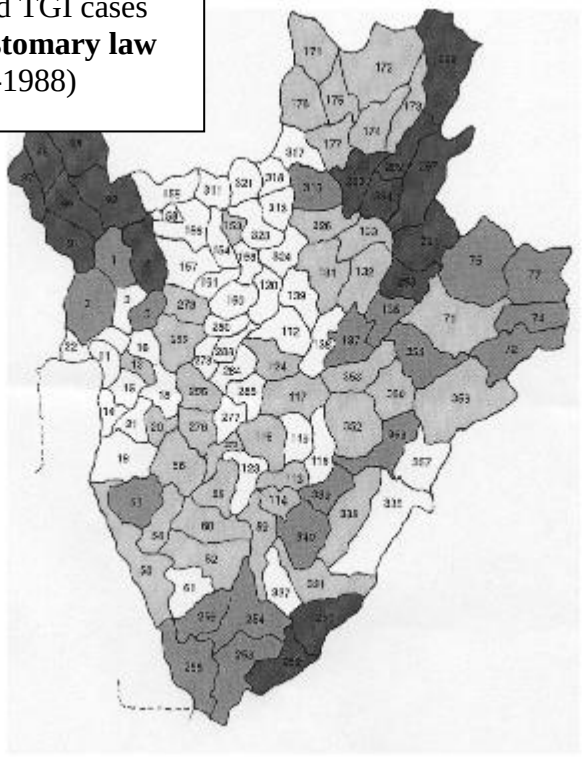
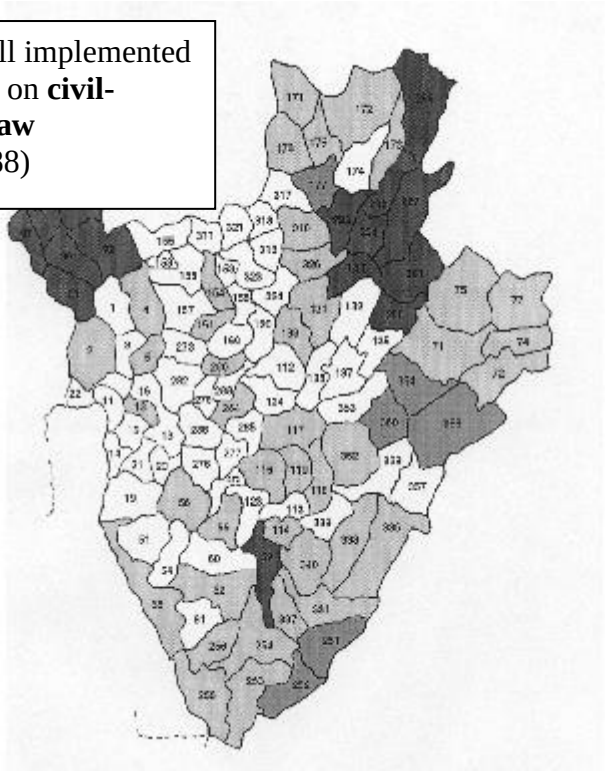


Chart of all implemented TGI cases on **civil-codified law** (1979-1988)



This observation is all the more surprising as it seems as if the different normative regulations of the various legal bodies only play a subordinate role. There is for instance a continuous negative connection between the implementation capacity per district and the pre-colonial power order of the former kingdom, which is particularly significant in the customary part (see chart above) and in the civil codified part as well. Interesting becomes this observation also, if we refer to the massacres of 1993, which has been officially mapped. In 34 of the 53 districts, that is in 64% of the localities in which the massacres of 1993 took place, the implementation capacity of criminal law matters is below 30%. The same is true for 44 of the 53 districts in civil-codified law matters and for 43 of the 53 districts in customary law matters. But it is also striking to see that the principle zones of weak legal implementation are involved in almost all the killings having taken place up to now in Burundi (Weilenmann, 1998:154f). We can refer to the massacres of Marangara/Ntega, that took place in 1988 or to the huge massacres from 1972 to 1974, that started in the north of Bururi (Rutovu), or to the massacres of 1965, that happened in Bukeye, always we are confronted with the same observation: While the pillars of the former feudalistic order were largely destroyed during the colonial and post-colonial period, the emerging bureaucratic regimes were however rarely able to implement an alternative legal order that really penetrated the social relations in the countryside. In regions with such a low implementation probability, it sounds therefore logical that in times of political crisis the attachment to strategies of self-help would be self-evident.

A first glance at the actual implementation capacity of Burundi's TGIs finally indicates a complete break-down of their legal assertiveness. While in the years 1979-1988 the average implementation rate for criminal law cases was very bad but at least at 26.6%, we have now an average of only 5% (2001-2004)![16] The corresponding figures of the codified civil law (1979-1988: 13.9%; 2001-2004: 15.4%) and the customary law (1979-1988: 24.4%; 2001-2004: 13.8%) are not very comforting either. A more detailed analysis of the geography of the implementation (in-)capacity indicates that there, where the courts already troubled in the 1980s we have in criminal law matters now a complete break down, that means an implementation rate close to 0%. And in most of the places where the TGIs already tried in the 1980s to implement at least partly their legal decisions, their actual implementation capacity is – though much more weakend – still a little bit existant[17].

[16] 11 out of 17 TGIs didn't even implement any single judgment of criminal law (0%)!
For details see Appendix 5

[17] see

	implementation capacity 2001-2004		
Bururi	criminal law 25.0%	civil law 33.0%	customary law 36.0%
Rutana	criminal law 15.4%	civil law 100.0%	customary law 44.45%
Kirundo	criminal law 12.5%	civil law 50.0%	customary law 63.64%
Ruyigi	criminal law 6.5%	civil law 33.0%	customary law 33.0%

From this angle the critical points are:

- *1) How does RCN improve the interactive relationships between the two models of governance, how does it bridge the cultural gap between the needs and means of a modern state bureaucracy and the living conditions in the countryside, principally marked by an agrarian economy and feudalistic interpretations of governance?*
- *2) No legal concept is out of the political power play outlined above. Lawyers and legal scientists however often have the tendency to reduce all law to Western state law. This way, their advice unfortunately get the smell of partisanship* (see Morse and Woodman, 1988)*. In addition, development cooperation is highly normative and this way predestinated to favour only one single normative approach, usually Western state law. Therefore: What kind of legal concepts are favoured by RCN's programme to promote justice and the rule of law and why?*
- *3) How does RCN's attempt, to improve the rule of law fit into the legal-political history of Burundi's nation state?*
- *4) What impact have RCN's supports on the actual implementation capacity of state courts?*

2 Problem Field II – Ethnicity

The multi-sided power struggles and violent ethnic conflicts, under which Burundi has been suffering since the end of the monarchy in 1966[16], are in line with the exposed problem of establishing the rule of law and the missing cultural and political legitimacy of the ruling powers. Widespread killings for instance are an extreme example of how power-political helplessness can be concealed by brute force. Burundi's ethnic ideology refers not to a former ethnic heterogeneity (in pre-colonial times there was one language, one legal order, one religion, one political system and agriculture and pastoralism never excluded each other) but to the break-down of the former aristocratic order as well as to the instrumentalisation of group ideologies by the colonial powers[17]. It is thus important to distinguish Burundi's folk concept of culture, marked amongst other points by its ethnic ideology, from culture as a scientific concept. No scientific definition restricts culture to biological characteristics or to characterstics of the male line only: A folk concept that distinguishes between „nobel" and

[16] With the removal of the throne successor Charles Ndizeye as King Ntare III in 1966 – he has been murdered in the early 70s – , Michel Micombero, an army captain, seized power, which has been since then (apart from a short interruption mainly 1993) until 2003 in the hands of selected clans of the so-called „Bururi-Matana group".

[17] Belgium, for example, broke the hereditary line in all the cases where *Bahutu* were in charge as local chiefs, so that the *Bahutu* finally completely disappeared from the political landscape. With respect to the future organisation of the state apparatus the connection between ethnicity and school education had a key position. For the selection of candidates the new rulers orientated themselves consequently on the "*Hutu-Tutsi* - question" and designated the *Abatutsi* from the outset as the real noble caste, exhibiting the ability for leadership *" from a more modest source, although belonging to the noble class, educated, converted to Chirstianity and much inclined to follow the civilising views of the white man"* (Rapport, 1931:61).

„modest“ ethnic groups and stipulating that ethnic identity is the bequest of the male line only is part of the culture and by the way very typical for an ***aristocratic*** society.
The cultural link between biological constitution (ethnic attributions, fertility, sex), physiognomy (neck, ribs etc.), social status and political power was and still is crucial for Burundi's societal stratification. For those who have the legal and administrative posts come from certain blood lines of the Abahima-tutsi and often look different. Simply put, it can be said that the state of Burundi had until 2003 a certain countenance. This induced a personalization of political processes and led to today's political dead end. These processes are paralleled by the classical problems of a state bureaucracy in an agrarian society: Due to the lack of an appropriate infrastructure, for instance awful conditions for communication (bad roads and frequent road blocks, missing telephone lines, a bad transportation system etc.), it became very difficult to govern the countryside. Homogenous instructions, as they are included in codified legal norms, assume a tremendous amount of local informations, if the public administration is to fulfil an equal treatment of third parties. Correspondingly, a tremendous need is growing for one-dimensional political movements, the setting up of a single-minded „unité de doctrine“ or the forming of a political unity party, having its branches spread all over the country. In Burundi, this need is largely echoed by the agrarian logic of such ethnic attributions. Hence, the political impact of ethnic or fascist movements cannot be understood without the consideration of this disorientation, without the ambiguity of violence and powerlessness as it is also manifest in the incapacity of state courts to implement its legal decisions. It is just the social significance of such ethnic attributions, gaining in moments of political crisis an enormous power, that demonstrates the actual weakness of the Burundian nation state. The corresponding problem of cultural legitimacy of the rulers has however hardly been touched upon today. While the state agents and their epigones find refuge in the continuous extension of the state and parastatal arm,[18] various international agencies of development cooperation have intruded by conditioning aid on democratization along a western ideal, without raising the key-problem of cultural legitimization of governance as such. The results of such an omission can easily be shown: While the history of the cultural and state rift runs through the entire population and raises the issue of cultural, psychological and political self-definition, manifest today in a powerful ethnic ideology, many development agencies only operate within the social context of the modern urban sector and its islands in the countryside. Ignoring the enormous political consequences of such a social and cultural rift they often regard agrarian societies as being simply backward, needing to cope with their „traditionalism“[19].

[18] Since Independence there have been six state constitutions, a fundamental reconstruction of the local administrative structures, the assumption of modern infrastructural duties, some measures indicate a *case law* that not only is affected by this change but also supports and deliberately promotes this process.
[19] Often, instances of nepotism, social exclusion and corruption are put down to „traditional“ networks only and people are asked to have their land registered, to marry monogamously, to apply for credit, to use fertilizer, to plant cash crops, to practise birth control, to learn their human rights and to pay taxes (see Franz von Benda-Beckmann, 1989). In this way, development agencies become „parquet floor organisations“ (see Lipsky, 1984) of international law and global western culture labeled by the European Union and the United States – and not cultural mediators taking the structural social contradictions as starting point for bridging the gap between the current local living conditions and the socio-political requirements of a modern nation state.

A very typical feature of Burundi's ongoing power struggles is the development of a widely accepted discourse order of conflict denial, which had its break through in the aftermath of the genocide of 1972. I guess that these patterns formed the historic background for processes of social disintegration, which became valid anew after the genocides in the aftermath of 1993. Hence I go back to the various patterns of argument that emanated after 1972.

2.1 Dynamics of a discourse order of conflict denial in a war-torn society

Under the impression of the genocide in 1972 – 1974, the former president Jean-Baptiste Bagaza[20] (1976 – 1987) declared in an official statement a full taboo concerning the ethnic conflict, pretending that there were no ethnical units at all[21], no Abatutsi and Abahutu but only Abarundi. Thus the taboo covered up the conditions by means of which the state class maintained power. When I travelled for the first time to Burundi in 1978, I was warned to use my job title, since my subject „ethnology" might evoke tabooed connotations such as „ethnic conflicts", „ethnicity" or even worse, „ethnocid". But if in Burundi there were no ethnic units, then there were also no ethnic slaughters and no genocides[22] but just ‚class battles'. For the political discourse and the perception of Burundi, inside as well as outside of the country, such a taboo evoked several deep-going consequences:

2.1.1 Politics with the minority argument

The social position of the abatutsi-leaders as an ethnic minority could be swept under the carpet. In April 1989 a governmental report was published that dissociates itself on the one hand from the paralysing taboo and takes up officially for the first time the problem of national disunity. On the other hand, pre-colonial Burundi is depicted as possessing harmonious unity, and with reference to the French historian, Jean-Pierre Chrétien, the myth is spread that the ethnicity of society has to do only with the Belgian colonial politics (cf. René Lemarchand, 1989:686). With the take-over of political power by Melchior Ndadaye thanks to democratic elections in 1993, the *political minority position* of the ‚Bururi-Matana-group' became finally visible for everybody. The murder of this president, he was killed in October 1993 by members of the army, since the early 80s largely controlled by the Abahima-tutsi,

[20] Bagaza still plays an important role in Burundi's national life of politics. After his deprivation of power in 1987 he spent some years in Libya and returned to Burundi after the democratic elections of 1993. He founded a new political party, called PARENA and started a new career as a kind of right-wing activist (and trouble-maker), advocating for the monopoly of power by the „Bururi-Matana - Group" and its devoted circles.
[21] The ideological basis of this statement refers to Emile Mwohora's work „Peuples et rois de l'Afrique des Lacs" (1977). In the 80s Emile Mworoha got scretary of Burundi's political single party UPRONA.
[22] Large scale ethnic slaughters and genocides happened in 1965, 1969, 1972-1974, 1988, 1991 and from 1993 until nowadays.

led for the first time to a real genocide of the abatutsi[23] minority in the countryside. Since the Coup d'État of Pierre Buyoya in August 1996 the *minority argument* has been thus systematically used as a political tool to authorize the claim to the monopoly of power by the abatutsi.

2.1.2 The politically delegitimising power of the taboo 1972

The 1972 taboo delegitimised the social significance of key-institutions of a modern nation state: The taboo that covered up the real conditions by means of which the state class maintained power, turned the public announcement proclaiming Burundi as ‚Democratic Republic' into an act of propaganda directing only at the donor community. Elections, parliament, unity party, council of ministers – all became fictitious institutions hiding the political intrigues and manoeuvres by which a military clique, strongly controlled by the ‚Bururi-Matana-group', monopolized political power. With the failed attempt to institutionalize a democratic order in the early 90s, sceptic attitudes vis-à-vis the already existing parts of the rule of law retained the upper hand.

2.1.3 Societal rifts

If one compares the way in which, on the one hand, the official report of national unity is offered as conflict resolution and on the other how the politicised Abahutu groups living abroad deal with the recent history of Burundi, it becomes clear how the recollections of Burundi split in two: in a pre-colonial culture oriented segment of the "Rapport de l'unité nationale" and a genocide-oriented segment, that lives according to the Hutu-Tutsi dichotomy. Bagaza's attempt to establish a taboo concerning the events of 1972-1974 could also be understood as a helpless strategy to ‚nationalize' a disunited Burundi, that means to sever old positions of power as the one of the (mainly catholic) mission, to push vigorously ahead the historiography of the nation state, as well as to ‚modernize' traditional conceptions of values and to replace the respective exponents[24] through young rising cadres. But with the officially proclaimed taboo Bagaza behaved as a king of the ‚good old times', who still told the population, what it had to do and what it had to avoid, if the whole nation were not to disintegrate. With this act he referred to the old monarchic tradition, as the establishment of the ‚taboo 1972' can be understood as the will to strengthen *per decree* national identification instead of ethnical ones. It found its counterpart within the ‚abahutu-community' living in refugee camps like the one of Mishamo (Tanzania). Their structuring observation pattern, as it has been well described by Liisa Malkki (1995), follows entirely the Hutu-Tutsi – dichotomy and gets by almost without any state history. It seems as if there never was a precolonial Burundi nation state; as if the societal contradictions, that became especially obvious

[23] All the other attempts, which have been made before by politicised abahutu-groups failed or had a rather limited impact on the abatutsi

[24] Bagaza for instance strongly weakened the former positions of the „bashingantahe" and he pushed the codification process of modern law foreward.

during the colonial period, were only linked to the abatutsi; as if Belgium had not only in the fifties, but forever already, sided with the Abahutus. The state and its history is reduced to the physical aspect; it is personalised, "tutsi-ised", and problems of administration are termed to be ethnic. This becomes clear from the conflicts in which the refugees in the camps become involved with the Tanzanian administration. Their representatives are said to be Tutsis and the UNHCR who defended the interests of the (hutu) refugees, a Belgian relationship. Characteristic is furthermore the mythical excessive timelessness: all Tutsi descriptions come along as constitutive characteristics reduced to physical features and any kind of maliciousness. The collective clichés reveal the racist thinking. The political history, as long as not linked to the 1972 genocide and the purging, is substituted by myths, ethnicised, and relegated to the unconscious. Common to both versions is that the other always is the aggressor. The result of the genocide, the societal rift, is revealed primarily in a fragmented access to time: it is, as is the access to history too and to the national identity, partly concealed and stretched, and torn. What disintegrates – until nowadays – is the coherence[25].

2.1.4 Foreign formations of reactions

In foreign countries this discourse order of conflict denial, particularly the ‚taboo 1972' started to generate its own dynamics, which to the contrary, upgraded the racial, ethnic or tribal side of the social tensions. In particular in the eyes of western observers the existence of this taboo „proved" by itself the enormous relevance of ethnic or tribal attributions in Burundi (see f.i. Greenland, 1974; Rodegem, 1974: Weinstein, 1974; Savatier, 1977; Reyntjens, 1994; and many others). It was no longer asked, what were the different motives of the groups and persons engaged in the fight for power, influence and prestige. The taboo as piece of evidence of the actual ethnicity and the taboo (not the ethnicity) as means of the actual politics of power seemed to be one and the same. These interpretations became also mental guide-lines for many Abarundi, living since 1972 in the diaspora of Europe and Canada and returning to Burundi in the aftermath of the democratic elections in 1993 as well as from 2004 onwards with a very westernized image of Burundi's ‚backwardness'.

2.1.5 Spirits and witchcraft

And finally the idea, that the taboo could represent still another, completely strange reality, which also emanates from a culprit fiction, namely from cruel persecution, remained far away: In rural Africa an already frequently observed phenomenon concerns however the "*smothering"* or "*sweeping under the carpet*" of conflicts (cf. for example, Bierschenk and de Sardan, 1998:19). The problem is that whole conflict configurations develop in this way to

[25] Even the „Arusha-Accord" clearly demonstrates this problem. The conflicting parties were still unable to give way to a coherent interpretation of the facts: „Les avis divergent quand il s'agit d'interpréter ces phénomènes et l'influence qu'ils ont exercée sur la situation politique, économique et socioculturelle actuelle du Burundi ainsi que leur impact sur le conflit"(Art. 3, para 2). The most crucial task is therefore delegated (or relegated) to a UN-commission on international law who should investigate the history of genocides and other crimes against the humanity (Art.6, para 10).

fester unseen. In the rural everyday routine of Burundi, this leads to ubiquitous concealed misrepresentation, curses, suspicions, and accusations of witchcraft. For an outsider it is extremely difficult to have access to this largely secret world. The sense of the taboo, to attempt to contol the ghosts through numerous measures of protection is often itself under taboo. Sylvestre Barancira, the only national ethno-psychiatrist and actually the coordinator of RCN's Burundi office, who wrote on that subject (1991), was also afraid to debase them, because the idea of the possession by ghosts could also be taken as a proof for the ‚primitiveness' and ‚underdevelopment' of Burundi.

2.1.6 Conflict denial and attempts of amnesty

Hand in hand with this „smothering" or „sweeping under the carpet" of key-conflicts of Burundi's cruel history go the manifold attempts of nowadays to push forward any forms of the „pardon" or even of a complete „amnesty" of all the rural slaughters and self-proclaimed executioners. To pardon however is only possible, if the subject of the pardon is clear. Otherwise, it simply degenerates into a formal „rite de passage" without any legal, social or psychological implications or consequences, as it was by the way the case with the rite to wash ones hands in the blood of a sheep, practiced by the political leaders during the preparation phase of the elections in 1993.

In combination with the aforementioned discourse order of conflict denial within the state class there is thus an enormous potential for an explosive situation. The rift stemming from the genocides and passing not only through the societal structures but also through people, leads to a very, very problematic situation.

- *For conflict resolution programmes it is therefore crucial how RCN deals with the ethnic ideology of Burundi's society. Two principal sets of questions could be tabled:*
  - *1) Does RCN really distinguish in the folk concept of culture and the scientific one or does it just refer to a „tutsi-„ and a „hutu-culture"? How does RCN operationalise the distinction in folk and scientific understanding of culture? What role does the fundamental social contradiction, i.e. common people vs aristocracy play? How does it respond to the interactive relationship between the ambiguity of violence and powerlessness of the nation state and the ethnicity?*
  - *2) By which measures are the RCN-programmes able to open doors in such highly contested social fields? How and how far can they deepen the political process of reconciliation? What kind of peace promoting inputs do they introduce in the ongoing processes of reconciliation? Do the actors of civil society really gain more abilities of acting? How does such a programme relate to the „Do no harm" – approach?*

3 Problem Field III – Politics within civil society

3.1 Concerning the legend of the „new civil society“ of Burundi

In most of all developing countries around the globe the actual discourse on civil society is very much influenced by the Anglo-Saxon paradigm. Many authors have already showed how this paradigm, that assumes a structural contradiction between the State[26] and society, often hampers – particularly in Subsaharan Africa – a deeper understanding of the historical and political shifts that once led to the formation of civil society there (see Comaroff and Comaroff, 1999; Hann and Dunn, 1996). This problem is also acute in Burundi. UNDP for instance organised in February 2003 so-called „journées de réflexions“ on the social significance of Burundi‘s civil society. In his opening speech, the General Director of the Public Administration (Ministry of Interior) of that time, Mr. Térence Mbonabuca, echoed the widespread understanding of today, namely that Burundi’s civil society is very young: *„Elle s’est développée vers les années 1990 avec le vent de démocratie qui faisait rage, et surtout avec la crise de 1993“*(UNDP, 2003:2). Unfortunately, this assumption refers to an ongoing tendency to always confuse political conception and social phenomenon, which entailed also in Burundi many statements, that only took the most recent history of civil society, based on the Anglo-Saxon paradigm, for granted.

The French conception however, that stays in the republican tradition, had long before a quite considerable impact on the formation of civil society in Burundi. The French paradigm is rather based on *„terms of a classical idea of the cité – a community of citizens who ideally practiced ‚civic virtue‘ by participating in public life and devoting themselves to the common good“*(Gary Wilder, 1999:51). The republican civil society is thus *„peopled by citizens (not individuals) and defined in terms of their right* ***to participate in government*** *(not in terms of their right to remain untouched by state power).“*(same, emphasized by MW). This conception, during colonial times mainly used to justify the corresponding political interventions (civilize the natives) and at the same time excluding them from any political participation (they are not yet civilized), mutated after Burundi’s independency into an important political tool of the Abahima-tutsi regimes, who then controled Burundi’s single political party UPRONA (party for unity and national progress)[27].

3.2 UPRONA‘s heritage – a structuring pattern for the organisation of development agencies

During the times of the military regimes, the mass of Burundi’s total population was subdivided into those who aspired to participate in government and thus had to become an active party member of UPRONA and those, who had to be sensitized via the channels of this political structure.

[26] The State as public authority and therefore capitalised, not the state as a synonymic category of a nation-state and thus identical with the whole society.
[27] UPRONA = **U**nité et **PRO**grès **NA**tional

The foundation of the UPRONA which only later became Burundi‘s single political party goes in fact back to the oldest son of Mwami Mwambutsa, Prince Louis Rwagasoré, who based his political aspirations on the vision of a mainly economically well developed Burundi. He thus promoted the creation of local associations, development cooperatives and local penny banks in the countryside in order to mobilise Burundian’s farmers for his own political purposes. After the coup d’État in 1966, Micombero took possession of UPRONA as an important political reservoir to create political legitimacy and transformed it into Burundi‘s single political party: *„The Party for Unity and National Progress (...) presided over by the Head of State, aims to incorporate the whole of the population; it inspires the actions of the political organs of the State and exercises control over the Youth Movements and over the Trade Unions“* (Decree-Law of 23 Nov. 1966, BOB. 1966:493). A typical outcome of this and the succeeding military regimes is the so-called „Admicom“[28], in Kirundi the „umusitanteri“, who was in a kind of personal union at the same time the principal „development agent“, „popular educator“ and the principal „policeman“.

Though with the political changes in the early nineties this period has now gone, it left some structures behind, that didn‘t just disappear with the new orientation towards the Anglo-Saxon pradigm of civil society. On the contrary, this period left some important structures behind, networks for political and development related issues for instance that now constitute key-elements of the heritage of the so-called „new civil society of Burundi“. In addition, one has to be aware that the former single political party of national unity had a huge impact on the political mobilisation and sensitisation of all those who attained maturity before 1990. In fact, most of those who are actually around 40 years old, have been trained and/or mobilised by the former single party and played sometimes even a key-role[29]. Though the philosophical concepts and the corresponding political orientations changed in between, it is still important to ask for the history of these networks. They might still have a not disdaining impact on the formation of new coalitions that of course do present themselves in public today in newer and more accurate ways. This is thus not to say – of course not – that the actual form and orientation of Burundis civil society would be identical with what was once the case under the former military regimes. Todays civil society has achieved a degree of plurality Burundi‘s public sphere never ever knew before. Nevertheless, it is very important to take the historical conditions of its social formation into consideration. Otherwise, the risk is too high that the problem descriptions refers to wrong or misleading notions. Illuminating for the role of the former networks on the actual form of burundi’s civil society is certainly the following excerpt of a transcribed interview, I had with some staff members of RCN on the occasion of my visit to Burundi:

(...)

(Question): Quelles sortes de concepts de la „société civile“ sont appliquées au Burundi? Comment ces concepts sont-ils liés aux besoins de l’aide au développement? Est-ce qu’il y a des modèls concurrents, appliqués par ex. par des partis politiques et/ou par l’Église?

[28] Administrateur communal

[29] Eugène Nindorera for instance, actually a leading personality of Burundi’s civil society and the promotor of the well-known human rights NGO ITEKA and Ex-minister of Justice and Human Rights, was once an important organ of the UPRONA’s Youth Movements JRR (Jeunesse Révolutionnaire Rwagasoré).

(Sylvestre Barancira[30]): Les ONGs ici sur place, elles appliquent le concept anglo-saxon. Cela concerne les ligues des Droits de l'homme, l'Observatoire de l'Action Gouvernementale (OAG), les formations syndicales, cela fonctionne de cette façon. Les structures qui sont laïques, ce sont des associations de type moderne. Les confessions religieuses sont beaucoup plus structurées dans le sens de la citoyenneté, de la régulation de conflits, des acteurs étatiques et le point de vue des citoyens, c'est dans ce sens....Sachant que les confessions religieuses sont beaucoup plus puissantes que les associations laïques, elles sont plus enracinées à l'interieur et aussi mieux enracinées dans plusieurs composantes de la société Burundaise.

(Question): Est-ce qu'il y a des modèles concurrants appliqués par des parties politiques? Est-ce qu'il y a des partis politiques qui utilisent le terme de société civile (SC) d'une manière contradictoire?
(Sylvestre Barancira): Il y a quelques-uns qui structurent des associations communautaires de développement. Alors nous trouvons des groupes d'intérêts qui luttent pour les intérêts d'une commune bien déterminée et qui se demandent, quelles actions pouvons-nous promouvoir pour renforcer notre position au sein de telle ou telle commune. Dans leurs actions, ces associations ne poursuivent pas nécessairement une politique bien déterminée – il y a des associations agricoles, des associations pour la promotion des femmes, des associations communautaires etc., - mais leur stratégie de développement sert certainment à un but politique (renforcement de la popularité; accès au pouvoir). Ce sont alors des organismes qui veulent canaliser le „fleuve" des ressources. C'est alors encore un autre concept. C'est le concept du clientélisme, encadré dans les structures de la SC. Alors s'il s'agit des élections, les leaders commencent à dire que c'est moi qui ai amené le centre de santé, c'est moi qui ai organisé une école, alors vous devez maintenant voter pour moi.

(Question): Et, à part de tout cela, vous avez la partie UPRONA, l'ancienne partie de l'unité nationale, qui pénétrait et structurait sous les anciens régimes républicains la SC Burundaise. Il y avait des structures pour des femmes, l'UFB[31] et pour la mobilisation de la jeunesse (JRR[32]), il y avait le syndicat pour les travailleurs UTB[33] et maintenant, l'actuel parti UPRONA est encore un tout petit tronc de toute cette structure, qui était une fois sur place. Et alors – est-ce que vous savez ce qui s'est passé avec tout le reste, tout ces autres structures de provenance „UPRONA"? Ce que moi, j'ai observé est que l'UFB par ex. s'est subdivisée en CAFOB[34], des femmes parlementaires, des femmes juristes, le dishurehamwe network etc. et je suppose que ces anciennes structures sont maintenant encore là, seulement elles sont maintenant utilisées soit par des partis politiques, soit par des ONGs, soit par des initiatives locales, pour s'approprier de l'argent des bailleurs de dvlpt. Et les organismes internationales qui interviennent de l'extérieur ne réalisent souvent pas que ce sont maintenant eux qui financent les anciennes structures de l'UPRONA, c'est –à-dire les anciennes structures civiles des régimes militaires. Est-ce vous, Sylvestre, est-ce que vous avez des informations sur cela?
(Sylvestre Barancira): Alors pour ce qui concerne l'UFB, il y avait par ex. le fait qu'elle avait organisé des résidences pour les jeunes filles avec les moyens qu'elle avaient de tout haut, pour des jeunes filles célibat,, qui n'ont pas encore les moyens de se marier. Et maintenant, ces résidences existent toujours. Et maintenant l'UFB s'est subdivisée en associations féminines qui luttent par ex. pour des valeurs de l'ancienne UPRONA comme l'unité, le progrès, le développement. etc. (...)
(...Et puis), il y a tout ces groupes d'épargne qui sont directement liés aux anciennes structures d'UPRONA.
(...)
(...Et du côté des personnes) ce sont des (gens) de l'âge mûr, par ex. des femmes qui actent comme conseillères de colline et à tous les coups, c'est directement structuré par l'encadrement dans l'ancienne UPRONA. Mais il y a aussi des autres acteurs politiques qui structures maintenant les

[30] Sylvestre Barancira is the coordinator of RCN's Burundi-office.
[31] UFB = Union des Femmes Burundaise
[32] JRR = Jeunesse Révolutionnaire Rwagasoré
[33] UTB = Union des Travailleurs du Burundi
[34] CAFOB = Collectif des Associations et ONGs Féminines du Burundi

associations de femmes, les femmes de Frodebu par ex., jeunesse de Frodebu, femmes CNDD, cela existe avec un système ni artistique, ni de maniere propagande avec lim. de femmes de cndd etc.
(Janouk Belanger[35]): Alors ce sont des associations qui se retrouvent aujourd'hui dans un système de clientélisme?
(Sylvestre Barancira): Le point est qu'ils ont toujours eu un lien avec un parti politique, ... depuis même les origines de l'UPRONA. C'était comme ça. La base de l'UPRONA elle même c'est la structuration de mouvement associatif. De petits coopératifs agricoles, de petites associations pour le développement, des comités locaux, comme ça, et les responsables de ces associations sont des militants de l'UPRONA ou des autres partis politiques. Je te dis même que tes femmes-là de Kirundo, ce sont des femmes de ce temps-là. (...)

- *For development agencies the question therefore is, in how far they really are aware about their own political role they play as donors of so-called civil society agencies in Burundi. The first point is, that they might – for instance via their funds for gender programmes, programmes on the promotion of civil society and good governance or funds for programmes on crisis prevention etc. – in fact simply finance the old UPRONA networks that are still operative, though, of course, now working with other labels and other hats. Crucial is therefore the question what RCN expects from a support of such associations and how RCN identified those groups, with which it works.*
- *The second point concerns the question of the actual social significance and recognition of these networks, in Bujumbura-ville as well as in the countryside: From the perspective of the simple farmers, what kind of attributes do they actually associate with these old networks? How far does the political history have an impact on the actual legitimacy of RCN's development activities?*

Part 2 The answer of RCN Justice & Democracy

RCN's identity refers to the vision of a peculiar NGO who at the same time is engaged in institutional matters and in emergency aid, who defends the right of an equal access to justice and who insists on the requirements and needs to maintain the rule of law as a pillar of nation-building in society. In accordance with the general mandate, RCN's programme activities refer to a twofold approach aiming at the promotion of justice and civil society matters. This dual approach is considered as a particular incitation to improve existing synergies with regard to the strengthening of the rule of law in society. According to the three year programme named "For an equal protection vis-à-vis the law" ("pour une égale protection devant la loi"), the programme activities in Burundi (and in the Democratic Republic of Congo) come the closest to the organisational identity of RCN (see 2004:6). A typical mark of RCN's approach is further the attempt to draw a global concept for both programme units. Both approaches are bound to the promotion of peace and justice and RCN emphasises conservative measures such as the „defense of the rule of law", which, in its own terms, is endan-

[35] Janouk Belanger est la résponsable du programme RCN-Burundi à Bruxelles

gered by the multiple crises and subsequent massacres (2004:12). The whole programme should therefore *prevent a disastrous regression of the rule of law* as it has been observed in Liberia.

The Burundi-Programme was launched five months after the signing of the Arusha Accord, in January 2001. At this time, RCN was already active in Rwanda and since the ethnic conflict profile prevailing there transcends the country's frontiers, it was obvious to get also involved in Burundi. Already from the outset RCN started with both programme-units. The first phase finished in 2002 and actually the Burundi-programme is in the **second phase** that is ending this year.

- The civil-society unit started with two main activities, a support on local development associations and initiatives and the promotion of a so-called „elogy of upright actions" („éloge des actes justes"). While RCN's support of the local development associations concerned primarily their engagement for the promotion of justice, reconciliation and the defense of human rights, the valorisation of upright actions was mainly regarded as *„un enjeu fondamental pour des sociétés déchirées et en perte de repères"* (2004:8). According to Janouk Belanger, the actual Director of RCN Pierre Vincke considered that the forming of Burundi's civil society should in each case refer to such an elogy, which should summarize the positive cultural values and thus constitute the basis for a large scale sensitizing programme, diffused by radio, theater, TV and tales.
- With the justice approach, RCN focused on the dispute settlement capacity of the district courts, the so-called „Tribunaux de Résidence". RCN thus started in 2001 a large-scale training programme in civil and criminal law for all judges and clerks of all basic courts, it equipped the „Tribunaux de Résidence"(TR) and the „Tribunaux de Grande Instances"(TGI) with the most requested materials and provided a support to aquire the most important documents (e.g. printed laws and whatnot). During the first implementation phase it soon became clear that it is much easier to work on the various institutional topics than on culture. The justice-unit thus started quickly with various training programmes for judges and clerks. The principal goal was to ameliorate the capacity of the courts to classify their own documents such as dockets or court-files and to render justice in accordance with the then applicable state law. In addition, RCN's training programmes got also involved into the land law which till now has been part of Burundi's „customary law". The background of this involvement was the massive reflux of refugees from Tanzania that was expected in 2002. The High Commission on Refugees (HCR) thus feared rising disputes on land and requested RCN's justice-unit to launch a new training programme for judges so that they could speed up the legal processes. Since that time, RCN's justice unit actively participates in the discussions on the use of „customary law" in Burundi.

1 Today‘s civil society approach

Today, the civil society approach is composed of four programme components. Pierre Vincke’s idea to collect ‚upright actions‘ for getting a moral elogy of Burundi’s civil society was mainly materialised by two projects, namely a collection of 19 tales, called „Munihi-zangingo“ and the formation of a group of performers who composed, together with a European artistic director, several plays for a history related theater. In addition, RCN got a contract of collaboration with „Radio Isanganiro“, a radio station of the NGO „Search for Common Ground“. Though RCN’s radio transmissions first dealt with upright actions, they later shifted their focus to the dissemination and vulgarisation of legal knowledge. And the fourth programme component finally still concerns the legal support for local development associations.

1.1 Rationale and design

According to the logical framework, the civil-society unit has to support Burundi’s civil society in ways so that its actors take progressively *confidence* into the services of the judiciary and become important promotors for the values of justice and democracy. This support will be measured i) by an augmentation of the number of local initiatives that are in favour of a promotion of the law and the values of justice; ii) by an augmentation of the number of initiatives of dialogue and democratic participation in local communities; iii) by a tougher resistance of the population in the face of legal abuses and harassments of the police and iv) finally by a better understanding and a more appropriate use of the law on the part of the litigants. The core issues of RCN’s civil-society unit are the popularisation of legal knowledge and positive cultural values (see part 1, chap. 1) as well as a problematisation of Burundi’s ethnicity with a particular focus on the aforementioned discourse order of conflict denial (see part 1, chap. 2). The whole programme unit is much concerned with the promotion of a culture of dialogue and mutual exchange. However, the programme is subdivided into two rather different branches: On the one hand, there is an ongoing work with the whole pool of Burundi’s culture. This work promotes new forms of social reflexivity as the „elogy for upright actions“ and the theater. On the other hand, RCN’s civil-society unit also applies an enlightenment related approach. It emphasises via radio transmissions and the promotion of local associations sensitizing programmes such as the dissemination and vulgarisation of legal knowledge, mainly positive state law and the body of human rights. But, as outlined in part 1 chapter 1, Burundi’s positive state law was, at least since the colonialization, principally a power instrument of the changing political élites, intended for political steering and for disciplinary actions rather than the common good of the total population. I agree thus with the programme coordinator Sophie Mareschal that the two approaches do not fit well together. In addition, she expressed some other reservations:

(...)

Déjà le volet ‚approche à la société civile‘....il faut déjà regarder à la dénomination, donc ce n’est pas structuré non plus, et on est tiraillé dans tous les sens, on disperse de l’énergie....Sauf le spectacle,

c'est de qualité parce que c'est pris en mains par un metteur en scène qui a travaillé de A à Z sur le spectacle. Mais ‚munihizangingo' ce n'est pas très bon, on avait les emissions de radio qui partent dans le sens de la vulgarisation du droit avec des réponses qui ne correspondent pas vraiment aux besoins des gens, ...ah... on produits de petits outils de vulgarisation et je ne sais pas si cela fait vraiment de sens (...) Et c'est même encore plus prononcé entre les deux volets, l'approche institutionnelle à la justice (AIJ) et l'approche société civile (ASC), là c'est encore plus grave. Mais déjà au sein du volet ASC il manque vraiment de sens et de cohérence
(...).

But let me start step by step. The key-elements of the rationale and the design are interwoven with the different, actually running project activities.

1.2 The programme activities and its background

1.2.1 The elogy of upright actions

As already outlined, the „elogy of upright actions" was the starting point of RCN's civil-society approach. Pierre Vincke expected to foster the sense for law and justice via a public documentation of particular heroic actions. The aim was thus to participate at the restoration and promotion of all positive values of Burundi's culture and to support the civil society in its search for justice and for the respect of the human dignity in order to make peace. The original idea was to interdigitate this approach with the universal concept on law and justice as it is enshrined in the International Covenant on Civil and Political Rights of the Human Rights body. On the spot were therefore not heroic persons as such but the universal side of locally particular valuable actions.
RCN first collected more than 260 tales throughout the whole country that are testaments to such upright actions, most of them referring to the last war and to the wisdom of Burundi's precolonial traditions. From this collection the unit selected the 19 most impressive tales and developed a handbook named „Munihizangingo". This handbook was mainly reserved for the education of children in the primary and secondary schools. But an external evaluation critisized its limited capacity to get its ideas across and finally questioned the whole approach. According to its own staff, RCN unfortunately also never consulted the already existing international literature[36] on the very rich pool of Kirundi proverbs. It only worked with local personnel who were not particularly specialised on that matter. Accordingly, RCN degraded with the literary quality of the collected texts. I thus wondered whether the civil-

[36] See for instance:
Rodegem, Franz (1966): Structures judiciaires traditionnelles, Bujumbura: Revue juridique de droit écrit et coutumier du Rwanda et du Burundi, VI-I, 1
Rodegem, Franz (1970): Dictionnaire rundi-français, Tervuren: Annales du Musée Royal de l'Afrique Centrale, Série in-8°, Sciences Humaines, n° 69
Rodegem, Franz (1973): Anthologie rundi, Paris: Armand Collin, Classiques Africaines, 12
Rodegem, Franz (1983): Paroles de Sagesse au Burundi, Leuven: Peters
Vansina, Jan (1972): La légende du passé – Traditions orales du Burundi, Tervuren: Musée Royal de l'Afrique Centrale, Archives d'anthropologie, n° 16

society unit wants to relaunch the project or not and asked the person responsible for the programme:

(...)

(Question): Est-ce qu'il y a une volonté de relancer ce travail, pas sur ce livre mais sur ce sujet?

(Sophie Mareschal): Oui, oui, en fait, on ne voulait pas l'abandonner. (...) Ce qui nous semble intéressant, c'est l'originalité du projet, l'idée de relier les Droits de l'homme aux valeurs burundais, c'est une approche qui intéressera les anthropologues et d'autres intellectuels, pour réfléchir finalement sur l'universalité des Droits de l'Homme, de montrer que les valeurs traditionnelles en fait sont reliables avec des valeurs universelles etc. Mais pour moi, personnellement, ce n'est pas cela qui est au centre. Moi, je trouve ce projet intéressant parce que... à travers des récits d'actes posés par des gens, donc des valeurs concrètes qui sont issue d'une tradition et d'une culture et qui sont fondatrices de justice. Pour moi, l'universalité des Droits de l'Homme, ce n'est pas cela, on laisse ça. Ce qui est important, c'est le comportement des gens qui est traduit par ces valeurs fondatrices de justice. Et je trouve que c'est une idée qui n'est pas unique parce qu'il y a d'autres associations et d'autres initiatives dans ce domaine, mais c'est une idée à valoriser. Et donc c'est pourquoi l'équipe ici dit maintenant qu'il faut reprendre le travail mais à condition de formuler beaucoup plus clairement la méthodologie et d'avoir une stratégie qui est mieux définie. (...)

Le conte est très intéressant, parce que le conte, par essence, est une téchnique orale. Et dans la culture Rundi, l'éducation passait par des contes. Le conte est aussi une des victimes de la crise. Cela ne se fait plus pour le moment. Mais (le coordinateur/MW) Sylvestre Barancira m'a dit qu'il avait été éduqué comme ça. Et donc c'est aussi non seulement de réinstaurer des messages, mais instaurer un moyen de véhiculer les valeurs. Et comme le conte est par essence oral, il s'agirait de le diffuser par l'oralité, donc d'organiser des soirées de contes, en cas de succès de les diffuser par la radio et ceci avec des ateliers d'animations qui sont aux ondes. (...)

1.2.2 The theater „si ayo guhora"

The theater project is certainly in the center of RCN's civil-society unit. This project emanated also from the idea to develop an elogy of upright actions. But the artistic director, specialised in improvisations, worked mainly with the oral culture, with the memories of the troupe, the subjective ways the artists expressed their own concerns and the corresponding phantasies and feelings they articulated. According to the programme responsible Sophie Mareschal the troupe is ethnically mixed and now composed of 10 professional performers, there are traditional drummers, dancers, poets and writers, there are men and women, some are well educated and others unfortunately illiterate and all have much experience of life:

(...)

La moitié parle le français et les autres ne savent même pas lire ni écrire ...et ils ont eu un passé. Un passé lourd, ils ont tout fuit, certains on fait la prison, ...bon, moi je ne connais pas leur passé mais Frédérique (the artistic director) a beaucoup travaillé là-dessus. Elle les a recrutés, et puis elle leur a fait faire une improvisation à la paix. Et bon elle faisait des improvisations sous des titres bien précis comme par ex. „j'ai vu ce que je n'aurais pas dû voir" et alors, ils doivent parler. Et bon, ça explose vite, ça commence par...on a tué mon père, j'ai vu la fuite, on a pris mes vaches, on a pris mes enfants, donc toujours les gens interviennent, toujours les yeux fermés, et puis.....c'est vraiment l'explosion...tout sort et puis ils pleurent. Donc, à partir de ces long travaux de verbalisation elle les a aussi formés, elle a composé le texte, c'est un travail d'identification de problèmes-clés et donc „Si ayo guhora" était créé. (...)

This way, the plays come very close to the personal experiences and feelings of the audience. Though the plays aim as well to sensitize the Abarundi on justice related topics such as the working of the judiciary or the human rights, they have no enlightenment related approach and thus no intention to steer the public's interest towards a distinct interpretation of their political history. The trained troupe now called „si ayo guhora[37]" (what is not to deny/to keep secret) is now travelling through the whole country and stages several plays as for instance „Habuze iki" (what is missing?) or „si ayo guhora". Both plays attack the ongoing discourse order of conflict denial and revitalise the momentum of the ethnic conflicts and the subsequent massacres. The plays do however not offer one single figure of thought or identification. Rather, they are structured from the perspective of the most important key-figures such as the victims and the committers, the lawyers and the judges, the politicians, the rebels, the troops, the widows and the children. And of course do the personated Abahutus, Abatutsis and Abatwas fight for the power of their (ethnic) arguments. But these arguments are embedded in a community of mutual dialogue that marks the play throughout its presentation. This way the plays are excellent triggers to start a community based reflection process on the local occurences of the political crisis and the subsequent massacres.

Very fascinating is the way in which such a play is introduced vis-à-vis the rural population who are often not very experienced with play-acting as such. During a public presentation I saw in the Kumosso-plains of Eastern Burundi, I became aware of the explosive power of the repressed horror. It was like a black shadow that resided over the faces of the audience and remained very present. In addition, the risk was not to deny that the public might intervene and cut through the important difference between imagination, play and reality. All the more surprising was the quality of mutual exchange the artists achieved with its audience. The public was thus invited to actively exchange with the actors, to participate in the selection process of the costumes and step by step it got familiarised with the different roles, the subject matter and the character of the artists:

(...)

(Comédienne): Alors montrez-moi avec qui on commence...- alors tu dis? Ah, par un fou? Qui veut jouer un fou? Est-ce que vous avez vu quelque part un fou qui peut dire la vérité? Jamais un fou dit la vérité! Je vais vous montrer par où on va commencer, des femmes qui meurent de faim qui ont perdu leurs enfants et le chagrin. C'est la cause de quoi, Messieurs, Dames, le chagrin? Le chagrin vient d'où? Le chagrin n'est jamais pour rien, cela a une racine, la racine elle est où? Est ce qu'on peut commencer par une femme en chagrin? On va commencer à jouer avec l'ikembe[38], mais (pointing to another actor) toi avec tes doigts, tu n'as jamais joué l'ikembe, tu vas te fatiguer avec tes doigts, ikembe toujours, ikembe....! On ne peut pas commencer avec l'ikembe, on va commencer avec le monde à l'envers....

(Comédien):... non, ce n'est pas possible de commencer avec le monde à l'envers...! Non, on va commencer par autre chose, je suis vengeance.

(Autre comédien): Comment? Vengeance? Vengeance, ce n'est pas possible, si non toute la famille va être décimée. Ce n'est pas bon de commencer avec la vengeance, sinon on risque que toute la famille sera victime d'une affaire de vengeance. Non, ce n'est pas bon. On va commencer par une loi.

[37] „Si ayo guhora" was the title of the first play.
[38] music box with lamellae (boite musicale à lamelles)

(Comédienne):...non, une loi est là pour se rébeller contre et on ne peut pas commencer avec une rébellion!
(l'autre comédien): Regardez-moi, ne rebellez pas! On va commencer par tirer avec la mitraillette....
(Comédien):...pas question, taisez-vous, vous tous, vous avez échoué! Les un disent rébellion, tirer avec la mitraillette, pas question...moi, très important, moi je vais vous montrer où on va commencer, on va commencer par un chaos, un chaos, un vrai chaos! Je vous ai donnés tous l'occasion, vous avez cherché sans trouver, je vais vous montrer, nous allons commencer par un procès, par un procès du chaos, un procès du désordre, oui, un procès du désordre....(...)

Starting from this introduction, the play developed its interpretative pattern along the existing links between the (personal) past and the present, between the civic duty and the human rights and between the personal involvement and the ethic conflicts. This way, it is an excellent trigger to launch a personal reflection process on politics, but not with polemics.

1.2.3 The promotion of local development associations

The work with local development associations aims at a general strengthening of their ability to intervene in socially critical constellations and to advocate for justice and the rule of law, for the civic duties and the human rights. One of their main tasks is to ensure a kind of triage for those who are in trouble and to advise the consulters on which authority they ought to address their own problem(s) to. The associations offer however no alternative dispute settlement services or other alternatives to compete the official authorities. In addition, the development associations are also used as important channels for the production and diffusion of legal documents as well as for the vulgarisation of state law in local settings. Therefore, RCN aims to improve their management capacities and advises them during the launching of micro-projects.
For the selection of these associations a series of critical criteria is applied. RCN is only interested in those associations that already were engaged in legal matters ***before*** the organisation intervenes. In addition, all selected associations

- have an apolitical profile, a moderate (political) discourse and are ethnically mixed
- have a coherent programme for the whole associations
- are engaged in the promotion of dialogue and justice and in the promotion of all forms of non-discrimination
- are organised in democratic and reliable ways
- are mainly based in the upcountry
- are competent and interested in a partnership

During the discussions on the role of the old political single party UPRONA on the structuring of Burundi's civil society, it became however clear that the team unfourtunately never discussed this point, though the new coordinator of the Burundi-office, Sylvester Barancira, was well aware of its critical impact[39]. RCN's rationale refers thus rather to the common legend

[39] (...)

within Burundi's development circles[40], namely that the civil society there would be one of the most important witnesses of the (collapsed) transition period to democracy in the early 90s and thus a very young phenomenon, mainly due to the „winds of change" that blew through the African continent in the aftermath of the fall of the Berlin Wall[41]. One of the consequences of such a perception is, that the „promotion of civil society", whatever the meaning of such a highly coloured term is, would be a very important tool to get out of the unfruitful ethnic clashes between politicised Abahutu- and Abatutsi-groups and would thus naturally be a promoter of an open, plural and democratic society. Further talks showed that RCN's staff members of the civil-society unit pointed more to the social processes of the ethnic conflict (Problem Field II) and less to the conflicting history of the state apparatus as such (Problem Field I and III). And since the social and political impact of the old political single party UPRONA on the forming of the structures of Burundi's civil society was not seen, it remained unclear what kind of difficulties could be linked to RCN's strategy to refer only to those local associations, which already were operational ***before*** the arrival of RCN:
(...)
(Question): Est-ce qu'on aide les associations pour qu'elles s'organisent en quelques sortes pour la promotion des Droits de l'Homme ou est-ce qu'on aide les associations à s'organiser pour qu'elles puissent se développer et à cette occasion on parle du droit aussi? Ou est-ce que on s'approprie à travers des associations de provenance UPRONA des structures existantes de l'ancien État Républicain pour mieux promouvoir les Droit de l'Homme à l'intérieur?

(Janouk Belanger)....non, non, non...alors....! Je pense, c'est la première question, c'est de promouvoir le mouvement associatif, les aider de mieux se structurer pour ...une meilleure promotion des Droits de l'homme et pour que les associations prennent en charge la lutte pour ces droits et pour toute cette problématique qui est liée aux Droits de l'homme.
(Sylvestre Barancira): ...ou qu'elles appliquent en quelque sorte des mentalités de l'organisation pour arriver à une sorte de démocratie interne et qu'elles sont des exemples en quelques sortes d'une vie démocratique et en même temps qu'elles ont la capacité de se positionner vis-à-vis des interlocuteurs étatiques locaux pour en fait défendre leurs propres intérêts...
(Janouk Belanger)....il y a une limite à cela. (...) Le siège refuse de faire cela parce qu'il dit que cela c'est de renforcement de capacité, du renforcement institutionnel et donc qu'on n'est pas une aide en cette matière. Donc, notre approche n'est pas celle-là.
(Sylvestre Barancira): Mais alors comment renforcer la promotion des Droits de l'homme? Parce que ces associations sont censées enseigner les Droits de l'homme dans des localités..
(Sophie Mareschal):...cela, c'est la condition avant que RCN arrive. Elles doivent montrer qu'elles ont déjà fait quelque chose, soit une activité, un combat.
(Sylvestre Barancira):...et alors c'est quand même comme Markus le dit: RCN s'approprie à travers des associations qui sont déjà opérationnelles, et donc en majorité de provenance UPRONA, des

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(Janouk Belanger): Alors ce sont des associations qui se retrouvent aujourd'hui dans un systeme de clientélisme? (...est-ce) c'est typiquement comme cela? (...oui..) C'est alors un problème! Pourquoi tu ne disais rien..?
(Sylvestre Barancira): Bon, moi je pensais que tu le savais. Pour nous (les Barundi/MW) c'est quelque-chose de tout à fait normal.(...)

[40] RCN's view refers to several important reports as for instance a study on the strategy and the programme assistance of Burundi's civil society, ordered by UNDP in december 2001 or the preparative study of CECI (Canada) for the implementation of the „ACIPA"-project in Burundi from 2002. Non of these reports ever considered the critical impact of the old single party UPRONA on the structering and fostering of Burundi's civil society!

[41] see also the statement of the General Director of the Public Administration in chapter 1.3

structures existantes de l'ancien État républicain pour promouvoir justement ces Droits de l'Homme-là. Comment alors ceci va ensemble avec les buts de RCN?
(Janouk Belanger):...pouuhh...oui, oui, c'est un problème. Bon.....
(Markus Weilenmann) ...je pense qu'au début vous avez fait beaucoup plus attention à cette question éthnique. Vous avez pensez que l'identité éthnique est vraiment la composante la plus intégrative de la société burundaise et vous n'avez pas toujours bien vu à quel niveau l'État en tant que structure institutionelle est aussi impliqué dans ce processus d'intégration et d'exclusion et à quel niveau l'histoire de l'État et l'histoire éthnique sont intriquées...
(Janouk Belanger):....oui....
(Markus Weilenmann): ...et je pense c'est parce que l'État était pendant une très longue période occupé par un groupe éthnique bien déterminé, les abahima-tutsi, et par conséquant éthnisé. Si on insiste alors sur la question éthnique, il est donc très important qu'il y a des bahutu, des batutsi et des batwa dans les associations et on suppose par conséquant qu'il y a donc des structures appropriées pour qu'il y ait une certaine hétérogénité de la pensée. Mais si on regarde du côté politique, il n'est pas du tout dit que s'il y a dans des associations des bahutu, des batutsi et des batwa qu'il y a par conséquant déjà une hétérogénité de la pensée politique. Cette hypothèse est beaucoup trop liée à l'histoire des massacres et aux affrontements correspondants. Mais à part cela, il y a toujours l'histoire des structures étatiques et des intérêts politiques liées à cette histoire. Je pense alors que vous vous êtes peut-être trop peu rendu compte du fait que l'État actuel est tout à fait jeune et donc que les structures existantes sur place, surtout à l'intérieur du pays, sont encore des structures tout à fait formées par l'ancien État de provenance „Bururi-Matana".
(Janouk Belanger et Sophie Mareschal):...oui...
(Markus Weilenmann): Léandre, le responsable de l'identification de ces associations, n'a-t-il pas toujours dit - comme il y a dans ces associations si possible toujours des bahutu, des batutsi et des batwa - que vous avez donc respecté tous les éléments critiques?
(Sylvestre Barancira):...oui, comme la troupe!
(Janouk Belanger): ...et bien, il y a d'autres éléments qui entrent en jeu...
(Sophie Mareschal): ...mais le public ne s'est jamais prononcé dans ce sens, jamais!...(...)

This difficulty can also be figured out from the programme description 2003-2005. There the analysis shows too how RCN has a tendency to emphasise the social implications of the ethnic conflicts at the expense of the conflicting history of the state apparatus[42]. Like many other development agencies emphasis is mainly put on the negative effects of the war between the different ethnic and social power groups who try – with various ideological means – to monopolise the state administration. The other complex of questions however, namely how these power groups make use of the Burundian nation state and its organisational and legal structure, what kind of implications such a capture could have for the term „nation-state", how these power groups transform (colonial) foundations of the actual „nation-state" in order to broaden their access to the rural population, how they also try to penetrate the precolonial dominions of the old monarchy and how such attempts are perceived by the rural population (problems of political legitimacy) etc., all these questions remain largely omitted.
The results of such an omission are then reflected in the ways how RCN perceives the relationship between the local population and the state administration: While the farmers are

[42] There the problem analysis stresses the endangering of the social relations between the various ethnic and social groupings caused by the manifold political crisis and subsequent massacres and it emphasises the growing hatered, psychotic forms of social behaviour and mistust (2004:11).

mainly seen as victims, suffering under institutional constrains and insufficiencies[43] as well as under a widespread lack of information, the public administration is ascribed a power to control and influence local behaviour and to (trans-)form social reality. Therefore and in accordance with the Anglo-Saxon paradigm it is also regarded that the principal purpose of civil society groups is to promote democracy. Remaining unmentioned is the lack of motivation on the side of the rural population to get informed at all and the corresponding problem of social passivity[44] due to their weak marked integration, the scattered settlement and the subsistence economy that is especially widespread in the countryside. Probably also therefore both programme units, particularly the justice unit and to a lesser extent the civil-society unit, attach great importance to all sorts of trainings and sensitizing programmes.

1.2.4 Radio transmissions

The fourth pillar of the civil-society unit refers to the production of radio transmissons. RCN has a partnership with „Radio Isanganiro"[45], currently subsidised by the NGO „Search for Common Ground". Like RCN „Search for Common Ground" (SCG) is also working in the domain of law and human rights but its main focus is not so much on the working of the legal apparatus as such but more on civil society programmes such as crisis prevention and the promotion of mutual dialogue and peace. SCG has the intention to cease Radio Isanganiro subsidies in 2007.

Currently, RCN's radio transmissions are broadcast each Thursday from 4 and 5 pm. They are concerned with the popularisation of legal knowledge, in particular the vulgarisation of state law. The principal goal is to offer some law related options to those who are in trouble so that they can address the responsible magistrate or civil servant and settle the conflicts in accordance with their statements. This activity is realised in close collaboration with RCN's project to promote local associations. RCN's radio programme embraces a concept that allows a direct connection to selected places in the countryside. There, the folks can go on the air and express their own concerns on distinct topics, for instance problems of divorce, child abuse or succession rights[46]. At the same time, several experts are sitting in the radio studio

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[43] „La population méconnaît largement ses droits. Peu informée, elle est d'autant plus victime de la défaillance des systèmes de justice traditionnelle et institutionnelle, et du pouvoir administratif"(2004:11).

[44] According to Gerd Spittler (1983:55) *"no agricultural administration has the necessary personnel and equipment in order to be able to supervise the production process of millions of family economies."* Vis-à-vis the state administration the farmers often prefer thus defensive strategies: *"Farmers avoid requests of the state by hyding people, cattle and goods (...). They withdraw from the market and again produce to a larger extent for the economy of subsistence. They ignore the instructions of the state, without opposing them in the open (...), they deform projects of the state and give them a function according to their own wishes (...), they "obdurately" say nothing and lie towards the administration. In other situations they verbally agree with everything (...) without keeping in line with it afterwards"*(1983:47).

[45] See www.live365.com/stations/isanganiro

[46] Until now 4 production series have been on the air. The first series concerned „procedure rules" (the role of the police and the constabulary within the public administration; the place of the old Bashingantahe and the local administration within the administration of justice; Tribunal de Résidence: the execution etc.); the second sercies concerned questions on land law (the distinction in civil and criminal law, mediation and appeal; the problem to get access to land; the case of the swamplands etc); for the third and the fourth series the profile was not so clear

at Bujumbura-ville and are listening and commenting on these stories. According to the radio journalists this concept is well appreciated in the countryside. After each session, an immediate programme evaluation with selected listeners takes place and in addition the radio station evaluates its social impact quarterly.

Though there are many arguments in favour of such a programme design, there is also the danger of cementing the cultural tendency of subordination: The experts, in most cases lawyers, are the well educated know-it-alls who are sitting in the radio studio and discussing on stories they are not directly concerned with while the often illiterate folks are delivering their personal experiences and examples. In addition, the arrangement does not consider the possibility that the urban lawyers are telling the rural bashingantahe about the problems they have for instance with their own rural kin so that the rural population can also actively participate in finding solutions.

In the beginning, the production of the radio transmissions was more closely linked to the elogy of upright actions and thus started with the publication of sequences of the play „si ayo guhora". The conceptual shift to the vulgarisation of state law has, according to Sophie Mareschal, mainly to do with an initially unclear profiling[47] and is perceived as an important rupture, marking the inner strain of the civil-society unit as a whole:

(...)

Alors, on n'est plus dans le concept des éloges des actes justes comme post-conflit, traumatismes, valeurs. On est dans le droit positif. Et là, il y a une scission entre les deux axes. Et le projet radio qui était au départ du côté des éloges des actes justes s'est progressivement mis dans le projet „vulgarisation et sensibilisation" du droit positif. (...)[48]

In addition, the civil-society unit started also with some tests for a later TV show. However, if RCN does not yet have a very well defined target group concept, such a project is not very promising. TV is only for the urban élite and mainly only in Bujumbura-ville.

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but nevertheless dealt the transmissions with improtant topics such as questions of succession rights, corruption; the implementation of legal decisions and so on.

[47] „Au début, le projet radio était peu précis, l'objectif d'une émission au début c'était „Si ayo Guhora", donc une émission de type „éloge actes justes" et flou."

[48] Personally, I do not fully agree with this statement. Culture is not just a box, the box of local tradition such as the positive, upright values, it is not just trauma, post-conflict behaviour etc. The official positive state law too is culture, namely a normative power instrument of the bureaucratic culture of decision-making. Critically is thus more how this distinction is percieved. According to the common perception of the staff deals the civil-society unit more with „soft topics" such as values and local culture while the justice unit deals more with „hard topics" such as law, power and science. And while the civil-society unit challenges many of the common assumptions via critical questions, the justice unit has rather a tendency to side with those who give advices. That is critical. (critically in particular also since the law „as such" contains no interpretation. It regulates. The interpretation happens always at the interface between law and case – also within the continental law – and is thus highly dependant from the interpreter. In addition, a good lawyer is always able to interpret each legal text in this or that way).

1.3 Strategic considerations

Rationale and design of the civil society projects are rich in inspiring ideas: In its attempt to work with local culture, RCN Burundi goes much farther than most development agencies. Nevertheless are there some deficiencies that could be changed for the better.

- The starting point, to work with an „elogy of upright actions", though of course not new, is for the Abarundi, who are in most cases so well rooted in their own culture and who have such a rich pool of proverbs, a very promising tool to stimulate their own considerations on the actual relationship between their political history and their cultural identity[49]. And in the face of Burundi's recent bloody history a restoration and promotion of all positive values is of course highly recommended.
  However, the failed „Munihizangingo" project opens new doors to discuss again the project realisation. Besides the question of the missing consultation of the existing international literature on that issue, I think the target group question should be considered once again. Except for the massacres of October/November 1993, one should keep in mind, that the principal committers of all the slaughters in Burundi were still the army[50] and the armed rebel groups. Politically interested farmers could thus get hold of the wrong end of the stick when they learn that development agencies now mainly contact civil society activists such as local associations to promote such an elogy. The topic is very important and it is important to stress that Burundi is not Rwanda. In Rwanda, very large parts of the total population organised the slaughters of 1994. In Burundi however, it is very important to address the key institutional people, such as some well-known politicians and mainly the young soldiers and officers, i.e. those parts of Burundi's army who instigated slaughters and large scale massacres time and again.

- For cutting through Burundi's discourse order on conflict denial, the theater „si ayo guhora" is a very helpful project. I highly value the troupe's work that includes the life experiences of the performers together with the corresponding fantasies and feelings they articulated during their preparative sessions. This brings a completely new and emotionally much more tangible quality into the whole play and since the play is very

[49] At the end of the 1980s the Swiss anthropologist Stephan Gebistorf questioned for instance a selection of old *Abatutsi* dignitaries in the coreland of Burundi about the problem of cultural change. On this occasion the development of the political history was commented on as follows: *"What is past, is past. Today one (yet) worries (only) about the drum"*, that means the royal insignia of power and the army (1991:104); the problem of the exchange of gifts as follows: *"If one (...) gives money it is difficult to offer the usual gift as compensation"* (1991:98); the payment of the bridal price as follows: *"Today a price is fixed as if a woman were a product. One asks up to 50'000 Burundi francs and in order to justify this high price one says, that it would be compensation for the costs of education"* (same); and the problem of the frequency of childbirth as follows: *"It is good to have many children. Because you do not know, how many of them will go to town"* (1991:106). *"The buses and lorries bring our children away. If there is a quarrel, they (simply) step into the next vehicle and off they are"* (1991:116).

[50] I know, it is a delicate remark. This statement has however nothing to do with the ethnical question. It is highly missleading to associate the personnel of Burundi's national army only to the Abahima-tutsi. The army of the late 1960s and the early 1970s, responsible for the massacres of Bukeye and the slaughters and executions in the aftermath of the 1972 revolt was not only dominated by „the tutsis". At this time, many „hutus" too were in the army, also in leading positions such as a major general and the like.

professionally presented, it has the potential to really influence the whole discussion on Burundi's past.

However, the post processing phase is of critical importance. The plays are emotionally very tangible. After the presentation I saw in the Kumosso-plains, the audience was very agitated, wanted to speak and to tell how it was in their own district, what really happened there and what this whole tragedy made with their own life scripts. But on site the play is not integrated into an enclosing structure that allows a real deepening just this process that is so difficult to launch in Burundi. It is true that there were some cautious steps in this direction, but according to the programme leader Sophie Merschal they have not been followed up:

(...)

oui ...après la présentation, les artistes se présentent au public et les gens suivent les personnages auxquels ils s'identifient le plus. Parce que l'identification est très importante, et ils viennent discuter, c'est un échange de vécu, c'est une interprétation du spectacle et ce sont aussi des questions de clarifications. Ces discussions font alors émerger un peu l'histoire des individus et elles la croisent et motivent de parler de son histoire. ...Mais c'est un peu le seul suivi qu'on a du spectacle. Il faut aussi ajouter que maintenant, les artistes ne font plus cela, parce que les scènes sont tellement épuisantes et les artistes doivent vraiment se retirer après la présentation pour se relaxer, pour eux, c'est vraiment très important....Donc le spectacle n'a jamais pu encadrer plus que cela. On arrive, on joue, on discute peut-être un peu avec les gens et on part....(...)

The risk is thus not to deny that with this play a new solution is not found. The traumatic memories are set in motion, yes, but again the audience is left to their own resources as was the case when all these cruelties happened. This can not be the solution. And the idea that the play would just launch a new thought-process that will go without saying, is just a naive illusion since nobody knows exactly which biographic and which social effects the repressed tragedy has on the present spectators[51]. Yes, of course this is a complex problem, but Burundi has to find a way out, a way out of just that. I guess, each society has its destiny and Burundi's destiny is to find a way out of this discourse order of conflict denial that hampers every attempt at appropriate handling with its tragic history[52].

RCN in particular is in a unique position. With such a theatre in its hands it comes really close to key-problems of Burundi's dodgy exposure to political history, but it has to improve this part. I guess this project, if it is enclosed within a larger structure, could become an excellent example of RCN's engagement in Burundi. I doubt however whether the idea of the civil-society unit, in the face of the public success of the troupe to stop subsidising the troupe, is really a wise conclusion. One can do that – but first one has to finish this project[53]. I thus rather advise the unit to bundle its powers and to link the sin-

[51] As an illustration of the complexity of the problem one has to deal with, see my ethnopsychoanalytic case study in Appendix 5 (Claire Ngerageze is in a Coma)

[52] One can discuss whether development agencies are appropriate institutions to assist such a process or not. But if they are not, who else? And what is then our role in the face of such a tragedy? If we advocate for a development of crisis countries like Burundi, can we then, when the real stakes come on the table say „oh sorry, too complex, too psychological, our instruments and technics are not made for that"? Forget it. I guess one of the most important tasks we have in Burundi is to think just about that.

[53] According to Sophie Mareschal it is also difficult to know the social impact of this play since RCN has no appropriate evaluation structure to check this: (...) „J'ai trouvé que c'était difficile de connaître l'impacte du

gular projects more closely to each other or to close or abandon one or more other projects and to finish at the very least this exceptional one.

- The promotion of local associations, though important, is not such a unique project as the first two. Nevertheless these associations accomplish a very important task. A key problem of agrarian states is their weak anchorage in the highlands. And it is at least unusual that civil society actors such as local associations have stooped to help the public administration and the administration of justice to get better rooted in the countryside. According to the Anglo-Saxon paradigm, most civil society actors rather compete with state agents and risk that way not only to weaken an already debilitated state structure but also to cash on its limited legitimacy and to create competing structures of political decision-making as well as to promote new forms of the „quasi-state status" in the countryside (see Randeria, 2001 and 2005; Rösel and von Trotha, 1999; Weilenmann, 1998 and 2005b). I am relieved that RCN's approach has nothing to do with that. On the contrary, it picks up a key-problem of governance in agrarian societies, namely the distance problem between state and society.

  However, it is advisable to learn more about their consulting service. How far do the associations really apply their local knowledge when they consult the help-seekers? Or do they mainly act as an extended arm of the state administration and are thus regarded as a partisan party? Most probably, such a study would show all shades and it is up to RCN to clarify what kind of service is really helpful. On the other hand, there is this „UPRONA-box". I guess, RCN has a right to ask the members of its associations for full transparency – it is obvious that everybody has a biography and a history – and possibly relaunch its identification process[54]. In addition, RCN should also launch this topic within the civil society actors of Bujumbura-ville, perhaps one could think about a conference on the impact of „the old UPRONA" on the structuring and forming of the actual networks that back the existing civil society structures. Such a reflection process could consolidate the identity of the engaged civil society members as political actors and RCN's brand as a cultural sensitive and reflexive NGO[55].

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spectacle parce qu'on ne reviends pas aux endroits où on a joué et qu'on n'a pas de donnés...Bon, on a des données quantitatives, on sait à quels lieux on a joué et combien de gens était présent, cela oui..., mais on n'a rien sur l'impact au vécu du milieu rural (and this is essential/MW) et donc on ne sait en fait pas si le théatre est instrumentalisé par des groupes d'intérêts bien précis. Pour cela on devrait avoir un autre concept, un concept qui permets d'encadrer ce jeux dans une structure de vérification qualitative. Mais pour l'instant on n'a pas de moyens pour faire tout cela.(...)"

[54] A first questioning on that issue during my visit at a training meeting in Ngozi led to some nervous reactions. That should however not result in an overcautious modus operandi. Most of all Barundi have a tendency to make a secret out of their (personal) history and in case of critical questions to fuss about details. And even though the political history left some traumatic traces one should keep in mind that not everything was traumatising. RCN has also a right to know with whom it really works and it should adhere to that right.

[55] During my stay in Bujumbura-ville I had a stimulating talk on this respect with Mr. Gratien Ntasumbumuyange from the ligue ITEKA. He was first surprised about my remark but afterwards he judged the topic as very important that should absolutely be deepened.

- The radio transmissions are certainly informative for those auditors who have a particular interest in Burundi's positive law as for instance lawyers. And according to the radio director Mr. Matthias Manirakiza all radio transmissions also attract the interest of many, many listeners[56]. I share however the critical view of the programme responsible Sophie Mareschal that the radio journalists are too much concerned only with the positive law:

  (...)
  En fait, moi, j'exprime toujours mon insatisfaction en face de l'équipe à l'issue des émissions et des solutions qu'on offre aux gens – pourquoi plaide-t-on justement? Il faudrait une analyse par rapport à cela. Pour être honnête, le droit n'offre pas de solutions très pratiques. Et quelles recommandations pourrait-on faire? On devrait donc recourir aux avis d'un sociologue, d'un anthropologue, et d'appliquer leurs points de vue pour analyser des situations à niveau microscopique. Donc, il y a une série de cas et une série de pratiques et on doit réfléchir aussi là. Et alors pourquoi les gens font-ils ceci et pas cela et pourquoi s'adressent-ils à la Justice? Et que les journalistes puissent aussi y recourir. Eux, ils observent juste une série de cas, et un encadrement un peu plus ouvert leurs permetteraient d'y réfléchir d'une autre manière plus appropriée au lieu de seulement de faire recours au droit, c'est-à-dire aux règles qui disent ce qu'il est permis ou pas. Mais nous n'avons pas encore sytématisé cela. (...)

  One problem is, that the radio transmissions are mainly used as a sensitising instrument of positive law and are thus *firstly* partial. As outlined in Problem Field I, Burundi's state law can not be compared with Swiss or Belgian state law since it refers in essence only to a history of suppression, control and cultural occupation – down to the present day! Burundi's actual state law, in fact the former „législation congolaise" has always been mainly a power instrument, it was a kind of „prostitute" of the different rulers and has never ever been the subject of a nationwide negotiation process. Do the farmers really want to abolish polygamy[57]? Do they really want to address the community in case of a marriage? Do they really want to abolish the custom of the bridal price? Do they really want judges, who are selected exclusively by the ministry of justice and completely unknown to the local community[58]? Do they really accept the kinship model as it is out-

[56] My own verification can however not confirm this statement. During my own trips to the countryside I checked whether my conversational partners were familiar with the jingle of RCN's radio transmission. This was however only the case for the personnel of justice (like judges, clerks and lawyers). All the other persons – though they are very familiar with Radio Isanganiro – could not identify RCN's jingle. According to earlier research on that issue during my work for Radio Maendeleo I can confirm the explanatory power of that verification.

[57] Sylvester Barancira told me that on the occasion of a meeting in 1996 in the Kumosso-plains, when the local population was informed about the Coup d'État and the take-over of power by Buyoya, the following dialogue developed: „(...)quand on leurs disait donc que Buyoya est devenu commandant-président et qu'il a une meilleur politique et qu'il favorise l'intégration de toutes les régions, d'unité etc., dans les meetings, et qu'ils avaient posé comme question „que ce nouveau **roi** interdit la polygamie?" „Est-ce ce nouveau **roi** interdit le droit à la bière de bananes?" Et c'étaient les seules questions qu'ils avaient posé. Et on leurs a dit „non, il n'interdit pas la polygamie en tant que telle", et ils avaient dit „alors c'est un bon roi" (accentuation by MW).

[58] My colleague Thomas Laely, who made extensive anthropological research in Kiganda, the place of the former throne of the king, followed in his study of the local administrative structures the farmers perspective vis-à-vis the local authorities and the judges (1995). There, one is confronted with a reluctant and even hostile position: *"We would be happy if the governor would appoint someone who has been born here. The population would be quieter. (...) But now one sends us beasts [inyamaswa], relentless and unapproachable characters, whose origin we do not know. They simply take somewhere a person, though we do not know it. It comes as a*

lined by the actual family law? What do they think about „gender equality"? And what about prisons? Etc. etc. A law that is valid has to be accepted by the large majority of the total population and one of the key-problems in Burundi is that this has never been verified. The actual state law is thus rather part of the conflict, rather a conflict reason than a model for conflict resolution. To defend the rule of law in Burundi can – at least from my viewpoint – therefore not mean to advocate only for the application of the actual „valid" state law[59]. As already mentioned in the footnote 48, state law is also culture, namely part of the bureaucratic culture of decision-making. The radio could therefore be an excellent platform to table the gap created by the colonial powers between a sense of justice that is nationally valid and a socio-cultural one and in respect to legal matters open a new space for a negotiation culture. This requires however an approach that distances itself from concepts of sensitisation and vulgarisation of positive law and shifts to a more participative approach which is not limited on public contests on the worth of knowing issues of (oppressive) state law.

There is *secondly* the unfortunate arrangement of the radio sessions – in the studio are the „knowledgeable", those who comment on the problems and in the countryside are the „cases". And nobody ever thought of a reversed scenario since the rural population is „not familiar" with state law. Therefore they are targeted, they can bring up their „cases" and then have to listen to the advice and comments coming down from Bujumbura-ville. Such a communication structure was once a typical characteristic of UPRONA and for all those development agencies, most of them human rights organisations, which favour an enlightenment related approach. However it doesn't fit well into the reflective profile of the other three projects of RCN's civil-society unit and effectively signifies a substantial rift.

2 Today's justice approach

RCN's main concern is the strengthening of the administration of justice, particularly the justice of proximity and therefore it focuses on an improvement of the basic courts. Its major goal is to invest into the fonctioning of the existing legal structures in order to improve the State in its mission, to empower its authority and to strengthen its sovereignty[60]. To do this

'wild and uncivilised animal' [igikôko], does only bad things and emerges as evil-doer [inkózi y'ikibi]" (1995:410, talk 43:21). (...)

[59] A result of that unfortunate history is the constantly sinking implementation rate. In the 80s it was below 30% and the actual „valid" state law has an implementation capacity that achieves even not 20% - and in criminal law it is even nearly zero percent!

[60] It was Charles Maurice de Talleyrand-Périgord, a cleric, politician and french diplomat, who made once the pertinent statement that one can do "everything with a bayonet except sit on it." With this remark he referred to this governance problem, namely that military superiority alone cannot stabilise the claim to power, since the stance of the monopoly of power is not identical with the use and demonstration of military-political power alone. "The claim to the monopoly of power and its enforcement must be presented to the long run and can not be reduced to a 'phase' in the process of domination. The monopoly of power is a process of institutionalising power" (von Trotha, 1988:329). Each political leadership therefore requires the application of concepts of truth

the justice unit provides a substantial logistic support to all basic courts at district level, the so-called „Tribunaux de Résidence“ (TR), and it also supplies the provincial courts, the „Tribunaux de Grande Instance“ (TGI), with some helpful and elementary material. Furthermore, it organised a systematic reprint of the most common laws such as the constitution, the procedural laws, the family law and the law on the organisation of the court proceedings. In addition, the justice unit started a large-scale training programme in civil and criminal law for all judges and clerks of all basic courts and for all officers of criminal investigation. Closely linked to such training programmes are further studies on especially critical legal issues such as the use of the „customary law“ on lands. And finally RCN also promotes in collaboration with the bilateral Belgian development agency DGCD[61] also an IT-project on information technologies for the Public Prosecution Services.

2.1 Rationale and Design

According to the logical framework the justice programme has to ameliorate the *quality* of the justice. This enhancement should arise in i) an augmentation of the quality of the enacted judgements, ii) a harmonisation of the court rulings, iii) a percentage reduction of the proportional number of postponement of hearings, iv) in an augmentation of the number of judgments that are confirmed by the appellate court, v) in an augmentation of the proportional number of implemented judgements (in percent) compared to the total number of judgements, vi) in a reduction of the number of badly treated detainees during the pre-trial confinement and vii) finally in a reduction of the proportional number of irregular detentions in all the prisons and/or bullpens.

The corresponding problem understanding stresses the non-respect of power sharing within the judiciary; it refers to questions of the impartiality and the ethnic imbalance of the judicial officers, to phenomena like corruption, the missing adaptation of legal texts, the length of the procedures, the non-execution of legal decisions...and to problems of the impunity of political crimes and crimes of vendetta. The actual agenda is largely influenced by the collapse of the public administration due to the ethnic war that casts a shadow over Burundi since 1993 and by the immediate political shifts such as the Arusha-Accord and the transition regime that now leaded to democratic elections. The programme closes in fact an important gap within Burundi’s development assistance. In spite of the whole discourse on the promotion of justice und good governance, Burundi’s judiciary has never before been subject to any development programme whatsoever[62]. And as RCN rightly states, since independence,

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and justice, which become institutionalised by a lawful order. Law can therefore be called the civil arm of political power and courts as one of the most important arenas where conflicting modes of behaviour intersect with normative concepts of truth and justice.

[61] DGCD = Direction Générale de la Coopération et du Développement

[62] In order to advocate for the right to get access to justice, development agencies rather design programmes for paralegals (International Alert), plan the creation of an ADR center (USAID), promote local NGOs like CAFOB or the Dushirehamwe network which start to denounciate the courts as „Macho-Institutions“ (see Weilenmann, 2005) and overtly compete with an already weakened official judiciary etc. (see also the general critics of DFID in a Briefing of the political division on „Non-state Justice and Security Systems“ in May 2004)

Burundi‘s judiciary has never ceased its services, despite of the whole societal crisis and all the massacres (see 2004:10). In addition, my own research indicates a close connection between the locally variable implementation (in-)capacity of Burundi‘s state courts and the landscape of all ethnic massacres (see part 1, chap. 1.4). It is thus imperative to focus on Burundi’s judiciary, especially since weak States have insufficient power to structure the social relations in society and are thus always very violent States.

In order to improve Burundi’s judiciary, there are two other big points that need to be mentioned. They too refer to unfortunate framework conditions and hamper - at least partially - the assertiveness of the programme namely Burundi’s chronic problems with power sharing and the limited autonomy of the basic courts, the restricted quality of some laws and the outdated out-put capacity of the legislative.

2.1.1 Daily problems with power sharing

The independency of the judges[63] as well as that of the district courts is still very precarious. While the courts collect their inscription fees[64], their finances remain under close supervision of the local administration which is responsible for their working credits. Consequently, the district courts contribute to the financing of the public administration but have no financial autonomy whatsoever. And since the public administration of the districts suffers under a very restricted budget too, they are – contrary to the legal provisions – in most cases rather reluctant to give the district courts a working credit. Therefore, compared with the public administration as representative of the executive power, the equipment of the courts is still very poor and the justice personnel remain in a position of simple suppliants. Of course, this unfortunate constellation has also a decisive and very negative impact on the quality of the jurisdiction itself, because it obstructs the power sharing and the rule of equality: The personnel have no means for their business trips and in case of a visit to the scene they need to charge the litigants. Those who are able to pay the additional (and illegal) fees, have thus a very different starting position. And at the very end of a legal process, the justice personnel also troubles with the implementation of its legal decisions. Although these principal blockings still remain, one can however, according to the programme responsible Anne-Aël Pohu, observe some slight changes in recent times:

(...)
Il y a une évolution qui me semble promettant. On voudrait revoir la situation financière des TRs en les détachant de la gestion des communes. Il y a une ordonnance, ...un décret-lois qui a passé là-dessus, mais qui n‘a pas encore eu son application. Là, on sent plutôt un blocage au niveau de l’application légale. De côté société civile on peut peut-être leur confier le problème de la justice, il y a par ex. beaucoup de corruption parmis les magistrats et aussi beaucoup d’influence de la côté administration mais aussi de la côté politique, des gens qui disent ce qui est de droit – en générale. (...) Non, il y a un décalage entre la garantie constitutionelle et la pratique. (...)

[63] See hereto my comments on article 18 of the actual state constitution in part 1, ch. 1.3.2
[64] The court fees for the judgement - especially at the TGI-level - are however only seldom charged! See Appendix 6

Nevertheless, in order to improve the mobility of the court personnel, RCN cannot refer to an ordinary working budget and has thus to think about other possibilities. However, it is important to stress that this problem persists now since quite a long time – already during my researches in the late 70s, the mid 80s and even in the 90s it was that way – and it stands for the high degree of dependency of the justice programme on larger political developments and shifts, which are of course difficult to influence.

2.1.2 Difficulties with weaknesses of the legislative branch

a) the rhythm of promulgation of new laws

Another („old") problem of the legislative branch concerns its undamped speed of the production of laws. Unlike to the situation in western industrial states, where state law often has a conserving side, Burundi's governing class assumes the jurisdiction with respect to the modernization process the role of pace-maker. But since this governing class has been in trouble for more than 40 years, one can also observe a strong temptation to have always recourse to the expansion of the State and the state-controlled armature, and to reduce the task of governance to a mainly legislative affair. And since the codified („modern", colonial) state law is much more instrumental than the precolonial one, we are confronted with a dangerous overheating of the legal body of the bureaucratic State.

The problem one encounters now is first a limited acessability to legal texts. Some of the laws were only published in some few copies. In addition, there is secondly an „outdated out-put capacity" of the legislative branch, i.e. the problem that the growing proclamation of new laws, that has as a result of the increasing disintegration of Burundi's nation-state – which even accelerated during the last decade – gets ahead of the time that is needed for their anouncement. This is also an important source for the creation of legal pluralism[65]. Accordingly, the state constitution already published by RCN's justice unit is anew void[66] and the same fate overtook the procedure laws on civil matters and the published code of the administration of justice[67].

b) the legislation

Parallel with the undamped speed of the law production goes also the inapplicability of many laws, particularly the laws of the civil law procedure, for instance in the domain of garnishment. According to Anne-Aël Pohu, the definitions of the objects to be distrained are far from being down-to-earth since those objects that are of interest are just those which remain legally excluded:

(...)

[65] Under such circumstances, the codification of the laws does – compared with oral traditions – not improve the legal protection, on the contrary!

[66] Since the independence of Burundi more than 8 state constitutions have been enacted. The most recent one has been released in March 2005

[67] released in March 2005

Donc il y a des lacunes énormes et un manque de réalisme de connaissance du terrain et de la pratique des juridictions ainsi bien que les magistrats sont extrèmement bloqués face à ce texte et il ne le comprennent pas, déjà parce qu'il est très téchnique et en plus il y a des enjeux inapplicables. Evidemment ce genre de problèmes laisse espérer que cette loi sera modifiée – mais pas tout de suite. Les textes qui sortent sont vraiment lacunières.(...)

In addition to the outlined problems these structural difficulties also hamper the sustainability of RCN's activities.

2.2 The programme activities and its background

Two out of the five fields of activity, the training programmes and the reprint of a selection of the most common laws contain several sub-projects. The other three fields of activity, the logistic support, the legal studies and the promotion of an IT-project for the prosecution services are so to speak „common" projects. Within the ministry of justice all these measures are warmly wellcomed. This certainly indicates that the measures taken respond to an important and real need. The justice unit has therefore within the ministry a very high recognition.

2.2.1 Backing of the courts with legal texts

The support in legal documentation is subdivided into three fields of activity:

- The *first* field of activity concerns the compilation and publication of a corpus juris in order to provide some important legal texts to national and international practitioners of law. A first edition was published in 2002 and the second actual one, a larger edition that consists now of three volumes, was just distributed in spring 2005. It contains all important international laws such as the convention on the prevention and punishment of the crime of genocide and some very basic national laws such as the constitution of Burundi, the procedural laws on civil law matters, the code of family law etc. There was however not the idea to include with that publication the old „Codes et Lois du Burundi" (1977), which is in part still valid.

  The 3 volumes have been published in a series of 330 copies this year and they have been widely distributed. From the public administration the ministry of justice has been provided with several editions for all key-positions[68], all the prisons got a copy, all the ordinary state courts at all levels got 2 copies, also all prosecution services, the court of labour and the court of commerce. Burundi's supreme court as well as the court of the constitution got 3 copies. In addition 1 copy was released to the university and the most important documentation services and libraries, to the parliament, the international

[68] as the minister of justice, the chief of the cabinet, the general director of justice, the general inspector of justice etc. etc.

partner NGOs[69] and the national associations[70] of Burundi's civil society and to those donor agencies[71] which are working in the same domain.

There is also a project to publish - together with the Belgian Technical Cooperation - a new edition of the B.O.B. (Bulletin Officiel du Burundi)[72] and a new edition of the softly modified colonial state law, the „Codes et Lois du Burundi". Furthermore all published texts were translated into Kirundi so that also those who are literate but not so familiar with the French can get the needed legal information. There the difficulty however is, that the European terminology of the compilation of laws does not fit well into the (rural) idiom of Burundi's national language Kirundi. Therefore, a whole procedure was launched so that attention could be paid to that ethnolinguistic problem. And at last there is a regular publication of new laws as for instance the new code of the procedural laws that was proclaimed last year.

With these steps the justice unit is trying to improve the quality of Burundi's adjudication which suffered, until now, inter alia under a very restricted or even accidental access to legal texts. Facing the outdated out-put capacity of the legislative branch the unit thinks now about other options to publicise the laws. It would however be difficult just to shift on the IT-technologies and to publish these new laws on CD-Rom, DVD or in the internet since only a tiny small urban group of the state élite has a constant access to computers – not to speak about the internet[73]. The exercice of print-outs has thus to be repeated.

- The *second* field of activity concerns a compilation of a corpus juris of the most ordinary procedural laws of criminal and civil law matters. The whole first section of this compilation is in fact an introduction into the correct application of the procedural laws and has thus mainly an explanatory value. The second section contains a series of relevant legal master copies such as an ordinary protocol of verification, a protocol of implementation, summons for trial, mandates, bills, receipts as well as master copies of the official correspondence etc. etc. This publication that was highly wellcomed refers on the one hand to the apprehension that a huge number of procedural certificates are about to disappear since there are no reproduction facilities and there are thus no master copies which could made available for the use at the different state courts. And on the other hand there is an immediate need to improve the legal harmonisation and uniformity. For instance the province of Bururi applies another procedural law than the province Muyinga

[69] like Avocat Sans Frontières, Global rights, Search for Common Ground, Care, Africare, ACCOR, AWEPA and Action Aid
[70] Ligue Iteka, APRODH, Observatoire de l'Action Gouvernementale, Commission Justice and Peace, Associations des Femmes Jursites, Bureau d'information juridique, the Centre for the Promotion of Human Rights and CAFOB
[71] such as the bilateral cooperation of Belgium (DGCD), the European PREBU, the swedish cooperation, GTZ or the intergovernmental agency of the francophones
[72] The B.O.B. contains all newly proclaimed laws.
[73] In many offices also of the high ranking personnel computers are still more a symbol of prestige and power and thus drag out their existence as an object of decoration.

does, which violates of course the proclaimed equality of third parties. According to the responsible for the programme, Ms Anne-Aël Pohu, this work was very time consuming
(...)
car il y avait beaucoup de modèles qui disparaissaient et il fallait donc faire toute une recherche documentaire pour arriver aux actes les plus usuels. (...) Ce livre a été distribué au mois d'avril et vous voyez, il est vraiment tout récent.(...) Aux Tribunaux de Résidence (TR) ils ont maintenant des machines à écrire et ils ont plus de greffes, alors ils peuvent juste copier ces models et les appliquer directement dans leurs travail quotidien. Et ce livre sera aussi distribué au niveau des Tribunaux de Grande Instance (TGI). (...)

- The *third* field of activity concerns a support for the „Centre of legal studies and documentation"[74]. Since the „early days" of RCN's engagement in Burundi, the foundation of such a centre was under discussion. Finally, this centre was founded in June 2004 but it still had some troubles to come on track. The director f.i. was elected in December 2004 and when I visited the centre in May 2005, the office of the director had just got its chattels and its electronic equipment. Nevertheless, the foundation of such a centre was a very important step forward for the justice unit:
  (...)
  ...déjà parce que cela faisait partie de la politique sectorielle définie par le Ministère de la Justice et en plus .... parce qu'on avait un peu le sentiment qu'on substituait l'État en publiant par ex. la loi. Et l'idée ça serait de s'orienter doucement dans ses actions vers un soutien en faveur de ce centre de documentation juridique d'une manière à ce que ce centre soit un vrai centre gouvernemental, donc la responsabilité reste au sein du Gouvernement et nous, on intervient et on soutient des elements bien précis.... (...)

  And since the centre is now operative, the justice unit can provide it with all its documents and materials in an electronic version as for instance a CD-Rom and it is now up to the centre to provoide the printouts.
  Jointly with the German GTZ the centre publishes in addition also a new „Revue de Jurisprudence". According to Peter Sostaric (GTZ) the principal goal of this journal is to set up a platform for already published judgements that are somehow controversial and could thus be critically debated. Actually one calculates with about 50 controversial judgements per year. The editorial staff then makes a selection of about 20 judgements for the debates. But the target group is very heterogene and one actually wonders whether there are enough critical lawyers in Burundi so that one could launch a debate on such judgments. Nevertheless, the actual bureaucratic state law requires a high degree of concretisation.

These activities should mainly lead to an augmentation of the quality of the enacted judgements, an augmentation of the number of judgments that are confirmed by the appellate court and to a harmonisation of the court rulings throughout the country. The manuels are highly estimated. All interviewed persons, the magistrates at the TRs and the correspondig TGIs of the provinces Kirundo and Mwaro as well as the officials from the ministry of Justice

[74] Le „Centre d'Etudes et de Documentation Juridique"

agreed on its great helpfulness. The usage of the manuals produces however some difficulties. While the justice unit wants to make sure that all manuals remain available at each court at district and provincial level, the magistrates consider the received material as personal property and take them home, sometimes hand them out to friends and kin and in case of their own mutation all the teaching aids are taken with them. Directives on the usage were ignored or – in case of a direct questioning – openly rejected.

2.2.2 Training programmes for the judicial personnel

- As a first step, RCN launched in 2000 and 2001 a training programme for the clerks. And in 2002, the justice unit launched a larger training programme with a much wider scope for the whole justice personnel. Actually, this larger programme consists of 3 cycles. The cycles A & B address the whole judicial personnel, in particular all those who did not participate in the earlier trainings. The cycle A is about the edition of judgements, questions on Human Rights (HR), the deontology, the succession law, the family law[75] and the land law. Cycle B deals with questions of the legal competency and the administration of justice, the procedures in civil law matters and again with HR-issues. And the third and last cycle C, is reserved for the magistrates only. It covers all questions related to the criminal law, the procedure of ciminal law, the special criminal law and the law of the minors. To each cycle a pedagogic manual is handed out. All trainees got also the corresponding legal texts.
- In addition, the justice unit also organises a training course on positive law for the local authorities such as the bashingantahe, the chiefs of the zone and the hill as well as a special training for the officers of the judicial police[76] (OPJ). This way the unit expects to clarify the various tasks due to the different roles:

  (...)

  (Anne-Aël Pohu): Alors là, justement, on veut réunir des différents intervenants de localités, donc des autorités de base et de les mettre ensemble pour discuter des cas pratiques et de dire, toi, tu mushingantahe, tu fais quoi, le magistrat, qu'est-ce qu'il va faire suivant les lois, qui est compétant, qui doit faire quoi, et comment tout cela peut fonctionner, mais aussi: qu'est-ce qu'on pouvait changer, qu'est-ce qu'on devrait donner à qui etc....Alors c'est plutôt leur comportement et leur capacité de médiation qui est au milieu (...)

- A further activity concerns the problem of the non-implementation of legal decisions. Burundi's judiciary at the district and the provincial level has no trained bailiffs. Until now the judges of the TRs and the TGIs are thus charged with that function. Such a task however interferes with the required power sharing. Investigations of the justice unit moreover showed that the court personnel have a very limited knowledge about an ordinary execution and on the role of the bailiffs. For the coming October the justice unit wants therefore to carry out a special training course for selected clerks[77] so that they can be-

[75] Family law = Code des Personnes et de la Famille (CPF)
[76] In french: Officiers de la Police juridique (OPJ).
[77] Each court has to delegate two clerks.

come a bailiff and this way improve the implementation capacity of the state courts. In addition, the justice unit wants, jointly with the Ministry of Justice, regulate the question of the lacking transport opportunities (cars) including the problem of the fuel. According to Anne-Aël Pohu most of the clerks are now women, who even would rarely accept long marches for the implementation of legal decisions.

With the trainings for the justice personnel, the justice unit tries to contribute to a reduction of the proportional number of postponement of hearings in percent compared to the total number of hearings, to an augmentation of the number of judgments that are confirmed by the appellate court, to an augmentation of the proportional number of implemented judgements in percent compared to the total number of judgements, to a reduction of the number of badly treated detainees during the pre-trial confinement and to a reduction of the proportional number of irregular detentions in all the prisons or bullpens.

In the long run, the idea is to create a platform for refresher courses. These training programmes fit also in RCN's long term perspective. RCN hopes for the foundation of a training centre, a wish that dates back to the beginnings of RCN's engagement in Burundi:

(...)
(**Janouk Belanger**): L'idée au départ était que l'État n'est pas en mesure de sa formation judiciaire et que nous, nous aidons à la formation du personnel judiciaire à un certain niveau et aussi que nous allons contribuer ou participer sur ce projet de centre de formation, remettre tout le matériel pédagogique au centre de formation. Ce centre n'est pas encore créé, c'est un projet par la coopération bilatérale et le ministère n'est pas encore en mesure de le créer forcément et nous, nous avons toujours pensé....alors tout le matériel qu'on a conçu, les formateurs qu'on aura formé et qui ont travaillé pour nous, qu'ils pourraient après travailler pour ce centre de formation. (...)

Unfortunately, the institutionalisation of such a centre has not reached a planning stage though the Arusha-Accord explicitly mentions such a centre. But perhaps there are also controversial expectations within the donor community:

(...)
(**Anne-Aël Pohu**): Je sais que la Coopération Française est derrière ce dossier mais elle est plus intéressée, semble-t-il, pour les magistrats de la haute juridiction et ce qui concerne le fonctionnement de l'appareil juridique le travail est vraiment à faire à la base.

2.2.3 Study on customary law: The land law question

The study on land law[78] is a very important attempt to provide a future harmonisation between the state law and the actual „customary law". It tables most of all important legal topics such as the land conflicts that are linked to the refugee question and to the problems of the displaced persons; the administration of the State owned lands; the expropriations; the access problem of the abatwa; the viewpoint of the farming community; questions of

[78] see Gatunange et all, 2005

the succession rights and the family law; and traditional conflicts and conventions between individuals. In its introduction the study refers to RCN's interest of the justice of proximity. Unfortunately the study however repeats also the widespread legend that most of all legal conflicts in Burundi would be conflicts on land[79]. Nevertheless, the study is highly relevant, particularly because of the refugee question. Since the massacres of 1972 hundreds of thousands of individuals have been thrown out of their lands[80].

RCN's goal was to get an overview of all the different critical questions linked to the problems of lands and to outline a range of possible solutions. For each problem including the question of a future codification the study distinguishes between the ways the law is applied by the different provinces. In addition, the study also addresses the authorities at the grassroots level, the district administration, the governors and the national council on scientific research and outlines for each of these groups of interests specific recommendations. I agree with **Anne-Aël Pohu** that this study could also strengthen the existing linkages between the civil-society unit and the justice unit:

(...)

puisque à partir de cette étude, on participe à tout un tas de discussions avec les autorités, avec les ONGs, cela peut alimenter nos propres actions aussi dans le volet société civile etc. C'est une étude, qui a été publiée très recemment et elle a été distribuée très largement. (...) En tout cas, j'éspère qu'on contribue au débat...c'est une contribution seulement, mais je pense pas qu'on peut amorcer seul un débat et qu'on trouve directement des solutions, au moins des solutions palpables. (...)

(**Question**): Qu'est-ce que vous en expectez alors? Je ne pense pas, qu'on finance juste une telle étude pour amorcer n'importe quel débat.

(**Anne-Aël Pohu**): Il y a plusieurs but, bon, pour moi, le but premier c'est déjà d'instruire, d'éduquer et d'écrire au niveau province des gens qui traitent des questions foncières au quotidien, ce qui se fait ailleure, il y a quel genre de problèmes, et puis de leurs donner de pistes de résolution de conflits auxquelles ils sont confrontées et qu'ils n'ont pas forcément envisagées. Donc une idée est de mettre les pratiques foncières en relation les unes avec les autres pour éclairer les personnes qui doivent les resoudre. Moi, je sens que c'est cela, l'objectif le plus immédiat.

(**Question**): Et alors, l'idée qui se cache derrière est de renforcer 1) le precessus de l'harmonisation en vue d'une codification future et 2) une clarification des compétances par rapport à la jonction juge/mu-shingantahe, comme ça?

(**Anne-Aël Pohu**): Oui. Oui, on peut le résumer comme ça. Et puis, vous avez déjà vu les recommandations? Ils s'adressent toujours à une autorité bien précise. Et on s'adresse à tous, y compris les bashingantahe. Donc l'idée est aussi qu'on regarde la pratique, qu'elle soit légale ou extra-légale, les médiations des bashingantahe ou quoi, d'essayer de valoriser l'une ou l'autre des options et de la faire connaître dans le débat. Après, c'est d'alimenter les membres de la commission, une commis-

[79] In another document it was the speech of 90%. I do not know where this legend coms from, but it is a legend: My statistical research on the mobilisation behaviour at all the TGIs in the years 1979-1988 shows that out of the collected 20'000 court cases conflicts on land (itôngo) coverd only 12.5% of all legal cases (see Weilenmann, 1997) and an additional 5.2% of all legal cases were conflicts on succession rights. But 15.5% concerned debts and 18.7% skilled thefts. Important were also the brawls (9%), conflicts on indemnities, simple thefts and divorces (each 5.2 %) as well as rapes (3.2%). A recount this year (for the details see appendix 6) shows some slight variances but certainly not fundamental changes! This does not exclude that there are some regions as for instance the Mugamba, the Buyenzi or the Kirimo and to a lesser extend the Bugesera where conflicts on lands are much more common.

[80] ...what, as the example indicates, not necessarily means that the disenfranchised will afterwards mobilise the official state courts....

sion qui a été nommée pour la révision du code fonçier et de renforcer la discussion sur la pratique et de les assister dans la séléction des pratiques qu'on peut retenir. (...)

2.2.4 Logistic Support for the district and provincial Courts, the Prosecution Services and the Department of Justice

In order to improve the general professionalism of the legal decisions at state courts and their out-put capacity, the justice unit launched a large scale logistic support for the official administration of justice. According to Sylvestre Barancira, this support is regarded as an important element to respond to typical problems of a precarious State:
(...)
Si les tribunaux n'étaient pas soutenus, ils ne seraient même pas en mesure de recevoir des plaintes, ils n'auraient pas de papier pour les rédiger, ils n'auraient pas de textes de lois pour se référer à la solvabilité des plaintes, ils n'auraient pas de machines pour taper les documents, ils n'auraient pas de formulaires etc. et comme l'État est justement dans une situation de précarité, l'organisation judiciaire n'est pas vraiment en mesure d'approvisionner les tribunaux et de leur donner le matériel courant comme par ex. dans une période de guerre. (...)

124 Tribunaux de Résidences (TRs) thus received a significant amount of office supplies: According to the justice unit[81] they got 1017 reams of hectograph paper, 1589 reams of carbons, 21'160 penal folders, 999 registres, 1383 ribbons for the typewriters, 123 decametres, 384 correction tapes, 384 ring binders, 129 staplers, 760 boxes of 1000 retaining clips, 13'690 envelops and 5202 ballpoint pens. All TRs got also 4 robes of justice. In addition, 31 TRs received a typewriter and 15 older typewriters have been repaired. In addition, the TR of Ruhororo got 6 desks, 10 banks, 1 table and 1 bar of a court of justice, 10 chairs, 2 cabinets and 2 typewriters and the TR of Rutana got 2 cabinets, 10 banks, 8 desks, 17 chairs and 1 bar of a court of justice. Furthermore, in order to facilitate the errands of the judicial personnel, nearly all TRs got 2 bicycles each. Furthermore, also all TGIs got a significant office supply. They got 17 photocopy-machines, 21 cabinets, 94 banks, 34 chairs for the audiences, 70 office chairs, 119 robes, 21 typewriters, 552 reams of hectograph paper, 276 reams of typing paper, 276 reams of carbon-paper, 2300 folders, 170 registres, 504 ribbons for the typewriters and 34 toners for the photocopy-machines. In addition, 14 out of the 17 TGIs got a fax and 4 fax rolls.
Recently, the appropriate use of this supply has been systematically verified[82] and all the necessary steps have been taken to provide more supplies and to ensure their maintenance in the mid-term.

[81] On my short term trip to Burundi I could not personally verify all these figures. During my trips to the countryside, especially to one TGI and one TR in Kirundo, Mwaro and Rutana I got however a good impression, could check the liability and all my observations as well as the interviews I had back these statements.
[82] RCN composed a team of national surveyors who travelled from court to court and checked on the basis of a standardised questionnaire the usefulness of the received materials and their actual usage. At the same time an additional needs assessment was made.

2.2.5 IT-projects for the prosecution service

The IT-project[83] is a very new activity. During my stay in Burundi, the consultant Mr. Bernard Fauque just carried out a feasibility study in order to clarify the options, opportunities and entry-points for launching an IT-project for the prosecutions services. This project has a complicated history. Originally it was initiated in 2001 on the request of Burundi's attorney general by the bilateral Belgian development cooperation, then outsourced to RCN and according to Bernard Fauque it is expected to collaborate in the next future closely with the European PREBU[84]. The aim is to develop an electronic programme structure that allows following the administration of each case-file throughout the country and this way to speed up the treatment and processing of these files. The core element of this project is however not the technical equipment (this is of course also important) but a large training programme for the concerned personnel of the administration of justice so that it really can handle the IT-technology in the long run. This way the project wants to fight against the chronic problem of impunity and respond to the requirements and needs of a complex criminal justice that has to deal in the near future with thousands of crimes of genocide and other crimes against humanity.

2.3 Strategic considerations

The project activities of the justice unit are forming a more uniform and integrated whole than the one of the civil-society unit. The operative fields are very capacious and its activities accordingly manifold. It is in addition very impressive to see that one single person coordinated and managed this whole programme with its manifold ramifications. Within the ministry of justice all these steps were highly welcomed and accordingly appreciated. All discussion partners insisted thus on its usefulness and requested a prolongation of RCN's engagement in the domain of justice.
Nevertheless, I do have to add some critical comments. They are mainly pointing in two directions. The rationale of this complex programme could on the one hand be better focused. The results of the impact study, which shall be outlined in detail in the next chapter, aliment some doubts as to whether all critical points have properly been identified. One important goal of RCN's justice programme for instance is to reduce the required process time from the first inscription until the final judgement by reducing the number of postponements of court hearings. Though many litigants complained already in the 1980s about the required process time, I have to stress that bureaucratic organised state courts with an average process time below 1 year do not, in this respect, have a problem. Both investigated TRs, the TR of Makamba (Commune Rusaka) and the TR Kirundo had between 1979 and 1988 an average process time below one year and this is also the case for the investigated time frame be-

[83] IT-project = a project on information technology
[84] PREBU = Programme de la REhabilitation du BUrundi. This programme is carried out by the European Union.

tween 2001 and 2004[85]. At the TGI level, which was (unfortunately!) not so much in the center of RCN's support, the situation however looks quite differently. There the average process time was until 2002[86] around 8 months, but in the years 2004/05 it climbed even up to 14.8 months. In addition, there are mainly 4 TGIs, namely Muyinga, Bururi, Karusi and Makamba with a very *high backlog rate*. On the other hand however there are 4 TGIs – Cankuzo, Muramvya, Ngozi and Gitega – which actually[87] have no pending processes at all! *RCN's approach focuses however not so much at the TGI-level and also it does not respond to such important local variations*. Its support risks referring rather to general or roughly generalised problem configurations, such as the general lack of training of the judicial personnel or the limited access to legal texts. To improve however the quality of Burundi's adjudication by printing and distributing the legal texts is a work of sisyphus – at least as long as the actual rhythm of promulgation of new laws (which indicates a structural problem of governance) still persists. *On the other hand, RCN did until now not very much focus on the most crucial question of the judicial assertiveness, the refeeding of the final judgements into the social contexts (implementation)*, a problem that has much to do with the difficulty of the governing class to get well rooted in the countryside. As already indicated in chapter 1.4 are the implementation rates at the TGI-level still very bad. And in respect to the two TRs I analysed, the results are hardly dazzling.

Though all the outlined project steps constitute important elements of an overall justice programme[88] *I criticise that the general approach of the justice unit is socially too little reflective, too formal and too technical*. This can also be observed in respect to the historical dimension of its support. In order to position the engagement of the justice unit between RCN's short term and a long term perspective it is important to point also to a much larger agenda of which RCN's justice programme makes part too, namely to envisage a State- and nation-building through legal means[89]. To do this, two theoretical questions are also very important, *firstly* to what kind of state model does RCN's concept refer to and *secondly* what kind of law definition shall be applied. Both are closely intertwined.

2.3.1 The state concept

Under the heading „Problem Field I" I chose a historic perspective and outlined how the precolonial state model and the colonial state model still get stuck into each other and how this key-problem of the precarious rule of law appears in Burundi's past and present. I point out,

[85] At the TR Makamba, the average values varied between 6.4 months (2001/2002) and 5.5 months (2003/2004), at the TR Kirundo even between 4.4 (2001/2002) and 4.25 months (2003/2004).
[86] This statement refers to my own investigations of all cases considered at the TGI-level and 5 selected TRs in the years 1979-1988 and – since RCN launched its programme in january 2001 – to the consideration of the datas from the years 2001 and 2002.
[87] i.e. between 2001 and 2004
[88] the logistic support of the courts for instance is very, very important!
[89] RCN's mandate is: « RCN Justice & Démocratie développe des actions dans le domaine de la justice auprès des autorités engagées dans un processus d'instauration ou de restauration de l'Etat de droit et auprès de la société civile.»

inter alia, the horizontal split in Burundi's society that still persists. Taking this historic perspective as a point of reference, it is striking to see that RCN's problem description does not refer to two state models with different, partly even competing legal bodies and different principals of legitimacy. This becomes e.g. crucial in respect to the valorisation of several critical problems such as Burundi's ethnicity. If we refer to two state models that are permanently competing with each other in respect to problems of the access to political and legal legitimacy, we can easily link Burundi's ethnicity to the cultural conflict(s) which mark the recent political history of Burundi's styles of governance (see Weilenmann, 2000). This way one can disclose the social scapegoat function of ethnic attributions and show to what extent hutu- and tutsi-characterisations just mask the principal contradictions between the two state models. This problem is particularly crucial since the bureaucratic state model is to some extent ethnicised because distinct abahimatutsi clans have occupied this structure for about 40 years. In order to improve the State as the ordering power, development agencies ought to take the position of a third party and assist the representatives of the different power models in bridging the gap.

If we base our considerations however only on one single state model, we forget that inspite of the abolition of the monarchy the memory of the king has not faded away - particularly not in rural areas. Instead, we refer to the assumption of a „modern" State that would have devoured the former one (the „crocodile model") and suppose a more or less linear development. In such a case, it looks as if the history of the state-building and the ethnicity would not have much to do with each other. They can only be linked by some political mistakes of the Belgian colonisers. And unless one assumes an already existing precolonial ethnicity, one does not in fact really understand why such a simplifying pattern could still persist after more than 40 years of independency. Therefore, many development agencies stress the importance of a mutual dialogue between the different ethnic groupings[90] and insist on the importance to always consider all ethnic units – „like a troupe", as Sylvestre Barancira tellingly noticed[91]. The relevance of the ongoing structural contradictions between the different normative settings remains however faded out. Concerning the role of „the" State, the development assistance concentrates then rather on modifications within that single „modern" structure. However, the potential of conflicts that are rising at its borders and the typical difficulties at the social interfaces such as the passivity of the rural population or the non-implementation of the legal decisions are too often neglected.

[90] See also my comments during the conversation with Janouk Belanger, Sophie Mareschal and Sylvestre Barancira on the impact of the UPRONA on the forming of the civil society in Burundi, esp. in part 2, ch. 1.2.3.
[91] ...and in addressing them as a homogeneous group, one recognises also the supposed value of the „ethnic" identity, which is still disputed.

2.3.2 The applied law definition

RCN's notion of law refers to positive law[92]. It is to a certain extent influenced by the current ideology of the legal decision-makers, and connects the existence of law to a western-like state-controlled organisation of power. Such a law definition corresponds to a distinct world view. It implies certain characteristics such as the existence of official forces empowered to impose sanctions, a hierarchy of courts and administrative units, the separation of powers and a codified state constitution. Accordingly, outside of the centralised power of bureaucratic organised states there is in the strict sense of the word no law – or at its best only quasi-law or proto-law. Burundi's „customary law" is thus not identified as a weakened but still powerful ***state law*** that still principally regulates access to the lands, succession rights, cattle and at least partly marriages. It is rather identified as „custom", as practices[93] that date back, a kind of cultural pattern or folklore[94] which has perforce a certain legal impact since the official legal body is still „incomplete" and Burundi's land law not yet codified. It is thus assumed that a future codification would just naturally be „the solution"[95]. The „customary law" needs therefore perforce to be somehow integrated into the „official legal body" (which is of course not folklore) so that the former colonial resp. bureaucratic structure is better anchored in the countryside. Thus for the administration of justice[96], only that part of the total legal body which is rooted in the former colonial state structure resp. in the state structure of the ***unjust*** military regimes[97] is recognized!

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[92] According to Janouk Belanger „...la prise de position RCN est la justice formelle, donc le droit positif – à part qu'on se rend compte que certaines règles ne sont pas applicables. Mais le droit positif, c'est quand-même notre pied de référence.(...)"

[93] Typically, the study on Burundi's land law is titled with „Étude sur les pratiques foncières au Burundi – Essai d'harmonisation" (emph. by MW)

[94] Anne-Aël Pohu formulated it this way: *„Je pense que ceux, qui s'intéressent pour le bushingantahe, c'est un peu folclorique. Eux, avec leurs sages et c'est vrai, eux avec leurs „ntahe", cela attire tout le monde et je pense que les visions liées au Bushingantahe sont un peu réstrictives.... Pendant la crise ils ont joué le même rôle comme les autres. S'ils ont aussi été la cible des assassinats, ce n'est pas pour rien, c'est parce qu'ils se sont identifiés avec des positions bien claires pour jouer un rôle dans ce Burundi (...)"*

[95] With the promulgation of the family law in 1980 parts of Burundi's succession law have been codified. A verification of the litigation rate of state courts however shows that just after the enactment of that law significantly less litigants mobilised the state courts (see Weilenmann, 1997). That means: for the problem solving the litigants addressed other institutions, most probably the structures of the bushingantahe. Since large parts of the total population are still illiterate, the codification of the law just deprives most rural litigants of the access to justice.

[96] See RCN's presentation of Burundi's justice system in: „Programme triennal 2003-2005, d'Appui à la Justice au Burundi: Pour une Égale Protection devant la Loi", 2004, Chapter 4.2, page 9-10.

[97] Also at the risk of being called long-winded, it is worth the trouble to call attention to some wide spread myths within the development community such as the one of the neutrality and the technicity of its assistance; or the myth that culture would be a local phenomenon (whereas international experts like myself would naturally represent the universal); or the myth of the „rationality" of the European resp. the colonial institutions whereas the local institutions such as the bushingantahe are not considered rational, of course not, they are systematically called „traditional"; and the myth of the natural dominance of the rule of law as a logical consequence of the „social progress" of developed and thus „civilised" countries. It is worth the trouble because it is this whole ethnocentric box that finally results in development programmes for governance structures that might have all required „rational" qualities but not a history of legitimacy. Nevertheless, the unjustness of the actual state structure constitutes a serious problem that has not, contrary to the wide spread belief, been solved with Burundi's democratisation.

RCN's goal is to „civilise" Burundi's legal order via the import of legal regulations that mark the rule of law in so-called „normal" and well functioning democratic (and Euro-American) nation-states. Though the justice unit has not in all points a strong legalistic position – some statements are closer to the current ideology of the legal decision-makers, others show that there is also a tendency to get rid of the matter[98] – one can still conclude that RCN delegates this difficulty largely to the political decision-makers who are supposed to launch and secure the democratisation process. Within their own field of activity however, the unit reduces the problem to simple training questions and to vulgarisation and sensitising campaigns. This way, the programme scales back the difficulty that the sense of justice that is nationally valid is not identical with the socio-cultural one to a lack of skills and does not in fact respond to the most crucial question, namely how both state models could be integrated into a new, open and single ensemble.

To do this, I guess that RCN's partition into a justice unit and a civil-society unit is risky since the justice unit cannot limit its activities on services for the ministry of justice only. Though highly respected and warmly welcomed, the justice unit has also to look at the borders and to take the perspective of the litigants more into consideration: A well working judiciary is certainly very helpful but the main problem remains, namely that the legal and state orders introduced by the colonial powers operate at a fairly abstract level and that they presuppose standardised behaviours and are in Burundi rather poorly integrated into the local culture. This difficulty cannot just be delegated to the civil-society unit. This unit can not make the bridge. It has also other implications for a justice programme. Women for instance who belong more to rural areas, the poor majority and the illiterate masses are also frequently more closely bound to the family and/or kinsfolk than are men, a fact which is particularly important in terms of modernisation plans, because the extended family is generally deemed one of the most conservative groups in society (cf. Talcott Parsons, 1951; Heidi Rosenbaum, 1979). John E. Rothenberger (1978) has also demonstrated that the social, economic and political *status* of parties involved has a great effect on court use. Poor women and those from rural areas do not belong to the high-status groups in society who would easily go to court when a conflict arises. To regulate conflicts they would be more likely to turn to „customary law" and/or religious authorities, to whom they have always had access. The programme needs therefore also to think more about the interface between the official state law and the other legal structures and deal more also with legal provisions that allow bridging the gap between (rural) „living law" and the official state legal system. As RCN's study on land law already indicates, modern legal systems can be made more effective if local legal reality is accorded greater consideration in modern law and in the application of that law. The challenge is thus to test new project activities in this vein. I disagree therefore with the programme responsible Anne-Aeël Pohu, that the justice unit just has to continue with its old approach. That would be a mistake, particularly in respect to the results of the impact studies.

[98] Particularly with the land law it tries to develop a concept on how to address the large majority of the total population so that they can take possession of ***their*** law.

Part 3 Impact studies

1 Discussion of the logical framework

RCN-Burundi has a very complex but still easily comprehensible programme structure. One is quickly informed about the keypoints of the programme units and the ways, RCN expects to verify the development progress. The above outlined programme and project activities are thus also regularly monitored by this framework. In addition to the „normal" project survey, there are a multitude of internal evaluations ordered by the programme responsibles or the coordinator himself in order to check the close link between the developed impact indicators and the progress of the different steps of the projects. The goal of this chapter is thus to check the reliability of these indicators.

For discussing the various aspects of the programme structure for the three year period 2003 – 2005 I would like to recall the keypoints of the logical framework:

The **principal goal** of both programme units is:

The justice is accessible, recognized by all Burundian citizens and it renders them an equal protection before the law.

For the **justice unit** counts:

The quality of the justice is ameliorated

For the **civil-society unit** counts:

The civil society progressively increases confidence in the judiciary and its actors become important promotors for the values of justice and democracy

In order to verify the achievement of objectives, RCN-Burundi has to bridge the ambitious gap between internal and external factors and to find categories that allow a more or less objective measuring.

In respect of the justice programme RCN supposes a close link between the internal operational procedure of the (bureaucratic oriented) judiciary and the external effects and the recognition of the judiciary in society[99]. Such a link can however only be postulated in socie-

[99] the indicators for the measuring of the quality of the judiciary are the

- augmentation of the quality of the enacted judgements
- harmonisation of the court rulings
- reduction of the proportional number of postponement of hearings in percent compared to the total number of hearings

ties where the logic of the legal decision-making fits well into the (national/local) culture of organisation and the corresponding system of cultural references in society (see Morse and Woodman, 1989). In agrarian societies like Burundi however, where the daily living conditions are marked by traditional production systems (such as rain field cultivation, horticulture, pastoralism, running irrigation systems and the like) the rural population always orientates itself also towards traditional kin-based systems of relationship as well as towards traditional political structures and their corresponding normative orders. In such societies to postulate a close link between the bureaucratic styles of governance and the basic value orientation of the rural population is thus highly questionable. This link is however an important precondition for the reliability of the chosen indicators, since they suppose for instance that the augmentation of the quality (quality in the sense of the western oriented legal sciences) of the enacted judgements and the harmonisation of the court rulings would have a decisive impact on the ***required*** manner of justice in Burundi's society.
The question of the applied state concept and the corresponding law definition is in this respect decisive: On the basis of an intercultural comparison to the use of state law and folk law institutions of dispute settlement Franz von Benda-Beckmann (1985:187) points to the very fact, that the question of the degree of cultural integration of the judicious institution is in general of great importance. His statistical comparison shows, that the socio-cultural degree of integration of the legal institution finally is decisive for the question, how often these institutions are approached – and not the question in how far these institutions are integrated in the colonial and/or national legal system. This point of view does thus not place the power of the political power centre in the foreground but rather the system of cultural references.

In addition, there is a tendency to overestimate the influence of an external intervention. Statistical investigations of Blankenburg et al. (1989) show that the question whether people go to appeal or not depends on a whole range of factors and the indicator of whether the judgements of the appellate court usually confirm the ones of the first instance is only a secondary one. Much more important is the question of the containment (in-)capacity of disputes by 1. Instance courts. This depends primarily however not on the legally stringent arguments of the judges at the 1. Instance but from the very fact of whether the applied laws really match(ed) the miseries and preoccupations of the litigants! The same counts also for questions of the harmonisation for instance of the court rulings. A harmonisation might favour a certain degree of equality but equally unsatisfying laws[100] are not very helpful either.
In addition, those who go to appeal do not necessarily expect a new decision. Perhaps they hope to get a reversal, yes, but perhaps they just want to postpone an unwelcome final deci-

- augmentation of the number of judgments that are confirmed by the appellate court
- augmentation of the proportional number of implemented judgements in percent compared to the total number of judgements
- reduction of the number of badly treated detainees during the pre-trial confinement
- reduction of the proportional number of irregular detentions in all the prisons or bullpens

[100]See part 2, chapter 2.1.2, section b

sion. Also critical is the question of whether they could suppose a legal implementation of the court's decision[101] or whether they have better relations to high ranking officials[102]. And to add is also the geographical distance to the appeal court, the question of the court fees (legal thresholds) and the additional costs of catering for the witnesses.

In respect of the civil-society programme the indicators signal a social concern for questions of the „modern" justice and human rights. In order to take confidence into the judiciary and to promote the civil society actors in ways so that they become important promotors for the values of justice and democracy the 4 indicators correlate roughly with the 4 projects of this programme. Two indicators stand for a broadening of civil society activities in favour of RCN's principal goals and two indicators refer to the values of justice[103]. They neglect however two power political power points, namely *firstly* the above mentioned impact of those networks that refer back to the old UPRONA structure and that can be activated for particular purposes of mainly political reasons within the „new" civil society and *secondly* the tremendous impact of money that comes to Burundi via the channels of the donor agencies. This became quite clear during a conversation I had with the programme responsibles:
(...)
(Question): Le contrôle de l'application des droits de l'homme, fait-il la société civile d'une façon volontaire ou est-ce cette tâche est remplise par des ONGs qui sont largement payées par des bailleurs internationaux (alors par les euro-américains)?
(**Sylvestre**): Alors moi, je pense que ces associations sont plutôt payées par des bailleurs internationaux.
(**Janouk**): Mais bien, je ne sais pas si cela fonctionne...de force? Oui?
(**Sylvestre**): De force? ...mais oui, c'est par les bailleurs internationaux, qui autres?
(**Janouk**): Mais pas tous! Mais non, si tu vois par ex....
(**Sylvestre**):...les ligues de droits de l'homme....
(**Janouk**):....mais la coordination, cela se fait sur place, non....?
(**Sylvestre**):....mais écoute, moi je me suis intéressé, je me suis présenté, j'ai dit voilà, il faut que je paye la côtisation parce qu'il fallait des fonds pour fonctionner et pour que les choses sont mises sur la table et comme ça, et après je les ai posées des questions au sujet de la côtisation et les dirigeants de ces associations m'ont dit que cet argent ne les interessent même pas..mais oui,...mais c'est comme ça, les membres ne cotisent pas et c'est seulement à cause des bailleurs.....bien sur!
(**Janouk**):...mais la structure sur place. Elles (les associations/MW) doivent s'organiser, elles doivent.....
(**Sylvestre**):...mais elles sont nées par les bailleurs de fonds! C'est en rapport avec la coopération internationale et des fois...."l'amnesty international", „UNHCR", „UNDP", „Alert international", certaine coopérations bilatérales, notamment je sais que les néerlandais sont actifs dedans, les danois, les norvégiens, etc. (...)

[101] Why should I go on appeal when I know that the court most probably will never implement its decision?
[102] This has not necessarily to do with corruption. Weak factors such as the identification with a particular social class, the background of education and questions of the social prestige and reputation play also a significant role.
[103]

- augmentation of the number of local initiatives in favour of a promotion of the law and the values of justice
- augmentation of the number of initiatives of dialogue and democratic participation in local communities
- Facing legal abuses and harassment of the police a tougher resistance of the population
- A better understanding and a mor appropriate use of the law on the part of the litigants

Alors, comment cela marche maintenant? Eh ben, les associations sur place forment un organisme chapeau, qui a un profil et un but bien claire comme par ex. maintenant pour les elections et alors après cet organisme chapeau se met ensemble avec „Search for Common Ground“ et ils obtiennent un financement qui sera après rédistribué à travers de cet organisme chapeau pour les ass. sur place. (**Janouk**): L'idée alors n'est pas qu'ils forment un organisme exprès pour les bailleurs, l'idée est qu'ils se mettent ensemble, secteur par secteur, et qu'ils forment une stratégie commune pour leur secteur, le secteur droits des femmes, le secteur droits de l'homme et qu'ils etablissent des axes et que toutes les ONGs travaillent dans la même direction...

2 Results of a statistical investigation

Since RCN's main concern refers to the right of an equal access to justice and to the requirements and needs to maintain the rule of law in society, I emphasise the mobilisation behaviour of state courts as well as their implementation capacity. Four different dimensions are thus researched: the litigation rate, the required process time, the appeals and the implementation rate. My data body refers to three different sources. There are *firstly* the evaluated results of a complete survey of all cases at all TGIs in the years 1979-1988, in total more than 20'000 court cases. The results of this survey have already been published (see Weilenmann, 1997). In order to get a good basis for comparisons I repeated this exercice *secondly* this year. I applied the same grid and collected again in all TGIs throughout the whole country each 10th case that has been inscribed between the years 2001 and 2004, in total 1048 out of 10482 court cases. The results of this survey will be interpreted on the background of my earlier studies. And *thirdly,* I also researched the working of two Tribunals de Residence, the TR Makamba of the district Rusaka (Mwaro) and the TR Kirundo of the district Kirundo (Kirundo). Both courts have also been investigated in the years 1987-1989. This way, the interpretation is much more reliable since it can refer to the results of a basic research.

2.1 The litigation rate

2.1.1 General introduction

Litigation rates are highly significant and stable figures for the measuring of the social distance (closeness/distance) of dispute settlement agencies to the local population, since they *measure the intensity of the* ***demand side*** (see Abel, 1979, F. von Benda-Beckmann, 1985; Ch. Wollschläger, 1989; M. Weilenmann, 1997, 2004). They are composed of the following information:

$$\text{Litigation rate} = \frac{\text{Number of civil and criminal cases at a 1. Instance court per year}}{\text{Number of the total population living in the area of the corresponding 1. Instance court}}$$

For assessing the value of such figures, many studies on court statistics and intercultural comparison of mobilisation behaviour in general (state and non-state justice systems) have been done. It is inter alia common knowledge that a good mobilisation rating of state courts varies between 1 case of 200 persons up to 1 case of 2000 persons. An access-to-justice problem exists in countries with an average litigation rate that is significantly higher than 1 case of 2000 persons per year. State court rates *below* 1 case : 200 persons per year have very weak pre-trial institutions and require high personal and financial resources. Otherwise they are good indicators for the risk of high backlog rates, an overflow of court cases including a possible collapsing of justice services. A list of a selection of countries shows the following picture:

	1. Instance state court	**Primary justice dispute settlement agency** (mostly customary court)
West Sumatra	1 : 10'000	1 : 892
Botswana	1 : 3‘000	1 : 720
Nord Togo	1 : 2‘700	1 : 360
Rwanda (2002)	1 : 510	1 : 20
Kenya	1 : 345	1 : 150
Burundi (1979-1988)	1 : 342	unchecked
West-Cameroon	1 : 220	unchecked
Malawi (appraisal values 2004)		
Mzuzu	1 : 120	unchecked
Zomba	1 : 40	unchecked
Switzerland (2004)	1 : 200	unchecked

2.1.2 Results

Compared with the figures I collected in the years 1979-1988 is Burundi’s actual litigation rate of *1 case at an official state court for 502 persons per annum* significantly lower than before. This general trend, that inspite of the general political ruptures is not very impressive, can also be confirmed by the two indepth studies I made this year in the provinces of Mwaro and Kirundo. In the province Mwaro the evolution of the population density contin-

ued in controlled grounds. In addition, the province of Mwaro was not so much involved in all the ethnic slaughters that disrupted Burundi's social and political landscape during the last decade. Nevertheless, the collected figures show an interesting pattern:

Province Mwaro:
Litigation rates: comparison 2001-2004 vs 1979-1988

Name of district Number abs. for 2001-04 Litigation rate (pro mille) for the period 01-04 Number abs. for 1979-88 and Lit. Rate 1979-1988	Customary law		Criminal law		Civil codified law (Code des Personnes et de la Famille; Dettes; Dé-dommagement)	
Bisoro N= 09.2004 = 28317 N= average 79-88 = 25498	**50** **0.441** 45 0.177	proportio-nal change **1: 2.5**	**10** **0.09** 41 0.16	proportio-nal change **1: 0.6**	**10** **0.09** 17 0.07	proportio-nal change **1: 1.3**
Gisozi N= 09.2004 = 23985 N= average 79-88 = 21937	**0** **0** 6 0.027	proportio-nal change **breakdown**	**10** **0.10** 21 0.10	proportio-nal change **1: 1**	**0** **0** 10 0.05	proportio-nal change **breakdown**
Kayokwe N= 09.2004 = 42138 N= average 79-88 = 37085	**10** **0.059** 44 0.119	proportio-nal change **1: 0.5**	**20** **0.12** 79 0.21	proportio-nal change **1: 0.6**	**10** **0.12** 26 0.07	proportio-nal change **1: 1.7**
Ndava N= 09.2004 = 52041 N= average 79-88 = 44432	**20** **0.096** 48 0.108	proportio-nal change **1: 0.9**	**0** **0** 6 0.015	proportio-nal change **breakdown**	**0** **0** 26 0.06	proportio-nal change **breakdown**
Nyabihanga N= 09.2004 = 56798 N= average 79-88 = 47483	**30** **0.132** 44 0.093	proportio-nal change **1: 1.4**	**0** **0** 27 0.06	proportio-nal change **breakdown**	**10** **0.04** 16 0.03	proportio-nal change **1: 1.3**
Rusaka N= 09.2004 = 38016 N= average 79-88 = 34847	**20** **0.131** 30 0.086	proportio-nal change **1: 1.5**	**10** **0.066** 31 0.090	proportio-nal change **1: 0.7**	**10** **0.066** 13 0.040	proportio-nal change **1: 1.7**

If one splits up the litigation rate according to the corresponding normative catalogue into a litigation rate for criminal law cases, a rate for cases on codified civil law and a rate for customary law cases, one realises that except for the customary law cases in Bisoro the general changes are not very impressive. In some districts as for instance Ndava or Gisozi, which already had very few court cases per year in the 1980s, one now observes even a complete absence of court cases in two normative categories. In other districts as for instance Rusaka or Kayokwe one observes within a controlled margin some slight changes. However, compared with the Province of Kirundo the social framework conditions of Mwaro are quite different. The Province Kirundo, which once was a very nice and silent place in the north east strip of Burundi, now attracts a lot of commerce and it got more and more a place of rural urbanity.

Province Kirundo

Name of district Number abs. for 2001-04 Litigation rate (pro mille) for the period 01-04 Number abs. for 1979-88 and Lit. Rate 1979-1988	Customary law		Criminal law		Civil codified law (Code des Personnes et de la Famille; Dettes; Dédommagement)	
Bugabira N= 09.2004 = 70040 N= average 79-88 = 35062	**10** **0.036** 27 0.096	proportional change **1: 0.4**	**0** **0** 60 0.18	proportional change **breakdown**	**10** **0.036** 12 0.040	proportional change **1: 1**
Busoni N= 09.2004 = 114733 N= average 79-88 = 55182	**10** **0.022** 36 0.082	proportional change **1: 0.3**	**20** **0.044** 100 0.19	proportional change **1: 2.3**	**0** **0** 34 0.06	proportional change **breakdown**
Bwambarangwe N= 09.2004 = 56862 N= average 79-88 = 31423	**0** **0** 12 0.048	proportional change **breakdown**	**0** **0** 92 0.30	proportional change **breakdown**	**10** **0.04** 5 0.02	proportional change **1: 2**
Gitobe N= 09.2004 = 59216 N= average 79-88 = 39078	**10** **0.042** 18 0.058	proportional change **1: 0.7**	**0** **0** 32 0.08	proportional change **breakdown**	**0** **0** 9 0.02	proportional change **breakdown**
Kirundo-Commune N= 09.2004 = 87991 N= average 79-88 = 55183	**50** **0.142** 54 0.122	proportional change **1: 1.2**	**60** **0.17** 239 0.45	proportional change **1: 0.4**	**10** **0.03** 59 0.11	proportional change **1: 0.3**

Name of district Number abs. for 2001-04 Litigation rate (pro mille) for the period 01-04 Number abs. for 1979-88 and Lit. Rate 1979-1988	Customary law		Criminal law		Civil codified law (Code des Personnes et de la Famille; Dettes; Dé-dommagement)	
Ntega N= 09.2004 = 92012 N= average 79-88 = 61619	**10** **0.027** 44 0.089	proportio-nal change **1: 0.3**	**50** **0.135** 100 0.17	proportio-nal change **1: 0.8**	**0** **0** 25 0.04	proportio-nal change **breakdown**
Vumbi N= 09.2004 = 83426 N= average 79-88 = 57894	**10** **0.030** 51 0.110	proportio-nal change **1: 0.3**	**20** **0.06** 137 0.24	proportio-nal change **1: 0.25**	**0** **0** 17 0.03	proportio-nal change **breakdown**

In the late 1980s the province of Kirundo got unfortunately in the maelstrom of the ethnic massacres[104] and today heavy changes in the population structure can be observed. Since my earlier research the population densitiy has in the districts of Bugabira, Busoni and Bwambarangwe practically doubled; but also in all the other districts a population raise of 50% or more is common. Within development circles it is thus very usual to argue that such a structural population change would have a strong impact on the court use. The reflux of refugees from Tanzania for instance gave reasons for the High Commission on Refugees (HCR) to request RCN's justice unit to launch a new traning programme for judges so that they can speed up the legal processes, since HCR feared a dramatic rising of disputes on land.

Though one can now observe a slight increase of land disputes, there is no reason to confirm such a dramatic assumption. The analysis of the statistical data shows quite a different picture. Except for the litigation rate in criminal law of the district Busoni and the rate on codified civil law in the district Bwambarangwe, *people go significantly less to court than in the 1980s*! And as already stressed, this observation is not a peculiarity of Kirundo but confirmed by my nation-wide recount. Contrary to the statements of the judicial personnel, all courts of today have significantly less cases than in the period from 1979 to 1988. This is not very surprising: For legal anthropologists it is common knowledge that during wartime people usually go less to court, in spite of the sometimes dramatic changes of the population composition or the like, since

[104] I remember at the massacres from Marangara and Ntega in august 1988.

i) there is a strong link between the development of the national economy and the court use in general[105], a link that is particularly endangered during wartime;
ii) there are clear and rigid concepts of the enemy with the corresponding bogeyman images. In everyday life they remain important patterns for interpretation of social behaviour, tie a lot of aggression, call for (political) „action“ and often hamper a direct verbal confrontation on objective and concrete issues as they are required during a court process;
iii) in civil wars state agencies such as the official courts, the police or the parliament often suffer under particular problems of political and legal legitimacy;
iv) people have in respect to their own life another perspective (questions of the endangered personal integrity). In addition, a lot of other immediate needs and preoccupations have priority[106], than quarreling during years at a state court.

The nation-wide recount of the mobilisation behaviour of all TGIs finally confims an older statement, namely that there is no reason to argue that people would not address Burundi's state courts because there were only abatutsi judges. This is false. With one court case per year out of 342 persons Burundi's state courts had already in the 1980s a very useful and good value. And now, after the signing of the Arusha-Accord, that is after the massive increase of justice personnel[107] i.e. after the integration of an appropriate number of abahutu judges as well as after the installation of the gender balance, the litigation rate did not climb up, not at all! – it broke on the contrary down to 1 case out of 502 persons a year! Evidently, there are other factors which have a much higher impact on the question whether people go to court than the ethnic or the gender argument. Facing unfitting statistical material, it is yet still surprising how immune the development community as a whole often behaves. Instead of verifying the obviously political coloured statements about the decisive negative impact, the ethnic identity (tutsi) and the gender identity (male) would have on the mobilisation behaviour, it is apparently still sufficient that some politicians or some (uninformed) journalists write some polemic articles on the „ethnic bias“ of the judicial personnel at Burundi's state courts and „everybody“ immediately feels a necessity „to take action“. This is by the way also a form to contribute to a growing ethnicity of Burundi's society!
Unfortunately, I have also to question the principal goal of RCNs justice and civil society units, namely that the „justice is accessible“ and that the „civil society takes progressively confidence into the judiciary“. Both goals refer inter alia to the unproven assumption that

[105] The stronger the national economy is, the more contracts are signed. And disputes on contracts (disputed debts, disputed questions on access to lands, divorces, disputed succession rights, disputed landmarks as well as criminal conflicts rising from such unsolved disputes on contracts such as brawls, libels or even thefts etc.) are the most important reasons for a court claim. Civil wars however go hand in hand with a breakdown of the national economy and the lesser the economic relations are the lesser is the need for new contracts.
[106] This priority is however a direct consequence of the war. All the more important is a development programme that deals not only with the negative consequences but with the reasons of the war!
[107] While in the 1980s a TGI usually was staffed with 3 to 4 judges (the only exception was the TGI of Bujumbura-ville with a much higher number of court cases) and 1 lawyer of the prosecution service as well as with 2 or 3 clerks, we encounter now between 10 and 12 judges as well as 5 to 7 clerks. The TRs were in the 1980s usually staffed with two official judge and as one lay judge and perhaps one clerk. Today the TRs are at least staffed with three trained judges and two clerks.

people would have no confidence in the state courts and therefore they would not mobilise them. But that is, as I shall outline, not the point. *The common people still address the courts, they expect to get finally justice but because of the bad implementation rates they do – regardless of the ethnic or the gender identity of the judges, regardless of the number of the court personnel and regardless of all the training courses this personnel received meanwhile – not get it! That is the point.*

The comparison of the litigation rates between the 1980s and nowadays finally shows that a programme of a development agency could not iniciate during only a three year phase a structural change. There are a lot of other macrosocial patterns of behaviour as for instance the culturally internalised attitudes towards the political and legal authorities which do not change from one year to the other and certainly not just because the judges now have a better legal background, a better logistic infrastructure of their offices and new robes. Other indicators are much more important. The comparison mainly demonstrates also the disturbing impact of the war. In regions like Mwaro with a dominant subistant economy, which was encapsulated and remained more or less untouched from the social warpings of the war, the corresponding litigation rates developed in more or less controlled margins. In regions like Kirundo however, where the social development was even before the war much more dependant from the access to cash money and where the war had a direct impact on the composition of the total population, the breakdown of the court use is easily visible.

2.2 Process time and backlog rates

RCN's intervention refers to the assumption that Burundi's judiciary would have a problem with the required process time. The two indepth studies at the TRs of Makamba (commune Rusaka) and Kirundo (commune Kirundo) do again unfortunately not confirm this assumption. The upraised figures are the following:

process time in months	**2001**	**2002**	**2003**	**2004**
TR Makamba	5	8.7	7	4
TR Kirundo	2.7	6.1	3.2	5.3

In addition, both TRs did not have pending cases. But since I here have only the figures of two TRs, their explanatory power remains not very comforting. I thus advise RCN to make a nation-wide check. However, I am able to put the results of these two TRs in relation to my nation-wide recount of all TGIs:

Process time						
Each 10th case	**process time**	**process time**	**Backlog rates**			
TGI	**average 01-02 in months**	**average 04-05 in months**	**number of** since 2001	**pending** since 2002	**processes** since 2003	since 2004
Bubanza	6.8	15	1	2	4	9
Bujumbura-ville	6.4	13	2	2	5	12
Bujumbura-rurale	5.9	12.4	4	3	4	11
Bururi	10.4	21	12	17	19	14
Cankuzo	8	11	0	0	0	0
Cibitoke	6.7	17.8	0	3	1	4
Gitega	7.2	15.1	0	0	0	0
Karusi	8.8	21	3	3	5	13
Kayanza	10.6	20	2	1	1	2
Kirundo	6	17.1	1	0	2	2
Makamba	10	5	4	4	8	10
Muramvya	12.5	15.4	0	0	0	0
Muyinga	8.9	16.3	15	13	11	25
Mwaro	7.2	15.8	2	2	3	4
Ngozi	8.6	15.4	0	0	0	0
Rutana	9.5	8.9	0	0	2	6
Ruyigi	3.9	11.5	0	0	1	6
average of the total	8.1	14.8				
average of the total	**1979-1983:** 7.2	**1984-1988:** 6.5	backlog rate total	46	50	66	118

A comparison of both levels suggests that *thanks to RCN's intervention at the TR-level the required process time still remained within the normal margins* while at the TGI-level we are confronted with a disturbingly rising process time and – what is even worser – with an alarmingly high backlog rate. These backlogs cannot, as suggested the consulted judicial personnel, be linked to the growing number of court cases per year. Burundi's TGIs of nowadays have less cases per year to deal with than in the 1980s and at the same time the court personnel has been significantly heightened. There must be structural reasons I do not know. A classification of the TGIs according to their corresponding backlog rates rather suggests regional reasons. Otherwise it remains uncomprehensible why the TGIs of Cankuzo, Gitega, Murmvya and Ngozi would have no backlog rate at all, while the TGIs of Bururi (62[108] pending cases) and Muyinga (64[111] pending cases) arrive at a level where one starts to wonder whether these two courts would ever be able to reduce their backlogs. A first glance into the detailed results of the recount[109] finally shows that the TGIs of Bururi and Karusi have in ad-

[108] remember that I only checked each 10th case! The figure of 62 resp 64 cases stays for about 620 resp 640 court files!
[109] See appendix 6

dition a very limited capacity to state final judgments. In Bururi only 27.6% of all the cases have been concluded, in Karusi even only 20%. On the other hand, both courts do more for the implementation of their legal decisions than the average of the judicial personnel at Burundi's state courts.

- *In respect to the statistical results one can conclude that RCNs intervention at the TR-level at least stopped the growing deterioration of the required process time. It would however be very advisable to expand the legal support and to include the work of the TGIs as well.*

My selected visits on the spot[110] finally showed that the logistic support had a quite positive impact on the daily working conditions at the state courts. The state of the court files differs much from what I saw in the 1980s. The courts have now a sufficiant logistic equipment to get order in their classifications of their dossiers and most of the courtrooms are appropriately equipped.

2.3 Appeals

The *appeal behaviour* informs about the varying containment (in-)capacity of disputes by 1. Instance courts. For RCN, an important indicator is thus the augmentation of judgements that are confirmed by the appellate court. The verification shows the following results:

Appeals	**2001/02/03**						
Each 10th case	**criminal law**		**civil law**		**customary law**		
TR-TGI	con-firmed	not conf.	con-firmed	not conf.	confirmed	not conf.	**row total**
Cankuzo	0	0	0	0	0	0	**0**
Cibitoke	0	0	2	1	8	8	**19**
Bubanza	0	0	0	2	5	6	**13**
Bujumbura-ville	0	0	3	1	0	2	**6**
Bujumbura-rurale	1	1	1	0	3	5	**11**
Bururi	1	1	3	0	14	1	**20**
Gitega	0	0	0	0	0	0	**0**
Karusi	0	2	0	0	3	4	**9**
Kayanza	1	0	0	0	7	0	**8**
Kirundo	1	0	0	0	2	1	**4**
Makamba	0	0	0	0	0	0	**0**
Muramvya	0	0	0	0	7	0	**7**
Muyinga	0	0	1	1	4	1	**7**
Mwaro	0	0	0	0	3	6	**9**
Ngozi	3	0	0	0	3	0	**6**
Rutana	0	0	0	1	0	5	**6**
Ruyigi	2	0	0	0	4	1	**7**
column total	**9**	**4**	**10**	**6**	**63**	**40**	**131**

[110] For additional information see the preliminary report from the 22. May 2005 in appendix 7

proportional values	9:4		10:6		6:4		
	2004/05						
Each 10th case	**criminal law**		**civil law**		**customary law**		**row total**
TR-TGI	con-firmed	not conf.	con-firmed	not conf.	confirmed	not conf.	**row total**
Bubanza	0	0	3	0	5	4	**12**
Bujumbura-ville	0	0	7	1	0	0	**8**
Bujumbura-rurale	0	0	1	1	3	2	**7**
Bururi	5	0	5	0	15	0	**25**
Cankuzo	0	0	0	0	0	0	**0**
Cbitoke	0	0	5	5	5	6	**21**
Gitega	0	0	0	0	1	0	**1**
Karusi	0	0	0	0	1	0	**1**
Kayanza	0	0	1	0	4	0	**5**
Kirundo	1	0	0	2	2	3	**8**
Makamba	0	0	0	0	0	0	**0**
Muramvya	0	0	0	0	1	0	**1**
Muyinga	0	0	1	4	2	4	**11**
Mwaro	0	0	0	1	1	2	**4**
Ngozi	0	0	0	0	12	1	**13**
Rutana	0	0	0	1	0	3	**4**
Ruyigi	0	0	1	1	2	0	**4**
column total	**6**	**0**	**24**	**16**	**54**	**25**	**125**
proportional value	6:0		9:6		8:4		

The collected data indicate indeed a slight amelioration of the proportional relation between confirmed and rejected judgments of the district courts (TRs), particularly in the sections of criminal and customary law. Nevertheless, the more I analyse the working conditions of Burundi's state courts, the more I wonder about the problem understanding of RCN's justice unit. From the point of view of the justice unit, how many disputed judgments of the TRs should be confirmed by the TGIs until the unit does not identify a „problem"? How should the proportion look like? Are the average proportions of 9:4 (more than 2:1) for the criminal law cases, 10:6 for civil law cases and 6:4 for the customary law cases as they have been figured out for the years 2001-2003 „a problem"? Is a proportional value of 6:0, as it has been calculated for the appeals on criminal law of the years 2004/05, a „better" score? Is that really a „progress"? Can we in the section of the customary law really speak of a positive development if the proportional value climbs up from an already 6:4 to an 8:4 relation? From my viewpoint are these considerations rather sidelines.

2.4 Implementation rates

To improve however the implementation capacity of Burundi's state courts is no sideline, but should keep top priority, in particular because Burundi's already bad implementation capacity even deteriorated since the 1980s:

Implementation TGI	**Comparison 2001-05 vs 1979- 88**					
Each 10th case						
TGI	**proportion of implemented judgements**					
	criminal law		**civil law**		**customary law**	
time period	**2001-04**	**(1979-88)**	**2001-04**	**(1979-88)**	**2001-04**	**(1979-88)**
Bubanza	0%	(7.8%)	14.3%	(8.9%)	5.6%	(23.8%)
Bujumbura-ville	0%	(6%)	10.64%	(3.9%)	0%	(3%)
Bujumbura-rurale	0%	(8.9%)	12.50%	(3%)	9.38%	(4.5%)
Bururi	25%	(49.9%)	33%	(17.6%)	36%	(21.5%)
Cankuzo	0%	(34.7%)	0%	(8.9%)	0%	(34.2%)
Cibitoke	0%	(37.3%)	0%	(84%)	2.95%	(92.2%)
Gitega	0%	(8.4%)	0%	(10.9%)	0%	(9.9%)
Karusi	17.65%	(26.2%)	0%	(18.5%)	25%	(17.7%)
Kayanza	0%	(4.4%)	0%	(2%)	0%	(1.5%)
Kirundo	12.5%	(31.7%)	50%	(20.5%)	63.64%	(19.5%)
Makamba	0%	(38.4%)	0%	(22.4%)	0%	(38.2%)
Muramvya	0%	(26.9%)	0%	(3.6%)	0%	(9.8%)
Muyinga	7.7%	(39.2%)	7.7%	(85.4%)	13.2%	(77.6%)
Mwaro	0%	(49.1%)	0%	(8.5%)	0%	(9.5%)
Ngozi	0%	(0.3%)	0%	(6%)	0%	(8.2%)
Rutana	15.4%	(54.6%)	100%	(37.9%)	44.45%	(31.8%)
Ruyigi	6.45%	(50.3%)	33%	(33%)	33%	(25%)
Total average	5%	(27.9%)	15.4%	(22.1%)	13.8%	(23.9%)

Indeed, RCN's justice-unit already tabled the problem of the non-implementation of legal decisions in the current phase. It explained this difficulty with the absence of trained bailiffs at the district and the provincial level and with the fact, that until now only the judges of the TRs and the TGIs were charged with that function. Investigations of the justice unit moreover showed that the court personnel have a very limited knowledge about an ordinary execution and on the role of the bailiffs. The justice unit therefore wants to carry out a special training course for selected clerks so that they can become a bailiff and this way improve the implementation capacity of Burundi's state courts. In addition, jointly with the Ministry of Justice the justice unit wants to regulate the question of the lacking transport opportunities (cars) including the problem of the fuel. According to Anne-Aël Pohu most of the clerks are now women who even would rarely accept long marches for the implementation of legal decisions.

Though I agree on the importance of having trained bailiffs, I do however have a sceptical stand against these considerations. The problems of the reintroduction of the legal decisions

into the local contexts are *firstly* very complex and sensitive ones. They can not be reduced to the act of trained bailiffs, who one morning come with a Four Wheeler in order to state for instance the new demarcation between two disputed plots of land, establish a protocol of the new borderline – and off they are. This way, the legal implementation only matches the needs and requirements of the state bureaucracy, namely to get an ordinary protocol, a so-called „P.V. d'exécution". The bailiffs need to be integrated in an overarching organisational structure that guarantees the communicative links with the local communities. It is thus also a priority to cutting through Burundi's horizontal split into a national (modern) and urban based state law and a local (traditional) rural based customary law and to better integrate the locally anchored bushingantahe. Vis-à-vis the new constitution, which completely ignores the bushingantahe, development agencies like RCN can thus not remain in an observant position.

And *secondly* I need to stress that already in the 1980s Burundi's state courts had no bailiffs and no cars. But a glance on the then implemented judgements clearly shows that some of these courts achieved pretty good values – even compared with European countries and inspite of their poor logistic equipment.

TGI	**proportion of implemented judgements**		
	criminal law	**civil law**	**customary law**
time period	**1979-88**	**1979-88**	**1979-88**
Bururi	49.9%	17.6%	21.5%
Cibitoke	37.3%	84%	92.2%
Muyinga	39.2%	85.4%	77.6%
Rutana	54.6%	37.9%	31.8%
Ruyigi	50.3%	33%	25%

The question thus rather is the regional variation of the rule of law that now even aggravated. Notwithstanding of the problem of the unequal treatment of third parties, which is indeed a serious matter, the weak implementation rate constitutes also a serious power problem, which clearly has some regional facets[111]: If one picks up for instance all those TGIs which since 2001 have not implemented any single court case, one can easily remark that 5 of these 7 TGIs are located in the corelands of the former monarchy of Burundi.

TGI-level	**criminal law**		**civil law**		**customary law**	
time period	**2001-04**	**(1979-88)**	**2001-04**	**(1979-88)**	**2001-04**	**(1979-88)**
Cankuzo	0%	(34.7%)	0%	(8.9%)	0%	(34.2%)
Gitega	0%	(8.4%)	0%	(10.9%)	0%	(9.9%)
Kayanza	0%	(4.4%)	0%	(2%)	0%	(1.5%)
Makamba	0%	(38.4%)	0%	(22.4%)	0%	(38.2%)

[111] According to Franz von Benda-Beckmann a basic problem concerns the fact, that *„little attention has been given to the spatiality of laws existence. Legal ideology and science define space and time of the existence of law in their own terms, and negate other forms of spatio-temporality. Legal constructions of law (...) projected onto the geographical space of which they claim validity – on ‚maps' of different scale, (...) – do not mean that law actually exists in that space"*(2002:124).

Muramvya	0%	(26.9%)	0%	(3.6%)	0%	(9.8%)
Mwaro	0%	(49.1%)	0%	(8.5%)	0%	(9.5%)
Ngozi	0%	(0.3%)	0%	(6%)	0%	(8.2%)

And except of Mwaro's relatively high implementation rate of 49.1% in criminal law matters for the years 1979-1988, all these 5 courts already had in the 1980s a remarkable bad implementation capacity. But because of the war, obviously also the TGIs of Cankuzo, Makamba and partly Cibitoke, which before had a quite good score, now got caught in the maelstrom of absolute insignificance. On the other hand the TGIs of the southern Mugamba and the Bututsi like Bururi and Rutana, where most of the governing class is coming from, could keep and partly even *improve* – even under the particular difficult security conditions of the civil war and without any trained bailiff – their implementation capacity:

TGI-level	**criminal law**		**civil law**		**customary law**	
time period	**2001-04**	**(1979-88)**	**2001-04**	**(1979-88)**	**2001-04**	**(1979-88)**
Bururi	25%	(49.9%)	33%	(17.6%)	36%	(21.5%)
Rutana	15.4%	(54.6%)	100%	(37.9%)	44.45%	(31.8%)

Interestingly enough, the same plays also for the TGIs of Kirundo and partly Ruyigi, both courts located in the eastern part of Burundi and also *outside* of the former dominions of the monarchy.

TGI-level	**criminal law**		**civil law**		**customary law**	
time period	**2001-04**	**(1979-88)**	**2001-04**	**(1979-88)**	**2001-04**	**(1979-88)**
Kirundo	12.5%	(31.7%)	50%	(20.5%)	63.64%	(19.5%)
Ruyigi	6.45%	(50.3%)	33%	(33%)	33%	(25%)

And for Bujumbura, Bubanza and Karusi the situation changed not very much, the implementation capacity was already very weak in the 1980s and so it is nowadays. A comparison of the implementation rates with both district courts I researched, the TRs of Makmba (Commune Rusaka, Province Mwaro) and Kirundo, finally confirm this national pattern:

TR-level	**criminal law**		**civil law**		**customary law**	
time period	**2001-04**	**(1979-88)**	**2001-04**	**(1979-88)**	**2001-04**	**(1979-88)**
TR Makamba (Rusaka/Mwaro)	0%	(no data)	0%	(no data)	28.6%	(no data)
TR Kirundo	1 case in appeal		64.3%	(no data)	63.1%	(no data)

It is thus time to recall the maps I presented in part 1, chapter 1.4. They visualise the consequences of the systematic destruction of the precolonial power structure and indicate a significant correlation between i) the low implementation probability of Burundi's state courts located in the corelands of the former kingdom and ii) the probability to initiate ethnic mas-

sacres in these localities. These charts have thus a high explanatory value since their general pattern fits well with the results of the actual recount. This clearly calls

- *i) for a prioritisation of a justice programme that aims at an improvement of the implementation capacity at both levels, the TR- and the TGI-level.*
- *ii) for a regional differentiated approach with a special focus on the corelands of the dominions of the former kingdom, that is mainly the Buyenzi, the Kirimiro, the central and the northern part of the Mugamba as well as the northern part of the Bututsi. RCN's actual ZIP („Zone d'intervention privilégié") however fits not very much with this diagnosis and requires a repositioning*
- *iii) for a historical sensitive approach that takes the question of how both state models could be integrated into a new, open and single ensemble for serious.*

Regrettably, the impact study ends in an ambivalent conclusion. With the trainings for the justice personnel, the justice unit for instance tried to contribute to a reduction of the proportional number of postponement of hearings in percent compared to the total number of hearings. Here one clearly has to distinguish into the impact at the TR-level and the one at the TGI-level. While the required process time at both evaluated TRs still remained within the normal margins – in respect to the question of pending cases it even came to a remarkable advancement (no pending cases at all: impact) – did the number of pending processes at the TGI-level even dramatically increase (no impact). Most probably, the Ministry of Justice now tries to correct RCN's approach: While nearly all magistrates at the TR-level systematically got an „RCN-training course", the magistrates at the TGI-level, who only have a slightly better educational background[112], could only selectively profit from this support. Therefore, a raising number of TR-lawyers with an „RCN-training" is now engaged at the TGI-level[113]. According to the unit, the trainings should also contribute to an augmentation of the number of judgments that are confirmed by the appellate court. Here, a certain impact can be confirmed, it however remains questionable whether the appeal rate really constitutes a problem. And finally, the trainings should lead to an augmentation of the proportional number of implemented judgements in percent compared to the total number of judgements (no impact at all), to a reduction of the number of badly treated detainees during the pre-trial confinement (no measurable impact since only a very limited number of implementation protocols have been made) and to a reduction of the proportional number of irregular detentions in all the prisons or bullpens (no measurable impact because of the absence of corresponding protocols that could prove a congruence between the contents of the judgement and the actions of the agencies responsible for the implementation).

[112] While most of the lawyers at the TR-level frequented partly the secondary school or even the „École Secondaire Téchnique et Administrative" (ESTA), the lawyers at the TGI-level usually got a general qualification for university entrance, some of them studied during 2 or 3 terms the legal sciences and very few got a law degree

[113] for details see Appendix 7

Part 4 Conclusions

1 Results of the potential/obstacle matrix

In order to get an overview of RCN's programme activities, each programme-unit has been screened by a potential/obstacle matrix. It clarifies the strong and the weak points of each unit and draws first options for the third phase.

Civil society approach

sucess	**potentialities**
The elogy of upright actions *to launch an internal reflection process on how to work with key-points of Burundi's culture. To inspire other project components such as the theater* ***Theater „si ayo guhora"*** *The plays are emotionally very tangible. They are cutting through Burundi's discourse order of conflict denial. They are an important brand of RCN-Burundi.* ***promotion of local associations*** *facilitate the access to justice* ***radio transmissions*** *popularizes RCN's programme activities in Burundi. Improves the popular knowledge on positive law.*	***The elogy of upright actions*** *originality of the project; to improve culturally rooted standards of moral and ethics and to explain social behaviour via the fundamental values of justice* ***Theater „si ayo guhora"*** *high potential to positively influence the whole discussion on Burundi's past* ***promotion of local associations*** *In the future, the local associations could act as local transmitters of information in order to improve the implementation capacity of Burundi's state courts; improve the tasks of the Bushingantahe; in addition, RCN should also launch the UPRONA question within the civil society actors of Bujumbura-ville. Perhaps one could think about a conference on the impact of „the old UPRONA" on the structuring and forming of the actual networks that back the existing civil society structures. Such a reflection process could consolidate the identity of the engaged civil society members as political actors and RCN's brand as a cultural sensitive and reflexive NGO* ***radio transmissions*** *to be a platform to table the gap between a sense of justice that is nationally valid and a socio-cutural one. to open new space for a negotiation culture*
failures	**obstacles**
The elogy of upright actions *not having reached the target group; not having consulted the existing international literature on Kirundi proverbs* ***Theater „si ayo guhora"*** *On site, the play is not integrated in an enclosing structure that allows a real deepening of the required treatment of the local and personal impact of Burundi's disturbing political history* ***promotion of local associations*** *The question, in how far the old UPRONA structure influences structure, goal and composition of the local associations has never been checked.* *The problem identification is critical: the goal of the local associations, to improve the access to justice, corresponds to th idea of a low litigation rate. Burundi's litigation rate however has never been checked nor compared with other societies.* ***radio transmissions*** *There is an unfortunate arrangement of the radio sessions – in the studio are the knowledgeable, in the countryside the „cases".* *In face of Burundi's problem of legal pluralism, the programms are too less reflective and too much only concerned with positive law.* *Difficulties to integrate the radio programmes into the programme design of the civil society-unit.*	***The elogy of upright actions*** *the range of variation in respect to possible interpretations* ***Theater „si ayo guhora"*** *No or very restricted national knowledge on how to deal with the repressed horror. Missing national experts qualified to work with groups on ethnopsychoanalytical issues.* ***promotion of local associations*** *politics within civil society. The legend of Burundi's „new civil society". Risk of instrumentalisation of civil society actors for other (political) purposes* ***radio transmissions*** *the number of radios is still limited. Rradio programmes are selectively consumed. The name recognition of RCN's radio programme is still limited..*

Justice approach

sucess	potentialities
Backing of the courts with legal texts *though the compiled and published corpi juris are in parts already outdated, is their improved accessability – especially compared with the former situation at the TRs and TGIs - still a great success. The same plays also for the translation of these texts into Kirundi. Particularly important finally is the publication of the procedural laws.* ***Training programmes*** *RCN's training programmes are highly welcomed, by the ministry of justice as well as by the justice personnel. According to an internal evaluation has the legal quality of the judgments identifiable increased. In order to work one's way up, having received an „RCN-training" is for the TR-judges a decisive element.* ***Study on customary law: the land law question*** *The study is of great actuality. It responds to an increasing need to handle the land question with legal means.In addition, the study opens space for discussing the question how to bridg the gap between Burundi's official state law and the customary law.* ***Logistic Support*** *the support is a very important element to respond to typical problems of a precarious State such as an inoperative administration of justice.The sevice capacity of the courts has increased – also compared with the situation in the 1980s.* ***IT-projects for the prosecution service*** *important but to early for a qualification*	***Backing of the courts with legal texts*** *A legal consulting of the legislative branch in respect to the negative sideffects of the undamped speed of the law production could improve the backing of the courts with legal texts.* ***Training programmes*** *A more appropriate problem identification (i.e. topics such as the implementation question, problems with pending processes as well as the settling of legal conflicts at the interface between state and non-state legal systems) could enhance the social and legal impact of the training programmes* ***legal studies*** *Future studies should focus on typical problems of the court use such as for instance the mobilisation behaviour of critical social groups like the batwa or the illiterates. In case of conflict – how do they proceed? Another important field for studies is the question of the refeeding of legal decisions into the local communities. Studies on customary law finally could focus on the existing contradictions between state and non-state justice systems in order to sensitise the political and legal decision-makers for questions of legal pluralism and the necessity of bridging the gap.* ***Logistic Support*** *in order to improve the containment capacity of the state courts, the support should be broadened in favour of the TRs and the TGIs* ***IT-projects for the prosecution service*** *In respect to the implementation problem, particularly in criminal law matters, the project is very promising.*
failures	**obstacles**
general failures *a) imprecise problem identification (the relation between macro-social changes and the development of the locally variable litigation rate has never been verified; there is a tendency to overestimate the proportional part of not confirmed appeals and an overestimation of the required process time, particularly in respect to the TRs)* *b) no project activity focuses on the the (organisational) problem of the growing number of pending processes at the TGI-level* *c) inaccurate prioritisation.The manifold programme activities are too less focused. Organisational difficulties such as the regionally variable incapacity to implement legal decisions did not get top priority inspite of the fact that Burundi's judiciary actually is a „justice of facade".* *d) questionable prioritisation of the TRs at the expense of the TGIs.*	***general obstacles*** *a) in Burundi, two states with two different legal models got stuck into each other. This results in a remarkable legal pluralism* *b) Daily problems with the power sharing: questionable independency of the judges and the state courts; no means for a proper budgeting – no access to the court fees* *c) corruption* *d) the undamped speed of the law production and an outdated out-put capacity of the legislative branch crisscrosses the value of the compilation of a corpus juris.* *e) inapplicability of many laws* .

2 Recommendations

In order to prioritise the Burundi programme, *I advice RCN to put the implementation question in the centre of the next 3 year phase*. After having realised the full dimensions of Burundi's implementation problem, RCN should not lapse into a hyperactivity and to immediately start with „actions". The problem is very complex and broad and requires a thoughtful concept. The refeeding of the final judgements into those social contexts where the disputes are coming from, requires legal decisions that really match the miseries and preoccupations of the litigants. Otherwise, the protocols of the legal implementations remain just sheets of paper for the state bureaucracy. Instead of settling disputes, implemented judgements then just risk to restart the causal conflict. Often, the same parties then get involved in new disputes on the same or similar issues and in the very end the state administration has to deal with never ending stories, stories which just might initiate new conflicts at another political stage.

Indicator for a successful implementation has to be the question whether the parties remain calm and do not mobilise again state institutions such as the courts, the police or the public administration with the same or similar issues or that even they become criminals. The success of legal implementations can thus be checked by taking a look at the registers (identity of the conflicting parties and subject matter of the dispute).

2.1 Possible levels of intervention

RCN's contribution could thus refer to the following levels of intervention:

(i) *legislative branch (parliament)*: A legal advice for the law reform commission in order to reduce the undamped speed of the law production and to get applicable laws;

(ii) *Ministry of Justice / Administration of Justice / Ministry of Public Security*: A legal advice in order to get an organisational infrastructure that enables the courts and the public prosecution services to implement their legal decisions;

(iii) *prosecution services*: to carry out in collaboration with the Belgian DGCD the IT-project (see part 2, chapter 2.2.5);

(iv) *TGIs and TRs*: To continue with the already running programme of a logistic support (see part 2, chapter 2.2.4);

(v) *regional groupings of courts*: A regional sensitive legal advice for well identified groupings of courts (TGIs and TRs), which are clustered according to their regionally variable conflict profile, their internal difficulties with pending cases and their local troubles to implement legal decisions;

(vi) *court personnel at the TGI and the TR-level,* the *Officers of the judicial Police (Officiers de la Police Judiciaire/OPJ)* and the *abashingantahe*

(vii) *local associations:* A legal advice and an advice on conflict mediation in order to enhance their capacity to support the refeeding of legal decisions into those social communities, where the disputes are coming from.

(viii) *interface state law/customary law*: since nobody has a monopoly on the interpretation of (local or localised) customary law to enhance the dialogue and the mutual exchange on local legal knowledge between the justice personnel of the state administration and those of the non-state justice systems (mainly bashingantahe).

(ix) *general public*: to enhance the promotion of dialogue and mutual exchange on central topics of Burundi's bloody political history. To broaden and deepen the activities against Burundi's discourse order on conflict denial.

(x) *army*: enhance the understanding for moral courage within Burundi's national army.

2.2 Possible activities

For the different levels, the following activities could be envisaged:

Members of the Parliament

- To organise a conference for the members of the parliament in order to outline the different facets of the implementation problem of Burundi including its history and its ways, the implementation problem is linked to Burundi's political landscape, to its ethnicity, to an enhancement of the non-state justice systems and to the undamped speed of the legislative branch to enact new laws.

- To advocate for a particular concern of the law reform commission for the inapplicability of so many laws. The commission should thus be
  (a) charged with a rating of those laws which remain inapplicable because of conflicts with other (important) laws (national laws, international laws, customary law etc.), because they do not refer to corresponding implementation rules, or because they trouble with cultural and/or social norms and thus refer to wrong or misleading assumptions of the social realities of most of the litigant parties;
  (b) in order to prepare the enactment of new laws, the law reform commission should also be receptive for the daily experiences and difficulties of the justice personnel with the required implementation of the existing laws, to include the lessons learnt into the process of legislation, to supervise the implementation process of state law and to serve as a permanent contact instance for RCN's Burundi office.

Ministry of Justice, Administration of Justice and Ministry for the Public Security

- To negotiate with the Ministry of Justice and the Administration of Justice on training programmes on the procedures of the legal implementation for the justice personnel. In particular, RCN should opt for a broad approach and not limit its request on the training of two bailiffs per court (TR and TGI) and on the organisation of transport possibilities

(cars) for the bailiffs including the payment of the fuel. Burundi is a country with a lot of manpower and it is not plausible why the administration of justice should not refer to an equally well organised local hierarchy as the public administration already does. It would be much more helpful to have at each „colline“ (administrative unit of the „hill“) a bailiff at hand who really knows the local living conditions and who can be adressed in case of need. In addition, one should also think about options how to integrate the locally rooted bashingantahe into the process of legal implementation. Perhaps they could act as advisors on customary law at the level of the „cellule“ and play a role as a kind of local assessors.

- to develop a mechanism to secure the communicative link(s) between the personnel at grass-roots level responsible for the implementation in the local settings, the administration of justice including the state courts and the legislative branch; to systematise the exchange of critical information by forwarding the daily experiences with the application of the different laws as well as by securising a reflection process on the daily difficulties with the required implementations, for instance by the promotion of permanent focus groups.

- to equip the „Centre of legal studies and documentation“ with the required legal texts as well as with international literature on the court use (mobilisation behaviour) and on critical and/or instructive issues of the legal containment (in-)capacity; to involve the Centre also into the process of information exchange between the different stakeholders of the administration of justice.

- to advocate within the donor community for the financing of a training centre for the Officers of the Judicial Police (OPJ). To offer advisory services for the Ministry for the Public Security, particularly in respect to the geography of unimplemented legal decisions (see below).

prosecution services:

- in collaboration with the Belgian General Direction of Development Cooperation (DGCD) to carry out the IT-project for the prosecution services in order to get an overview and an order into the various files of the detainees;

TGIs and TRs

- to enhance the logistic support for the district and province courts. To focus on the difficult working conditions of the TGIs too.

regional groupings of the courts

- to clarify the different local and regional variations of the implementation problem, this report indicates. To do this, it would be helpful to analyse in detail a) my first hand data that are referring to the TGI-level. Where, in which districts legal decisions remain un-

implemented? And where are they implemented? In addition, the available data should be completed b) by a count of each 10th case at the TR-level. In order to get comparable data, this count should refer to the same grid. This grid would allow identifying those districts/collines which are particularly difficult for the state courts;

- to identify the different conflict profiles of each province/district. There might be important variations[114] that can be mapped. This way, training programmes for the justice personnel of distinct courts at both levels (TR/TGI) can be designed, that are focusing on the prevailing conflict profile per geographical and/or cultural area and thus responding to specific regional needs. In Bujumbura for instance, distinct TRs have to deal also with the islamic law. The region of Ijenda is known as a region of unweary pettifoggers, in the Province of Mwaro one third of all Bashingantahe of Burundi is living, the region of the Buyenzi, the Kirimiro and the Mugamba remains also structured by the old feudalistic order of the clientele model[115], at the borders of the Lake Tanganyika the local economy (palm oil, cotton) refers to rather different resources than at the highlands etc. And so change also the predominant normative orders to which the different conflicts mights refer to. Inspite of the postulated legal equality of the citizens change the corresponding regional requirements vis-à-vis the containment capacity of the state courts. For a successful state administration it is thus imperativ to find ways in order to respond adequately to such local variations.

- RCN's actual ZIP („Zone d'intervention privilégié") should be readjusted. On the basis of my impact study I advise a special focus on the corelands of the dominions of the former kingdom, mainly the Buyenzi, the Kirimiro, the central and the northern part of the Mugamba as well as the northern part of the Bututsi.

<u>Trainings for the justice personnel at the TGI and the TR-level, the Officers of the judicial Police (Officiers de la Police Judiciaire/OPJ) and the abashingantahe:</u>

- In addition to the already running training programmes for the court personnel that – depending from the available financial and personal resources - must perhaps be downsized slowly, a new cycle in each case should be launched that guarantees a general introduction into the significance ant the problems of the legal implementation. In collaboration with the „Ministry of Justice" and the „Conseil Supérieur de la Magistrature" and in addition of the (broad) training of bailiffs a legal advice (mainly trainings) for the court personnel on the general rules of a legal implementation and on topics like legal plural-

[114] During my research in the 1980s, I figured for instance out that conflicts with drogs are mainly prevailing in the north east strip of Burundi, cases on polygamie are particularly widespread in the Kumosso, in the Bugesera and in the plains of the Ruzizi, while cases on succession rights dominated in the corelands of the old Kingdom. Important local and/or regional variations hold also for cases on divorce, on lands, on destruction of the fields, on cattle, on libels, on „abus de confiance", on debts, on thefts etc. etc.

[115] especially. the „ubugabire/ubugererwa - relation" that refers to the question whether the disputed itongo [plots of land] are itôngo ry'umuheto [old dominions of the royal court] or itôngo ry'umuryango [plots of the kin-group]

ism, Burundi's history of the rule of law and on conflict mediation combined with an on-the-job training on the spot should be offered;

- It would be advisible to create also a forum for the mutual exchange of experiences with the state law/customary law interface in order to improve the applicability of the existing laws and getting inputs in terms of content for the legal advise of the law reform commission.

<u>local associations/promotion of civil society</u>

- the local associations could act as local transmitters of information in order to improve the implementation capacity of Burundi's state courts; improve the tasks of the Bushingantahe; in addition, the local associations could critically accompany processes of legal implementation and make questionable processes publicly available. (similar function like the „Observatoire de l'Action Gouvernementale (OAG)") at another level;

- for internal purposes, RCN should clarify the possible links of these associations to the former networks of the old UPRONA structure and relaunch the identification process;

- in order to promote the cvil society, RCN could think about a conference on the impact of „the old UPRONA" on the structuring and forming of the actual networks that back the existing civil society structures. Such a reflection process could consolidate the identity of the engaged civil society members as political actors and RCN's brand as a cultural and political sensitive and reflective NGO.

<u>general public</u>

(a) *radio programmes*: The radio could be an excellent platform to table the gap created by the colonial powers between a sense of justice that is nationally valid and a socio-cultural one and in respect to legal matters open a new space for a negotiation culture. This requires however an approach that distances itself from concepts of sensitisation and vulgarisation of positive law and shifts to a more participative approach which is not limited on public contests on the worth of knowing issues of (oppressive) state law.

(b) *theater*: a conceptual proposition for the post processing phase is under way.

<u>Army</u>

- in order to enhance the understanding for moral courage within Burundi's national army to develop a new elogy of upright actions that adresses as a target group of priority the military personnel

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