

Land Rights and the Forest Peoples of Africa



Forest Peoples
Programme

Historical, Legal and Anthropological Perspectives

O. Overview: Analysis & Context **1. Burundi**
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Land rights and the forest peoples of Africa

Historical, legal and anthropological perspectives

No 1 Historical developments in Burundi's land law and impacts on Batwa land ownership

Jean-Pierre Amani

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1c Fosseyway Business Centre, Stratford Road
Moreton-in-Marsh GL56 9NQ, United Kingdom
Tel: +44 (0)1608 652893 · info@forestpeoples.org · www.forestpeoples.org

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General Introduction

1 Overview of Burundi and land value in general

Burundi is a small landlocked country in eastern Africa, which has high population density. The country is made up of three ethnic groups: the Bahutu, Batutsi and Batwa,¹ the latter make up 1% of the population. This social makeup can be seen on each and every hill, where these ethnic groups have coexisted and formed neighbourhood units.²



The vast majority of the population in Burundi live in the countryside, where there is considerable land pressure and average family plots range from between 0.5 hectares and 0.8 hectares.³ Nonetheless, the many

land disputes that reach law courts result not only from land scarcity, but also often because the legislation in place is not respected.

Due to stereotyping and marginalisation the Batwa are not involved in public life. Despite positive progress made recently, they rarely attend political or religious gatherings.⁴ In short, the Batwa in Burundi have been subject to increased marginalisation in all respects, including in terms of land access. Under these conditions, in order to study the development of land laws and their impact on the Batwa, it is necessary to examine the various existing legal statutes and the political, social, economic and environmental factors of the situation of the Batwa in Burundi.

¹ The terms *Muhutu*, *Mututsi* and *Mutwa* are used in the singular, whereas the terms *Bahutu*, *Batutsi* and *Batwa* are in the plural.

² Jean-Louis Acquier (1986) *Le Burundi*, Éditions Parenthèses, Marseille, France, p 20.

³ Republic of Burundi (2007) *Programme de gestion décentralisée des terres dans la Province de Ngozi*, Planning Document, Bujumbura, March 2007, p 8.

⁴ Since the Arusha Agreement was signed on 28 August 2000 (http://www.usip.org/library/pa/burundi/pa_burundi_08282000.html), there have been a few rare cases of Batwa being promoted to official posts in the various institutions in Burundi.

2 The general land context in relation to the Batwa

In theory, Burundian land law, as it is set out in the 1986 Land Code currently in operation, has three statutes for land resources. These are: ownership registered under written law (generally situated in urban areas), state owned land, and ownership through customary laws.

There have been many different legislative attempts to register land resources from the colonial period onwards. However, in Burundi, as in many other African countries with oral traditions, some practices are followed by the people without them being strictly set out in the law.⁵ This is the case for Batwa who, due to their marginalisation, continue to observe their specific customary practices by asserting their ownership rights in their traditional areas (collective freedom to access areas that are currently protected, such as forests and parks, and collective clay exploitation in marshland areas).

Collective ownership is used by the Batwa as a form of traditional land appropriation; it assumes that multiple users will be involved in exploiting natural resources in forests and extracting clay in marshland areas.

The small parcels of land occupied by the Batwa cannot be transferred as they come under the common law of Batwa group members, often family groups.

3 Historical context of Burundi

The evolution of land laws in Burundi is linked to the history of political and administrative institutions of the country, which also provide a chronological framework. A brief summary of this history is given below.

Oral tradition states that at the end of the reign of King Ntare Rugamba (around 1850) Burundi was one of the most powerful lakeside kingdoms, which was densely populated by a people all of whom spoke the same language and had the same understanding of belonging to one nation led by the same *Mwami* (king).⁶

It was a centralised kingdom led by a *Mwami*, with support from administrative authorities, agents, known as the *Abaganwa* (*Umuganwa* in the singular), to administer the chiefdoms (without civil status); as well as deputy chiefs, known as *Abatware* (*Umutware* in the singular), who were either Tutsis or Hutus.⁷ There is no indication anywhere in history that there were any Batwa deputy chiefs.

Burundi became a German colony in 1896. The Germans did not impose their own laws; they adopted an indirect administration policy based on maintaining customary institutions and authorities.⁸

⁵ UNDP, UNOPS, CNTB (2007) '*Étude sur la problématique foncière et les solutions alternatives face aux défis de la réintégration et de la réinsertion des sinistrés au Burundi*', PEM - Consult, Bujumbura, October 2007, p 1.

⁶ Joseph Gahama (2001) *Le Burundi sous administration belge : la période du mandat 1919-1939*, Paris Karthala, p 19.

⁷ Jean-Pierre Chrétien and Jean-Luc Coifard (1967) *Le Burundi*, Paris, Documentation Française, p 14.

⁸ *Ibid.*, p 15.

This situation continued until 1916 when the Belgian military occupation began, which was officialised under the League of Nations mandate in 1919 as 'Ruanda-Urundi'. In 1925 Ruanda-Urundi was attached to the Belgian colony, Congo.⁹ This administration continued under trusteeship of the United Nations and substantial changes were made to customary land law in Burundi.¹⁰

Independence was solemnly declared in Burundi¹¹ on 1 July 1962 and on this day various land laws were adopted and promulgated, or rather, abrogated. We must, therefore, consider whether these different legislations had an impact on Batwa land rights.

Before looking at this issue, it is necessary to consider the overall situation of the Batwa, in terms of their way of life and land practices.

4 Brief overview of the situation of the Batwa

The term 'Batwa' or 'Pygmies' is used to describe hunter-gatherers, who are small in stature, live in small groups and constantly move around the equatorial forest areas of Central Africa. They are known as 'forest peoples' as they live in the dense forest, which is favourable to their way of life based around hunting and gathering.

In Burundi, the pre-colonial status of the Batwa placed them in what could be called a 'caste' within Burundian society. Their traditions involved marriage mainly within their own community and they had specific economic, technical and ritual characteristics.¹² The Burundian historian, Émile Mworoha, confirms this by explaining that the term 'Batwa' meant a completely separate caste: it was not acceptable for others to eat or drink with them or marry them.¹³ The only activities (and traditional cultural values) of the Batwa were hunting and pottery and they exchanged the animals they had hunted, or the pottery they had made, for agricultural products.

The Batwa were also characterised by their ability to wield weapons (arrows)¹⁴ and for a particular dialect of the national language, Kirundi.¹⁵ The colonial and post-colonial periods did not bring about any changes to the social and economic status of the Batwa.

⁹ Jean-Louis Acquier (1986) *Le Burundi*, Éditions Parenthèses, Marseille, France, p 12.

¹⁰ From 1927, Burundi experienced a considerable change in its customary land regime with the introduction of Order No. 9 of 8 March 1927 on Ruanda-Urundi, relating to occupying land.

¹¹ The Ruanda-Urundi territory, the official name given by Belgium, gained independence on the same date, on 1 July 1962. The Ruanda territory became Rwanda and Urundi became Burundi. The Belgian colonisers used the Swahili name Urundi. The people of the colony referred more generally to it as Burundi, to the extent that historical works about the country refer to it as Burundi during this period when it was still Ruanda-Urundi.

¹² Jean-Louis Acquier, *op. cit.*, p 101.

¹³ Émile Mworoha (1977) *Peuples et rois de l'Afrique des Grands Lacs, le Burundi et les royaumes voisins au XIXe siècle, Dakar-Abidjan*, Les Nouvelles Éditions Africaines, p 114.

¹⁴ Report on the regional conference on peace, reconciliation and human rights organised by Minority Rights Group (MRG) in collaboration with the community of indigenous Rwandans (CAURWA), 17–19 December 2002, Kigali, Rwanda, *La promotion des droits des Batwa-Pygmées: Reconnaissance, représentation et coopération*, p 13.

¹⁵ Bi-monthly information on United Nations activities in Burundi, *Spécial Batwa*, magazine n° 10, juin 2006, p 6.

There has been no recent official census to calculate the total Batwa population, or that of other ethnic groups in Burundi. However, a survey by UNIPROBA (*UNIssons-nous pour la PROMotion des BATwa*) on the land situation of the Batwa, estimated a total of 78,071 Batwa¹⁶ out of a population estimated at over eight million.

Traditionally the Batwa did not farm the land; they were *abasangwasi*, which can be translated as 'the first occupants'.¹⁷ As there is no historical information indicating exactly how forest areas came under the control of farmers and how land ownership became subject to the authority of the Mwami, we can assume that in Burundi the Batwa were dominated firstly by farmers and then subsequently by the royal authorities.

Consequently the majority of the Batwa have no land and live in extreme poverty,¹⁸ which today causes confusion: when people talk about the Batwa they imagine vulnerable peasants without their own land.

There has been a long tradition of migration by the Batwa population, for various reasons. For example, if they suffered any kind of injustice they would not appeal to the *bashingantahe*¹⁹ or the courts. Nowadays there is more of a tendency to settle in one place.

5 Methodology and work

We have chosen an 'action-research' methodology. Action-research is defined by Benoît Gauthier as 'a method of research that makes the person involved a researcher and which moves the research towards action and which leads the action back to research considerations'.²⁰

It is often wondered why today the majority of Batwa are landless. Is there a legal explanation for this? Have tradition and land laws had an impact on their land rights?

Our analysis takes aspects linked to Burundi's history into account, from how land is structured to international law and other disciplines, in order to give an overview of the subject of this study.

During our desk-based research we consulted books and many different publications: for example legal documents, reports from organisations such as UNIPROBA and doctrine and case law documentation.

Unfortunately, the problem was the lack of documentation regarding the history, sociology, land practice and customs of the Batwa; the available information was largely disseminated

¹⁶ UNIPROBA (2008) *Rapport sur la situation foncière des Batwa au Burundi*, Bujumbura, January 2008, p 16.

¹⁷ UNIPROBA (2007) *La situation foncière des Batwa dans six provinces du Burundi*, Bujumbura, March 2007, p 1.

¹⁸ Detailed information on the Batwa available in: J Lewis (2000) *Les Pygmées batwa de la région des Grands Lacs*, MRG, London; D Jackson (2003) *Femmes twas et droits des Twas dans la région africaine des Grands Lacs*, MRG, London.

¹⁹ Traditional figures who regulated conflicts in Burundi. The institution is called *ubushingantahe*.

²⁰ B Gauthier (1987) *Recherche sociale*, Édition Presse de l'Université du Québec, Québec, p 464.

through other works, such as those concerning Pygmies in the Democratic Republic of Congo. At times we had to rely on Batwa informants.

6 General workplan

The technical presentation is split into four areas: land acquisition by the state of Burundi and its impact on the Batwa (I); Belgian colonial law: the ongoing precarious situation for Batwa land rights (II); post-independence law in Burundi: the need to break with the colonial heritage to take the land rights of the Batwa into account (III); and Burundi's commitment to international human rights to protect the rights of the Batwa (IV).

I Land acquisition by the Burundi government and its impact on the Batwa

1 Burundi during the pre-colonial era and the Batwa issue

1.1 Territoriality in Pre-Colonial Burundi

We must remember that there was no region in Burundi occupied by one single ethnic group²¹ (even though the Batwa are considered to be the first occupants) and that none of these ethnic groups shared the same culture or political structure. It would appear, therefore, that acquisition of territory in Burundi came under the Mwami's conquest.²² The central characteristic of land tenure in Burundi at the start of European occupation was the absence of clearly defined land boundaries.²³

As there are no historical sources concerning the political structure of the Batwa prior to the other ethnic groups arrival, we can assume that the Batwa were dominated by the Bahutu, after the authority of the Mwami was imposed through various Hutu lords. The existence of Burundi as a state meant that at legal level all land in Burundi belonged to the Mwami. Everybody else was merely a land user, even though according to customary law forest areas were a communal asset of the Batwa that nobody else could claim ownership over.

The political position of the Mwami on land issues is clear, particularly in terms of their concept of territoriality. In fact, land was seen primarily at a political level by the state and even by the people, as a legally recognised area (the national territory) subject to state sovereignty and upon which the security and well-being of Burundian people was secured.

1.2 The Batwa concept of land

The concept of territorial sovereignty was unknown to the Batwa; for them forest living space had no boundaries²⁴ and all of the covered forest area was their home. Family groups stayed in one area for a few months and then set up in any other area where they could hunt and gather food.

As long as forest areas still remained, the Batwa way of life was rarely affected. This does not mean, however, that living spaces were divided out for different family groups or different Batwa clans, or even for other ethnic groups.

²¹ Jean-Louis Acquier, *op. cit.*, p 19.

²² On this subject see the Ntare IV Rugamba conquests cited by Jean-Pierre Chrétien and Jean-Luc Coifard (1967) in *Le Burundi*, Paris, Notes and documented studies, Paris, February 1967, n° 3364, pp 12–13; work by Émile Mworoha (1977), *Peuples et rois de l'Afrique des Grands Lacs*, Nouvelles Éditions Africaines, Dakar Abidjan, p 113 onwards.

²³ Joseph Gahama, *op. cit.*, p 29.

²⁴ UNIPROBA, *La situation foncière des Batwa dans six provinces du Burundi*, *op. cit.*, p 2.

2 Customary Laws in pre-colonial Burundi

2.1 The Imposition of National Customary Law

Customary law can be defined as a collection of unwritten regulations transmitted orally and recognised as duties by all of a given population and which are intended to govern the social activities of that population.²⁵

All former laws in Burundi were, therefore, customary laws, from the law structuring public life and the state. to those governing the private life of the Burundian people.²⁶

The population included the Bahutu, Batutsi and the Batwa. However, as Delacauw states, according to Burundian customary laws the population was made up of two main ethnic groups: Batutsi and Bahutu.²⁷

It is clear, therefore, that the Batwa were not involved in the national customary law process, rather that it was imposed on them. It seems clear that the Batwa were left out of the Burundian culture²⁸ and were subjected to the general dominant tradition.

2.2 Ancestral rights to use land for hunting and pottery

Land was seen as a collective and non-transferable estate, which was administered by the Mwami and his representatives. No other person was a landowner.²⁹

The people only had ownership over crops, harvests, houses and banana groves that were on the land. The Mwami was the provider and protector of land assets and the Batwa recognised the authority of the Mwami, as they were involved in certain activities, such as war and taking part in the royal hunt.³⁰

On the other hand, they always had absolute usage rights for hunting, without having to seek authorisation for this activity, as was the case for clay extraction on marshland. National customary law, therefore, contradicted the traditions of the Batwa, as they believe they own the forest and marshland where their communities live.

2.3 An individualistic approach to the land allocation process

When an *itongo* (land property or estate in land) claimant was poor and unknown to the authority empowered to allocate land concessions, granting land became rather more complicated. There were numerous steps to follow.

²⁵ Louis De Clerck (1968) 'La place de la coutume dans le droit actuel du Burundi', *Revue administrative et juridique du Burundi*, Quarter 1, n° 2, p 31.

²⁶ *Idem.*

²⁷ Delacauw (1936) 'Droit coutumier des Burundi', *Revue générale de la colonie belge*, Tome I, p 1.

²⁸ Jean-Louis Acquier, *op. cit.*, p 20.

²⁹ See R Bourgeois, *Banyarwanda et Burundi*, Tome II, p 186 onwards ; Delacauw, *op. cit.*, p 48.

³⁰ Bimensuel d'information sur les activités des Nations unies au Burundi, *Spécial Batwa*, magazine No. 10, June 2006, p 8.

What was the scope of the concession holder's rights? The *itongo* recipient had hereditary rights of possession. However, as the Mwami owned the land, the concessions they granted could be terminated at any time and returned to the national land reserves if there was no heir, if the land was abandoned or if the occupier had been banished.³¹

Lands that were likely to be allocated³² included vacant land, land used for pastoral purposes and developed land:

- Vacant land, i.e. uncultivated land, included forested land (*ikibira, ishamba*) Settling on this unoccupied or abandoned land was known as '*kugerera*'. The forest was, therefore, classified as private domain and considered as vacant land even though the Batwa saw themselves as owners of the forestland, which was their living space.
- Pastoral land included both vacant fallow land, whether it had short grass cover ('*amashinge*') or longer grass ('*umukenke*') (vegetation that is not particularly favourable for farming without access to manure) and also marshland, which was the part of state land and also considered to be vacant land.
- Developed land, i.e. under cultivation, including land already cleared belonging to people who had been evicted, land that had been abandoned where there was no chance of the owners returning, or land where there was no heir.

The use of forestland and marshland for hunting, gathering and pottery is generally not recognised for its true worth, in terms of the right of access to land, either by the dominant Burundian society or by the customary authorities.

The concept of 'developed land', meaning used for agriculture, emerged from a narrow interpretation of land usage and has contributed to the marginalisation of Batwa land rights. In fact, the economic value of land depends on what practical uses it offers to the user; pottery for example, clay being the raw material, that is extracted on marshland. It is well known that most Burundian people used to get their clay cooking pots, plates and containers that they cooked their food in from the Batwa.

The Batwa are critical of the concept of land that is abandoned with no chance of the owners returning. They believe that they own land they have left to find a new collective place to live in order to move closer to a hunting ground or to an area for collecting clay that they have just discovered, and that they may later return to the previous camp. This approach suggests that Batwa land was considered as abandoned land, even though this was not the case because they often returned to their former land.

2.4 The issue of landless peasant farmers: the traditional Batwa *ubugererwa* institution

Ubugererwa is a traditional institution, which is deeply established in the minds of the Burundian people and was the result of a contract between two individuals: the *shebuja*, who

³¹ R Bourgeois (1954) *Banyarwanda et Barundi*, Tome I, La Coutume, Brussels, pp 186–187.

³² Sylvestre Zidona (1981) *Les prérogatives des autorités coutumières en droit foncier Burundais*, dissertation by the Department of Law at the University of Burundi, Bujumbura, pp 39–46.

was the owner of a plot of land and committed to allowing the *mugererwa* to have enjoyment rights. The *mugererwa* agreed to make payments in kind and to carry out various different tasks for the *shebuja*.

The contract, the length of which was unspecified, could be annulled at the request of either party. However, although the agreement granted both parties the freedom to terminate the contract, this clause gave the *shebuja* greater power and they undoubtedly used their power to terminate³³ contracts more often than their clients.

The institution is now referred to so frequently by the Batwa to show their distress due to their lack of land that it sometimes causes confusion, although there is no confusion between the *bagererwa* and the Batwa without land.

Due to the nature of the *ubugerewa* institution and the precarious situation of the Batwa, who faced the pressure of farming on free areas of land and had trouble accessing the political authorities, some Batwa became *bagererwa* thinking that by providing benefits to *shebuja* they could take advantage of the protection and continue to practice hunting and pottery. It is important to note that pre-colonial land laws were not modified during the German protectorate over Burundi.

3 Transposition of Belgian colonial law into Burundi³⁴

Article 1, paragraph two, of the 1925 law, which brought about the administrative union of Ruanda-Urundi and Belgian Congo that: 'Ruanda-Urundi be subject to the law of Belgian Congo in accordance with the following structure . . . '.

To have a greater understanding of the complexities of transposing Belgian colonial law into Burundi using the texts applying to Belgian Congo, it is necessary to consult Articles 3 and 5 of the law of 21 August 1925 and Article 3 of the Royal Decree of 11 January 1926.

Article 3 of the 1925 law stipulated that:

The legislative orders and decrees of the Governor General of Belgian Congo, the clauses of which are not specific to Ruanda-Urundi, will only apply to this country once it has come into operation following an order passed by Vice Governor General responsible.

Article 5 of the same law stipulated that:

The rights of the Congolese people recognised by Belgian Congo laws belong, in accordance with the specifications it puts in place, to the citizens of Ruanda-Urundi.

³³ Sylvestre Bikorindagara (1980) *Le propriétaire face à la suppression de l'ubugererwa*, dissertation by the Department of Law at the University of Burundi, Bujumbura, pp 3–11.

³⁴ See Joseph Gahama, *op. cit.*, pp 44–45; Jean-Luc Coifard, *Soixante ans de colonisation au Royaume du Burundi (190–1962)*, *op. cit.*, p 76; Louis De Clerck (1971), 'Le régime foncier du Burundi', in *Revue administrative et juridique du Burundi*, Quarter 1, p 1; R Bellon and P Delfosse (1970), *Codes et lois du Burundi*, first edition, Bujumbura, pp ix, 951.

As a result of these clauses, the Vice-Governor General of Ruanda-Urundi was authorised to carry into effect, through a simple order, all Congolese decrees, orders and regulations.

II Belgian Colonial Law: the continuing precarious situation for Batwa land rights

The Belgian administration had more influence over land law in Burundi and never tried to understand or interpret the complex conception of land of the Burundians in general, or that of the Batwa in particular. Various legal documents came into effect in Burundi through the same colonial authority and administrative regulations were adjusted in parallel to that.

1 Colonial administrative practice to develop agriculture on marshland without consideration for the Batwa pot-making

The first major land measure taken by the Belgian colonial administration, which detracted from traditional grazing rights, was in 1925 – customary authorities were obliged to make wetlands and marshlands available to all farmers. The purpose of this was to develop food-producing crops to combat the famine that was ravaging the country.³⁵

Opening up marshland created enormous legal problems in relation to land issues. Traditionally marshland was reserved for grazing large cattle during the dry season and for clay extraction by the Batwa. Clearly customary chiefs did not see this measure, which was preventing them from giving priority to the masses, as a good thing.

This was an administrative practice that did not take into account clay extraction for pottery. However, the majority of Burundians used ceramic products made by the Batwa to cook their food and some of the Batwa lived near marshland so that they could do this work more effectively. In addition, this administrative practice called customary land law into question, which considered that the owner of a hill also owned the land below it.

2 Structure of Order No. 9 of 8 March 1927 in Ruanda-Urundi relating to land occupation³⁶ and its inadequacy in relation to the Batwa social environment

With the exception of a few clauses considered incompatible with Burundian land tenure, all of the land legislation in place in Belgian Congo came into operation in Burundi under the 1927 order mentioned above. Some of these laws are worth mentioning.

2.1 Order of the Congolese General Administrator of 1 July 1885

This order set out, under Articles 2 and 3, the following principles:³⁷

- Contracts with native people to occupy land for any purpose should be undertaken by a public officer assigned by the authorities, in accordance with the regulations set out by this authority.

³⁵ Sylvestre Zidona, *op. cit.*, p 55.

³⁶ Rémi Bellon and Pierre Delfosse, *op. cit.*, pp 97, 109, 951 and 960.

³⁷ *Ibid.*, p 952.

- No person can occupy vacant land without land titles or dispossess indigenous persons of the land they occupy.
- Vacant land must be considered state property.

Right from the start the colonial administration avoided using the word 'ownership' and were careful to define occupation rights for indigenous peoples on their land. They considered that 'land occupied by indigenous persons' was land inhabited and cultivated by indigenous persons.³⁸

On national land native people could exercise specific *sui generis* rights for hunting, fishing and gathering, etc.

The Batwa ownership claim over free areas of forest land, therefore, were clearly not taken into consideration in this legislation.

2.2 The sovereign King's Decree of 14 September 1886

Colonial legislation also introduced a system for registering land: land which was owned by an individual under written law.

Article 1 of this Decree stipulates that:

Currently existing exclusive rights or rights acquired in the future over land situated in the Congo Free State should, in order to be legally recognised, be registered by the registrar for land titles in accordance with the requirements set out by our General Administrator.³⁹

However, land occupied by native populations under the authority of their chief would continue to be registered by local customs and usages, according to Article 2 of the same Decree.

3 Order No. 83 bis/agri of 12 December 1933 on Ruanda-Urundi, relating to establishing forest reserves: Batwa no longer have the right to live in newly protected areas

This legislation was used to create three forest reserves: firstly the forest reserve on the Congo-Nile watershed, which today corresponds to the Kibira, and then in 1951 two other reserves on land in Bururi: the Bururi forest reserve and the Kigwena forest reserve.⁴⁰ In all of these forestry reserves it was strictly forbidden to damage the forest in any way, particularly constructing houses for people (Article 2). Strangely, it is in these areas that there is a high concentration of Batwa living near the forest reserves, particularly near to Kibira. This leads us to believe that they were forced to leave their natural environment to live in surrounding areas: the Batwa were the only people who knew the Kibira forest and certain areas of the

³⁸ Louis De Clerck (1971) 'Le régime foncier du Burundi', in *Revue administrative et juridique du Burundi*, Quarter 1, p 1.

³⁹ Rémi Bellon and Pierre Delfosse, *op. cit.*, p 97.

⁴⁰ *Ibid.*, pp 583-584.

forest were protected by families who had responsibility for looking after sites where kings were buried.⁴¹

4 Decree of 21 April 1937 relating to hunting and fishing regulations: increased vulnerability and lack of awareness of the cultural value of the environment for the Batwa people

The colonial legislator made hunting a strictly regulated activity, while in the pre-colonial period hunting was unrestricted and authorisation was not required.

The decree referred to above stipulated in Article 1 that: 'Hunting is prohibited on all land in the colony to all persons without administrative permission'.⁴²

The decree was partially amended by legal order No. 273/agri of 31 August 1940, which came into operation in Burundi under order No. 80/agri of 26 October 1940 in Ruanda-Urundi and stipulated under Article 2 (1) that:

This permission is verified: (1) for indigenous populations of the Colony:

- a) via an individual hunting permit
- b) via a collective hunting permit, which is valid for all indigenous males from indigenous areas

The structure of this decree sets out that the statement authorising the right to hunt must indicate the area that it is valid for, the animals that cannot be killed or captured and for certain species it specified the maximum number of animals that could be killed or captured and can prohibit the use of certain traps, devices, weapons and hunting methods (Article 20).

This legislation on hunting is contentious as it does not take the cultural value of the environment of the Batwa into consideration. In fact, when the Batwa leave their crops to hunt and they kill mature game in the forest, they know that as a member of the community it is their duty to not exhaust the stock of animals. Each time they go hunting they ensure that the forest will still contain enough game and they express their gratitude to the forest for providing them with food and as a life source.

In this way, by expressing their gratitude to respect cultural values dating back to time immemorial, the Batwa show they are respectful of nature and are careful to preserve the animal population and recognise the responsibility of humans towards their environment.

5 Structure of Civil Code Book II, Property and the various amendments to ownership: no consideration of Batwa collective ownership

Article 14 stipulates that:

Ownership is the right to use something absolutely and exclusively (...).

⁴¹ Cyriaque Nzojibwami (2002), 'Étude de cas d'aménagement forestier exemplaire en Afrique centrale : Le Parc national de la Kibira', Burundi, FAO, working document FM/9F, Rome, October 2002, p 1.

⁴² Rémi Bellon and Pierre Delfosse, *op. cit.*, pp 606–615.

This article guarantees the land rights of the Batwa in general and the statement that 'usage is absolute' in fact sums up all the prerogatives of the Batwa collective ownership over the areas they live in.

It is important to note, in relation to previous comments on Batwa collective ownership, that this should not be confused with communal ownership or co-ownership, which, although the opposite of individual ownership, does not imply the notion of undivided ownership.

Batwa collective ownership of specified areas of land involves collective activities of family groups and constitutes a common right of all members of the group. The Batwa believe they are the owners of the whole area of their group's land.

Batwa collective ownership is in fact missing one essential attribute of ownership law: the right to dispose of or sell land to whomever they choose, whenever they choose. Collective land is managed with a view to maintaining balance and cohesion within the Batwa family group.

6 Evolution of customary land rights under case law and state's interventions

6.1 Abandoned land with no chance of return – a criteria which enables chiefs and sub-chiefs to monopolise land

Chiefs could dispose of land which had been abandoned by its users; users that had left the chiefdom and would not return. A ruling from the Barusasiyeko chiefdom tribunal, given on 7 April 1945, stated that abandoned land under these conditions belonged to the chief or sub-chief and not to the family members of the person who had moved away.⁴³

Under this assumption it appears that land occupied by the Batwa, which is left for various reasons, either to find another hunting ground, or to change camp following the loss of a family member,⁴⁴ would become occupied by other people.

6.2 Ownership of marshland

Even though exercising exclusive rights over certain marshland areas containing clay did not lead the authorities to grant ownership rights to people exploiting the land, it is interesting to look at the decision on brick making made by the Rwanda public tribunal on 28 October 1959.⁴⁵

In Rwanda marshland is communal property and no exclusive rights can be claimed on this land. Tradition only recognises one exception, which is exploiting marshland for brick making. The tribunal states that as a third ground for a decision ruling that an indigenous person can in fact have exclusive rights over marshland in exceptional cases, for brickmaking for example, where the raw materials can only be extracted from marshland.

⁴³ Louis De Clerck, *Le régime foncier du Burundi, op. cit.*, p 5.

⁴⁴ J Lewis (2000) *Les Pygmées batwa de la région des Grands Lacs*, MRG, London, p 8.

⁴⁵ *Revue juridique de droit écrit et coutumier du Ruanda-Urundi*, Year 1, September–October 1961, n° 5, pp 174–175.

In Burundi this Rwandan case law could have encouraged the traditional and colonial authorities to consider that as the raw materials used for pottery come exclusively from marshland that ownership of marsh areas containing clay should be assigned to the Batwa living near these areas.

3 Peasant farmers without land: the *bagererwa*⁴⁶ and the Batwa

Although the basis of the *ubugererwa* institution was not directly affected, its position was weakened.

In 1952 a political body responded officially to the institution. The Mwami's council set the amount of labour required from the *bagererwa* at one day per week. In addition, from this time termination of contracts by the *shebuja* was subject to a local court decision.

Even in this instance the *mugererwa* had the right to *umuzibukiro*, meaning compensation corresponding to the increase in value since the date of the grant of the concession brought about by developing land owned by the *shebuja*.

In this way, we can see how the *ubugererwa* issue could relate to the Batwa. In addition, it was during the colonial period that modern kitchen utensils were introduced which started competing with pottery, a professional Batwa activity that satisfied to the demand of rural people.

All indications suggest that while other Burundian people freed themselves from the *ubugererwa* practice, the Batwa were forced to put up with a constantly changing *ubugererwa*.

⁴⁶ Sylvestre Bikorindagara, *op. cit.*, pp 13–26.

III Post-independence and contemporary land law in Burundi

The Burundian legislator is noted for delaying tactics regarding the reform of land legislation required by the law of 29 June 1962, which maintained the legislative and regulatory acts decreed by the colonial authorities. After the millennium, the legislator again hesitated to take into account the people's concerns, particularly in terms of natural resources, as we can see in the Environment Code of 30 June 2000, which still lacks implementing provisions.

With regard to administrative practices to grant land to vulnerable populations, including the Batwa, the 2005 Constitution, which is now operating, recognises Batwa's representatively in the conduct of public affairs, which could have an indirect effect on future land legislation.

Also it is important to note that the Mwami's order No. 050/65 of 22 March 1966, which brought about a hunting ban across the whole of Burundi, had a considerable impact on Batwa hunting activities. The immediate solution for the Batwa was to go and live among families of other ethnic groups who owned large areas of land, which led to increased land servitude system for the Batwa – *ubugererwa*.⁴⁷

1 Decree No. 1/19 of 30 June 1977 abolishing the institution of *ubugererwa* and the continuation of the traditional discriminatory practice of Batwa land servitude

Despite the abolition of the *ubugererwa*⁴⁸ institution, certain Batwa continued to be exploited by this regime of land servitude - possibly due to ignorance - to the point that they did still did not consider they had the right to land ownership; a human right recognised by the relevant international bodies.⁴⁹

We will consider the legal principles of the abolition of the institution prior to examining how the illegal *ubugererwa* practice is still imposed on the Batwa.

1.1 Legal principles applicable to the abolition of the *ubugererwa*⁵⁰

- Invalidity of the institution and all new contracts
- Termination of contracts passed before 30 June 1977
- Acquisition of ownership rights by the *bagererwa*

1.2 The current *ubugererwa* situation in relation to the Batwa: continued discriminatory practice which denies the Batwa their right to landed property

Despite the abolition of the *ubugererwa* institution, many Batwa still live under this system today.

⁴⁷ UNIPROBA (2007) *La situation foncière des Batwa dans six provinces du Burundi*, Bujumbura, March 2007, p 1.

⁴⁸ Decree-law No. 1/19 of 30 June 1977 which abolished the *ubugererwa* institution, *BOB*, n° 10/77, pp 555–557.

⁴⁹ Article 17 of the Universal Declaration on Human Rights and Article 14 of the African Charter on Human and Peoples' Rights.

⁵⁰ See Sylvestre Bikorindagara, *op. cit.*, pp 37–44.

However, in accordance with the abolition of *ubugererwa*, these Batwa own the land they occupy and even if they were driven away from their land, the state should grant land to Batwa who no longer have any, in accordance with Article 3, paragraph two, of the above-mentioned decree.

Unfortunately this situation is far from being resolved. According to UNIPROBA, resolving this issue would allow this community to enjoy their rights fully and to do carry out their duties. Amongst other things, possessing land would put an end to the problem of wandering, begging and idleness that can be seen⁵¹ amongst the Batwa.

2 Lack of recognition of Batwa land issues being tackled as a separate issue in modern legislation

2.1 Decree No. 1/6 of 3 March 1980 establishing national parks and nature reserves in Burundi

The above decree, which came into effect in 1980⁵² sets out the legal structure applicable to protected areas, particularly regarding the ban on their transfer and concession; the special conservation measures for fauna and flora; the restriction on settlement less than 1000m from protected areas; and visits to protected areas.

The neighbouring population, including the Batwa, was not involved in either location or management of the protected areas and were deprived of customary usage rights, such as the right to grow medicinal plants, the right to hunt, etc.

There are no economic or social development programmes in the zones surrounding the protected areas to offset the constraints that local people are subjected to. There are also no development plans for the different protected areas involving the neighbouring⁵³ local population, including the Batwa.

2.2 Law No. 1/2 of 25 March 1985 establishing the forestry code

This document sets out all the specific regulations governing administration, development, exploitation, monitoring and policing of forest land. It also contains various clauses relating to conservation and sustainable usage of forestry resources. Apart from these it has little merit.

Articles 45 and 56 explicitly ban usage rights.

Clauses such as this do not guarantee a reasonable life for the Batwa who live near protected areas and who still depend on natural resources.

⁵¹ UNIPROBA, *La situation foncière des Batwa dans six provinces du Burundi*, Bujumbura, March 2007, p ii.

⁵² Ministry of Land Management and Environment, *Analyse du cadre légal, institutionnel et politique du pays sur la gestion de la biodiversité suivant les objectifs de la Convention sur la diversité biologique*, National Institute for the Environment and Nature Conservation 'INECN', Bujumbura, October 1999, p 4.

⁵³ Law No. 1/010 of 30 June 2000, which brought about the Environment Code of the Republic of Burundi, *BOB* n° 6/2000.

2.3 Law No. 1/008 of 1 September 1986 establishing the land code

The land code is currently incapable of resolving land issues in general and those of the Batwa in particular. We will, therefore, examine the general issues relating to this code. The land code is not in general use and the people, in general, are unaware its contents. It is easy to see that its clauses could be a source of conflict.

Assessment of some of the problems relating to the Batwa is necessary.

2.3.1 Maintaining the private ownership of vacant and ownerless land: natural forests

There is a legal uncertainty relating to the private ownership of forest land due to a contradiction between the Land Code and the Forest Code.

According to Article 231 of the Land Code, uncultivated forests and land are part of the state's private domain, as they are not allocated or reassigned to a service or public usage.

The forests are therefore inalienable and prescriptible.

In this way, the state can grant, in return for payment or free of charge, part of the forest to a third party. Rich people, who can easily approach the person responsible for making land grants have clearly benefitted from transfers based on no objective criteria. This has been to the detriment of the poor – including the Batwa.

On the other hand, according to the Forest Code of 25 March 1985 (in a specific document), natural forests belong to the state's public domain and are definitively and without exception inalienable, non-prescriptible and non-distrainable. In this way, natural forests cannot be transferred to a third party.

Luckily the Environment Code,⁵⁴ which came into force on 30 June 2000, defines the issue of land owned by the authorities by stipulating in Article 72 that:

State land which, in accordance with Articles 1 and 2 of law No. 1/02 of March 1985, which established the Forest Code, is officially described as forests or woods and cannot be transferred or granted as concessions to private persons in line with chapter III, heading III of the law of 1 September 1986, which established the Land Code of Burundi.

2.3.2 Duty to develop occupied land: marshland and concessions and transfers of land

According to the terms of Article 380 of the Land Code, any holder of land rights is committed to making productive use of the land, in line with the type and potential of the land to which they hold rights. The same article emphasises that productive usage consists of ongoing development and exploitation of the land.

⁵⁴ RCN Justice et Démocratie (2004), *Étude sur les pratiques foncières au Burundi – Attempt at harmonisation, surveys carried out in 10 provinces of Burundi in February–March 2004, Bujumbura, December 2004*, pp 39–40.

a) Legal issues relating to marshland and land rights of the Batwa

Theoretically, according to the Land Code, marshland is part of the state's private land.

Article 2 of the Decree of 26 November 1992, which introduced and coordinated public water services, classes in this category 'marshland that is permanently covered in water'. People working in these areas, particularly farmers, have usufructuary status as they have contributed to developing this marshland.

On the other hand, Article 331, paragraph two, of the Land Code stipulates that:

Farmed marshland belongs to the person who has developed it and not to the owner of the adjoining land.

It is true to say that in practice that peasant farmers, who are more and more interested in exploiting the marshland, consider themselves owners of the marshland that they farm, and they transfer plots of land in exchange with or without payment.⁵⁵

According to surveys carried out by RCN – Justice et Démocratie in 2004,⁵⁶ there are various points of convergence on large areas of marshland, which are generally recognised as belonging to the state, but there is still ambiguity over small areas of marshland.

Although the customary regulation that marshland belongs to the person that develops it is often cited (*umwonga uganzwa n'ikigazuzo*), the owners of areas which include marshland set out specific claims. Given the contradictory claims of the state and of individuals, a distinction needs to be made between large and small areas of marshland.

Large areas of marshland, which must be maintained by the state, belong to the latter for the purpose of general interest, and farmers benefit from usufructuary status, either if they have contributed to developing the marshland or if the state has developed the marshland to distribute to peasant farmers who require it for their agricultural needs.

The Batwa most certainly need this land but as clay extraction is seen a damaging to the environment and as the Batwa are not farmers, it is not a given that the Batwa will become usufructuary owners of large areas of marshland.

In this case, given that in practice large areas of marshland are in the state's private domain and that according to Article 234 of the Land Code this land can be transferred or form part of a concession, should the government not adopt an optional conversion policy for the Batwa for agricultural activities and encourage a "modern" pottery industry by granting the Batwa certain large areas of marshland free of charge, land which is not permanently covered in water and which is not classed as a protected area?

⁵⁵ *Idem.*

⁵⁶ Decree No. 100/007 of 25 January 2000, which set the boundaries of the National Park and four natural reserves, *BOB*, n° 1 bis/2000, pp 73–76.

b) Concessions and transfers of state land in view of the poverty of the Batwa

The state's private domain consists, according to Article 231 of the Land Code, of vacant land without an owner, land in the public domain that is disused or discarded, land that the state has acquired for free or through payment, land that has been appropriated for public utility use, land acquired by prescription and confiscated land.

The transfer of land in the private domain for payment can be agreed through a straightforward sale or by means of an exchange, and constitutes a definitive transfer of ownership rights. On the other hand, concessions give the beneficiary temporary enjoyment of a land right other than ownership.

The relevant authority grants the transfer or concession when the development programme presented and the applicant's means are considered to be serious. The Batwa, in general, do not put forward requests. This lack of requests for land is due to poverty and illiteracy amongst the Batwa.

However, the administrative practice gives us examples of free land transfers to certain Batwa groups without land, purely for habitation purposes, but unfortunately as they are poor the Batwa then sell the land for very small amounts of money, which does not encourage the administrative authorities to allocate land to them.

2.3.3 Difficulty of applying the 1986 Land Code to the Batwa

The registration process involves many stakeholders and many different documents, but for rural populations, including the Batwa, simpler and faster procedures need to be adopted.

The Land Code makes provision for a communal administrator, a communal council, and a communal secretary (Article 329, paragraph two) and that a request from the land rights holder triggers this process.

Three essential documents are necessary:

- A comprehensive certificate proving the applicant's identity
- A record of the land survey and boundary marking
- A summary description of the piece of land indicating in particular the surface area and its geographical location in relation to the main recognised reference points.

The list is not exhaustive as Article 358, paragraph 1, d) of the code refers to all other documents that can confirm or support the applicant's claims.

All the documents that are presented must be submitted with two copies. The process is, therefore, very expensive, while the Batwa are generally poor.

2.4 Decree No. 100/007 of 25 January 2000 which set the boundaries of the national park and the four nature reserves

Article 26 of this decree stipulates that:

Hunting, fishing and tree felling are prohibited within the protected areas.

However, the local population in protected areas could be given permission to extract certain products or resources that are crucial for their lives without prejudice to the clauses of Article 28, paragraph two of the present Decree.⁵⁷

This article appears to take the rights of local people – including the Batwa – into account. However, there are still functional issues relating to Batwa populations accessing resources from protected areas, given their absolute need of biologically diverse natural resources. Taking into account the cultural value of the environment would improve the way in which authorisation is implemented.

It is unfortunate that during a research and information visit undertaken by the African Commission on Indigenous Populations and Communities, the Environment Minister told the visitors that he had never received the dossier which set out the specific issues of the Batwa, although he knew that Batwa from the Kanyanza province were cutting down bamboo in the Kibira forest reserve. According to the minister the authorities had decided to confiscate bamboo coming from this forest each time that they found it being sold.⁵⁸

3 Batwa land litigation

Given that in decisions of the court the ethnicity of parties in conflict is not indicated, we checked with the organisation that best represents the Batwa, UNIPROBA, to enquire about pending land cases of Batwa that had already been concluded.

3.1 Problem of access to the legal system by the Batwa

The Batwa have problems accessing the legal system due to various constraints that make it impossible for the Batwa who are the injured party to appeal through the legal system in time. As ownership is collective the Batwa nominate one of their members – a chief or a representative – to defend their land rights.

When they manage to lodge their complaint, the most vulnerable Batwa are not generally not able to pay travel and accommodation costs for court hearings, let alone able to pay for witnesses. Testimonies are the most widely used method of proof in the Burundian court system and witnesses are looked after by the parties that summons them to appear.

Furthermore, they do not have sufficient understanding of the law concerning the abolition of *ubugererwa*, nor of the civil procedure, nor the requirements of the code concerning the

⁵⁷ Report of the African Commission's working group on indigenous populations/communities (2007) *Visite de recherche et d'information en République du Burundi*, Banjul, Gambia, p 24.

⁵⁸ CNTB is a governmental institution created for a three year period (from July 2006), which can be renewed at the government's request. Its mission is to resolve past injustices related to ownership rights.

power and organisation of jurisdiction to be able to effectively ensure their own defence, and are, therefore sometimes obliged to leave it to the administrative authorities.

3.2 What about court decisions on land rights for Batwa?

The numerous cases of injustice referred to UNIPROBA are generally linked to the lack of awareness of abolition of the *ubugererwa* by the court and of the sale of land to other communities. The courts do not usually get involved with issues relating to their traditional areas of land (forest and marshland).

Local courts do not take into account the fact that the *ubugererwa* institution no longer exists to grant land ownership to the Batwa. Judges consider, moreover, that this ownership belongs to the *shebuja* and that people who are not related to the *shebuja* farm their land on lease.

These decisions indicate that certain Batwa still defend themselves in court, not as a former *bagererwa* but as landowners, arguing that the land they farm has always belonged to their grandfather and their great grandfather. They think that they can win the case in this way, but in reality their grandfather and their great grandfather were *bagererwa*.

Losing cases brings about a lack of understanding and gives the impression that the authorities are not sufficiently interested in the problems of the Batwa. The Batwa are currently appealing to the national commission for land and other property (CNTB).⁵⁹

4 Scope of the constitutional guarantee of the right to ownership and non-discrimination on grounds of race

The preamble to the Constitution of 18 March 2005,⁶⁰ as with all previous constitutions, makes it a constitutional principle to protect minority ethnic, cultural and religious groups as part of the general system of good governance, to ban discrimination and to put equality, social justice and respect of property rights into action.

These constitutional principles were strengthened by articles of the 2005 Constitution through the Arusha Agreement for peace and reconciliation in Burundi of August 2000, and by the ceasefire agreements.

In fact, Article 7, Protocol I of the Arusha Agreement of 28 August 2000 advocates

The proactive promotion of all disadvantaged groups, the Batwa in particular, in order to correct the existing imbalances that exist in all sectors.⁶¹

In this way, by drawing on Article 171, paragraph 4, of the Constitution, which stipulates that:

⁵⁹ Law No. 1/010 of 18 March 2005, which brought about the promulgation of the Constitution of the Republic of Burundi, *BOB*, n° 3 TER/2005, pp 1–35.

⁶⁰ See the Arusha Agreement.

⁶¹ The Burundi Senate (2008) (<http://www.senat.bi>), *Rapport d'information sur la situation des Batwa*, LEG III/RAP n° 7, Bujumbura, 7 August 2008, p 1.

The Senate has the power to carry out investigations into public administrations and, where necessary, can make recommendations to ensure that no region and no group is excluded from benefiting from public services

the Senate of Burundi has concentrated for the first time on the issue of living conditions of the Batwa communities to make sure that all persons that make up the nation are treated equally.⁶²

It is for all these reasons that the articles of the 2005 Constitution constitute a guarantee for the Batwa community to make up for all the wrongdoings of the past. If this is violated the Batwa can bring it to the constitutional court either directly through legal action or indirectly through a special unconstitutional procedure based on a case being submitted to another court (Article 230, paragraph two, of the Constitution).

However, it worth highlighting that the vast majority of Batwa currently live in rural areas on collective land with no written titles. Some Batwa who received land from the administrative authorities possess administrative documents that prove their possession or assignment of collective land. However, as the Batwa are poor and as the Batwa concept of collective ownership is not taken into account, the rural land of the Batwa is not registered by land titles. The very few Batwa who live in households in urban areas have individually registered plots of land.

⁶² Professor H Dumont (2005) *Systèmes internationaux de protection des droits de l'homme*, the Unesco Chair on education for peace and conflict resolution. Université du Burundi, DESS des droits de l'homme, teaching materials from the 2005–2006 academic year, pp 35–36.

IV Burundi's commitments under international human rights law to protect the rights of the Batwa

Resolution No. 60/251 of 15 March 2006 adopted by the United Nations General Assembly related to the change of the Human Rights Commission into the Human Rights Council reaffirms that:

All human rights are universal, indivisible and interdependent and interrelated and they strengthen each other. All human rights should be considered as of equal importance and we must refrain from organising them into a hierarchy or giving priority to certain of them.⁶³

In this way, there are links between protecting the environment (third-generation human rights) and enjoying human rights which are recognised by a growing number of national and international bodies.⁶⁴

The Constitution of 18 March 2005⁶⁵, currently in force, explicitly mentions the different international norms relating to human rights having value as constitutional norms, but does not make reference to international norms relating to the environment, which however could also be greatly beneficial for the Batwa.

1 The principle of carrying out conventional obligations in good faith

Burundi is a state that is party to international and regional conventions relating to human rights.

The principle of acting in good faith involves introducing, within the internal legal system, treaties that establish the rights and duties of individuals. This allows standards to be applied effectively application of norms, as with any other internal right, not only to all the authorities, government bodies and the administration at all levels, but also to all citizens of the country. The duty to introduce this is an obligation in terms of the result, not the means. The method by which this is undertaken is therefore up to the state government.⁶⁶

We will examine how the introduction of this would be undertaken in Burundi.

⁶³ Laurence Boisson De Chazournes, Richard Desgagne, Cesare Romano (1998) *Protection internationale de l'environnement : Recueil d'instruments juridiques*, preface by Luigi Condorelli, Éditions Pedone, p 931.

⁶⁴ Law No. 1/010 of 18 mars 2005, which brought about the promulgation of the Constitution of the Republic of Burundi, *BOB*, n° 3 TER/2005, pp 1–35.

⁶⁵ Patrick Daillier, Alain Pellet, *op. cit.*, p 229.

⁶⁶ J Salmon (ed) (2001) *Dictionnaire de droit international public*, Bruylant, Brussels, p 413.

2 The direct effect in Burundi of standards relating to international human rights law

International legal standards result from 'the characteristic of a requirement of international law which grants the recipient the right to prevail in justice',⁶⁷ 'the capacity of an international regulation to confer to individuals, without requiring any internal measure to carry them out, rights that enable them to have a fair trial in the state where this regulation is in operation'⁶⁸.

2.1 Clear Monism for norms of international human rights standards under Article 19 of the Constitution of 18 March 2005

According to Article 19:

The rights and duties stated and guaranteed in, amongst others, the Universal Declaration of Human Rights, international human rights treaties, the African Charter on Human and Peoples' Rights, the convention to eliminate all forms of discrimination towards women and the convention on children's rights, which are an integral part of the Republic of Burundi's Constitution.

Article 19 makes no mention of any convention that is specific to the environment in the list of international instruments, which are part of the Constitution - in this case the Convention on Biological Diversity, which was ratified on 15 April 1997.

2 The position of international human rights standards that do not come under Article 19

The Constitution stipulates in Article 292 that:

The treaties only come into effect if they have been properly ratified and subject to their application by the other party in the case of bilateral treaties, and subject to the conditions laid down for implementing multilateral treaties.

The Constitution therefore does not regulate the position of other international standards of Burundian internal legal authorisation, unlike the French Constitution of 1958, which stipulates in Article 55 that:

The treaties or agreements that are properly ratified or approved are, once published, of greater authority than laws, subject to, in the case each agreement or treaty, it being applied by the other party.⁶⁹

⁶⁷ J Verhoeven, *La notion d'applicabilité directe du droit international*, *Revue belge de droit international*, 1980, p 243.

⁶⁸ François Luchaire, Gérard Conac (1987) *La Constitution de la République française*, 2nd edition, Economica, Paris, p 24.

⁶⁹ Michel Masabo (2005) *Raisonnement juridique*, Training session for legal actors on professional practice on criminal issues and legal undertaking of victims of inhuman (sexual violence and torture), Ministry of Justice and Lawyers without Borders, Bujumbura, Hôtel Safari Gate, 11–22 July 2005, p 2.

In practice, we can confirm that in Burundi these standards have a higher value than the law but less value than the Constitution,⁷⁰ in which case judges and lawyers should be able to refer to them to apply them in court.

Appeals to conventional standards relating to the environment can be extremely useful for the Batwa, who are dependant on natural resources and need to live in a safe environment. If we do not take the environment and sustainable development into account, the enjoyment first and second generation human rights will always be at risk.

The environment is not an abstraction; it is where human beings live and what their quality of life and health depends on, as well as that of future generations.⁷¹

3 The role of Burundian judges and lawyers

There is one remaining issue: the capacity of magistrates to take into account human rights issues when they make their decisions, return their verdict and give their judgment.

An awareness raising training workshop for magistrates on taking into account human rights issues in their daily work took place on 16 May 2008. During this workshop the magistrates recognised that in general they did not consult international human rights tools to formulate their legal decisions. They made a commitment to consult them since these tools are incorporated into Article 19 of the Constitution and Burundi has ratified others.⁷²

The constitutional court of Burundi has existed for long: it was created in 1992, suspended in 1996 due to exceptional circumstances, and was then put back in place in 1998.

After 13 years of experience the court's jurisprudence has seen very few individual or collective appeals linked to human rights violations, and none from the Batwa, even though they are often victims of these violations and referrals are free.

Even though applicants often do not refer to international documentation or they refer to them by listing them but do not show how they contravene national laws,⁷³ it is important to note that the constitutional court always takes the applicant's conclusions into account when they refer to international human rights documentation. For example, the RCCB 54 decisions on appeal (given in 1995) and RCCB 160–161 (given in 2006), for which the court could have either taken up this appeal when it was justified or dismissed the applicant when the appeal was unjustified.⁷⁴

Lawyers refer to international standards to guarantee a fair case to defend their clients, but in other areas they do not refer sufficiently to international tools. At times they refer to

⁷⁰ International Court of Justice (ICJ) (1995), Appeal decision of 25 September 1995, *Gabcikovo Affair – Nagymaros*, §140.

⁷¹ Report on the workshop of 16 May 2008 held at the Hotel Safari Gate organised by the Supreme Court with support from BINUB (United Nations Integrated Office in Burundi) and the High Commission on Human Rights in Burundi, pp 8–9.

⁷² RCCB 48, (1994) Appeal decision of the constitutional court of 24 November 1994, pp 5–6.

⁷³ RCCB 54, p 4 and RCCB 160–161, p 17.

⁷⁴ RCCB 48, *op. cit.*, pp 5–6.

international documentation without demonstrating to the constitutional judge what they are basing it on. In the RRCB decision on Appeal 48 mentioned above, which was given on 24/11/1994,⁷⁵ the applicant's legal counsel referred to an article of the code to organise the power of jurisdiction of international human rights documentation which did not conform. It had constitutional value without demonstrating how the law applied to the facts presented to the constitutional judge, and in this way the judge rejected the applicant's argument.

However, in another decision on appeal cited above (RCCB 160–161) the constitutional judge recognised the legal counsel's arguments as they had clearly demonstrated the nonconformity of one of the laws of the international agreement on civil and political rights.

It is clear that lawyers play a critical role and that they should be made aware of human rights issues as much as of any other Burundian jurisdiction and the principle that prohibits judges from adjudicating more than is asked for in terms of the applicant's claims is almost universally respected.

⁷⁵ Ministry for Land, Environment and Tourism (2006) § PRASAB-URAM, *Stratégie nationale d'utilisation durable des terres*, Book 2, August 2006, pp 6, 56.

V Conclusion and recommendations

Since the pre-colonial, colonial and post-colonial periods, the implementation of land legislation has been difficult for the Batwa. The Batwa continue to carry out unregulated land practices.

As the areas of forest land have considerably decreased due to demographic and agricultural pressure, ownership of public land by the local authorities is justified, although there are practical details that still need to be put in place to involve the population of surrounding areas, including the Batwa, to manage protected areas.

It is possible that claims to ownership rights over land that was previously traditional Batwa land sits uneasily with the current legislation. As all possible solutions to resolve the problems of the Batwa must be considered, it is also necessary to determine the extent to which current legislative systems can be referred to in order to claim the collective and individual ownership of the Batwa.

Implementation of the recommendations below would contribute considerably to the Batwa being able to exercise their land rights.

Recommendations

- All new legislative and regulatory documentation relating to land tenure should take Batwa land issues into account.
- Awareness-raising amongst the Batwa in terms of protecting their land rights.
- Guarantee legal and judicial aid to protect Batwa land rights.
- Launch a national investigation into the illegal practice of *ubugererwa*, which is still imposed on the Batwa, and re-establish Batwa land rights.
- Continue to seek land allocation for the Batwa and prohibit the sale of attributed land within a reasonable timeframe.
- Take the issue of Batwa collective ownership into consideration when revising the land code.
- Facilitate access for the Batwa to genetic resources and a fair and equitable share of the profits from exploiting the biological diversity in protected areas.
- Grant ownership to the Batwa over some areas of marshland containing clay.
- Adopt a land security system adapted to Batwa rural land and take the Batwa concept of collective ownership into consideration.
- Adopt a national land use planning policy.
- Implement technical planning for the national villagisation policy.

- Burundi must respect international obligations that the country has committed itself to observe.

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Timeline of historical and legal developments pertaining to land law in Burundi

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| 1885 | Ordinance by the Congolese Administrator General of 1 July recognising the right of 'native people' to occupy land inhabited and cultivated by them, with vacant land deemed to belong to the state |
| 1886 | The Sovereign King's decree of 14 September which introduces a system for registering land owned by individuals under written law. Land occupied by 'native' populations under the authority of their chief is governed by custom and usage |
| 1896 | Burundi becomes a German colony and the traditional institutions are retained |
| 1916 | Belgian military occupation begins |
| 1919 | Belgium obtains a mandate from the League of Nations to govern Ruanda-Urundi |
| 1925 | Law bringing about the administrative union of Ruanda-Urundi and the Belgian Congo. The new colonial administration obliges the customary authorities to make wetlands and marshlands available to all farmers |
| 1927 | Ordinance No 9 of 8 March on Ruanda-Urundi amending the land tenure system |
| 1933 | Ordinance No 83 bis/agri of 12 December on Ruanda-Urundi relating to the establishment of forest reserves, allowing the creation of a forest reserve on the Congo-Nile watershed (present day Kibira) and in 1951, two other reserves in the Bururi region: the Bururi Forest Reserve and the Kigwena Forest Reserve. All damage to the forest is forbidden, particularly through house-building |
| 1937 | Decree of 21 April relating to hunting and fishing regulations which sets in place a system of hunting permits (both individual and collective) |
| 1945 | Ruling by the Barusasiyeko chiefdom tribunal allowing chiefs to dispose of land which has been abandoned by users who are not expected to return |
| 1959 | Ruling by public tribunal allows a 'native' to have exclusive rights over marshlands, in the sole case of brick-making |
| 1962 | Independence of Burundi |
| | Land legislation amended under a law of 29 June continues to apply the laws and regulations set in place by the colonial authorities |

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| 1966 | Order No 050/65 of 22 March by the Mwami, banning hunting throughout Burundi, has a considerable impact on the Batwa's hunting activities | |
| 1977 | Abolition of the institution of <i>ubugererwa</i> under Decree-law No 1/19 of 30 June. However, some Batwa continue to be exploited under this land servitude system | |
| 1980 | Decree-law No 1/6 of 3 March establishing national parks and nature reserves in Burundi bans the transfer and concession of protected areas, sets out special conservation measures for fauna and flora, prohibits population settlement within 1,000 metres of protected areas and bans entry inside such areas | |
| 1985 | Law No 1/2 of 25 March establishing the forestry code sets out the regulations governing the administration, development, exploitation and monitoring of forests, as well as the conservation and sustainable use of forest resources | |
| 1986 | Law No 1/008 of 1 September establishing the land code (still in force today). ' <i>Les terres vacantes et sans maître</i> ' remain within the state domain. People using the land, especially farmers, have usufructuary status because they have helped to develop the marshlands | |
| 1992 | Decree-Law of 26 November establishing and organising public water services classifies marshlands as an integral part of the private state domain | |
| 2000 | <ul style="list-style-type: none"> • Decree No 100/007 of 25 January setting the boundaries of a National Park and four Natural Reserves prohibits hunting, fishing and tree felling in protected areas except by the local population who can be authorised to extract certain products or other resources that are essential to their way of life • Protocol I of the Arusha Accord of 28 August advocates the proactive promotion of all disadvantaged groups, especially the Batwa, in order to correct the imbalances that exist in all sectors | Environment Code of 30 June (for which rules of implementation have yet to be issued) states that state land cannot be transferred or granted as concessions to private individuals |
| 2005 | Adoption of the Constitution, still in force today, which allows for the Batwa to be represented in the management of public affairs | |



Forest Peoples Programme

1c Fosseway Business Centre, Stratford Road,
Moreton-in-Marsh GL56 9NQ, England
tel: +44 (0)1608 652893 fax: +44 (0)1608 652878
info@forestpeoples.org www.forestpeoples.org

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