Ombuds Institutions for the Armed Forces in Francophone Africa

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Contents

Abbreviations and acronyms

ADP	Assembly of People's Deputies
AMP-UEMOA	Association of Ombudsmen of Member Countries of West African Economic and Monetary Union
AOMF	Association of Ombudsmen and Mediators of La Francophonie
AOMA	African Ombudsman & Mediators Association
BOB	Burundi Official Gazette
CDR	Committees for the defence of the revolution
CNDD-FDD	Comprehensive Ceasefire Agreement between the Transitional Government of Burundi and the National Council for the Defense of Democracy-Forces of Democracy
CNIDH	Independent National Human Rights Commission
CNR	National Council of the Revolution
DCAF	Geneva Centre for the Democratic Control of Armed Forces
DDR	Demobilization, reintegration and rehabilitation programme
ECOWAS	Economic Community of West African States
ENOA	Ecole Nationale des officiers d'active de Thiès
FAB	Burundian Armed Forces (Forces armées burundaises
FAS	Femmes Africa Solidarité
FDN	National Defense Forces (Forces de Défense Nationale)
FNL	Forces of National Liberation
HDI	Human Development Index
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia

OECD-DAC	Organisation for Economic Co-operation and Development's Development Assistance Committee
OIF	International Organisation of the Francophonie
PIC	Peace Implementation Council
RDC	Regional Development Committees
SNEEG	Senegal National Strategy for Gender justice and equity
SSR	Security Sector Reform
STP	Strategic Framework for Peacebuilding
UNDP	United Nations Development Programme

Introduction: Ombuds Institutions for the Armed Forces in Francophone Africa

The project entitled *Ombuds Institutions for the Armed Forces in Francophone Africa* has been initiated under the aegis of the Organisation Internationale de la Francophonie (OIF) and the Geneva Centre for the Democratic Control of Armed Forces (DCAF) as part of OIF's peacebuilding support programme.

The objective of this project is to better understand the role and functioning of ombuds institutions for the armed forces in francophone Africa. As independent mechanisms for human rights protection, these institutions have had a considerable impact on the security sector reform processes, initiated in many African states since the early 1990s. More generally, such institutions contribute to the consolidation and reaffirmation of good governance and the rule of law, both key to the success of ongoing democratisation processes on the African continent. Despite the growing international interest in ombuds institutions since the Second World War, little attention has been paid to the functioning of these institutions, either in francophone states or in Africa more generally.

Burkina Faso, Burundi and Senegal were selected for analysis and three case studies have been prepared by country experts. Each study seeks to identify and facilitate the exchange of good practices and experiences between the states concerned, as well as among similar institutions around the world. Each study examines relevant national institutions, as well as their legal status, shedding light on their strengths and weaknesses and contributing to an evaluation of their capacity building needs. Each study also includes details of their complaints handling procedures and of standards that may be relevant to other similar institutions, contributing as a result to a deepened understanding of their mandates, remit, and functioning. Furthermore, these case studies provide a snapshot of the state of security sector governance in each of the three countries, as well as the progress of ongoing reforms.

The fourth International Conference of Ombuds Institutions for the Armed Forces (ICOAF), which took place in Ottawa in September 2012, brought together representatives of ombuds institutions from around the world. Four institutions from francophone Africa—Burkina Faso, Senegal, Ivory Coast and Burundi—attended for the first time, supported by DCAF. The three case studies presented here were submitted to representatives of these states, who provided suggestions and commentary, before they were distributed to all conference participants.

The Organisation Internationale de la Francophonie has a particular interest in ombuds institutions for the armed forces. The Bamako Declaration, adopted on the 3rd of November 2000, by its member states is a key reference text for democratisation, human rights and fundamental freedoms in the francophone world. This declaration underlines the importance of ombuds institutions to democratic transition and the rule of law. In 1998, the OIF also supported the creation of the *Association des Ombudsmans et des Médiateurs de la Francophonie*, which organises regular programmes for the exchange of information and experiences, as well as training seminars.

For more information, see:
www.francophonie.org/
www.aomf-ombudsmans-francophonie.org/

The Geneva Centre for the Democratic Control of Armed Forces (DCAF) is fully engaged in supporting and promoting ombuds institutions for the armed forces. As part of this work, DCAF supports the International Conference of Ombuds Institutions for the Armed Forces (ICOAF), which brings together representatives of ombuds institutions from around the world and seeks to increase our understanding of their role and functions. The initiative identifies good practices and encourages international cooperation on this important topic.

For more information, see:
www.dcaf.ch/Project/Ombuds-Institutions-for-Armed-Forces/
http://icoaf.org/

Chapter 1

Burkina Faso

Jean-Pierre Bayala

Introduction[1]

Francophone Africa, which largely emerged from colonial rule in the 1960s, is still struggling to take its place among democratic states. Indeed, the independence that was sometimes violently claimed seems to have surprised most African leaders. However, General De Gaulle's message at the time of his proposal for the creation of the French Community had been very clear: "*You want independence, take it with all its consequences.*"[2] Today, "all these consequences" have names: democracy, rule of law, good governance, justice, respect for human rights and individual freedoms, political alternation, free and transparent elections.

The sixteenth Africa-France Summit held in La Baule, France, from 19 to 21 June 1990 – during the presidency of François Mitterrand, was the occasion for France to confront many African leaders, after some thirty years of poor management of public affairs. [3] This summit was considered, rightly or wrongly, as an encouragement to democracy. "*France's traditional aid to African countries will remain, in substance, said the French President, but it is clear that this support will be cooler towards regimes that behave in an authoritarian manner, and more enthusiastic towards those who move boldly forward "towards democratisation.*" He then added: "*when I talk about democracy, when I say that it is the only way to reach a state of equilibrium at a time when the need for greater freedom arises, I, of course, have something specific in mind: representative systems, free elections, multiparty systems, freedom of the press, independence of the judiciary, rejection of censorship... It is up to you, free people and sovereign states that I respect, to choose your path, to determine its steps and pace...*" France announced for the first time, through its President, that aid would henceforth be given out on a scale commensurate with efforts at

[1] This document is part of a project led by the International Organisation of the Francophonie (OIF) and DCAF. The project's main objective is to examine ombuds institutions in three francophone African states. In this regard, DCAF was commissioned by the OIF to produce three case studies, which were written by experts from the three countries concerned. The opinions expressed here are those of the author and do not necessarily reflect the views of DCAF, nor of the OIF.

[2] General de Gaulle in response to Hamed Sekou Touré's indictment of 24 August 1958 in Conakry, demanding immediate independence for Guinea. From: Georges Chaffard, *Les Carnets secrets de la décolonisation*, Volume 2 (Paris: Calman-Levy, 1967), 197-199.

[3] In France-Diplomatie-Sommets Afrique-France, 16ème Sommet Franco-africain, La Baule, 19-21 June 1990.

democratisation. This message from the French President had the effect of a bomb, causing a "forced democratisation process" in virtually all States concerned.[4]

It is in this context of political trauma suffered by African leaders as a result of the La Baule Summit, that Burkina Faso first showed signs of democratisation after a state of emergency that lasted nine years by adopting by referendum its fourth Constitution. The institution of the Mediator of Burkina Faso was thus created during the democratisation process initiated since 1991. Its development is not without difficulties, but the dynamism of the different officeholders has contributed to strengthening its position among democratic institutions, necessary instruments to support the process of democratisation and strengthen the rule of law. This study will attempt to show the progress of the institution and the undeniable improvement it has allowed in the resolution of disputes between public administration and individuals, who have been seeking greater respect for their legitimate rights and dignity. Indeed, these rights and dignity were sorely tried by the different states of emergency that Burkina Faso experienced, including revolutionary regimes.

1.2. Overview

Justification of the study

There is now a rich variety of mediation institutions. The first ones were established over two centuries ago, but were only recognized as an important component of democratic governance after the Second World War. Over the last fifty years, the number of these institutions has increased steadily. Nevertheless, there is a general lack of information on the role of mediation institutions for the armed forces in French-speaking states, especially in African states. As such, this study is particularly appropriate in the context of Burkina Faso. This study aims to examine the Mediator of Burkina Faso, an independent institution with broad jurisdiction. It will particularly focus on the handling of cases

[4] 23 Heads of State and 13 ministerial delegations participated in the conference.

relating to the armed forces and reflect on the creation of an independent and autonomous ombuds institution with exclusive jurisdiction over the armed forces, as in many other countries.

Objectives

The project's main objective is to analyse the functioning of ombuds institutions for the armed forces in three francophone African states, namely Burkina Faso, Burundi and Senegal. It also aims to contribute to a better understanding of ombuds institutions in francophone African states, and consider future developments in this area.

Methodology

The methodology consists of the following phases:

- Collection of documentary source;
- Compilation of a contact list;
- Interviews with the persons listed;
- Processing and analysis of documentary sources and interviews;
- Drafting of the study report.

Recommendations

Final recommendations will include:

- the various reforms to be undertaken;
- the capacity building of the Mediator of Burkina Faso;
- the creation of a new unit or the introduction of specialisations within the Mediator of Burkina Faso's office, to deal exclusively with military-specific cases;
- the establishment of an independent ombuds institution for the armed forces.

1.3. Security sector governance

Background

Burkina Faso, the former French colony called the Republic of Upper Volta, also known as "the land of upright men," attained independence on 5 August 1960. It is a landlocked country with no maritime outlet and is a hub for trafficking in all sorts of goods destined for and coming from the neighbouring countries, especially small arms and light weapons, drugs, precious stones, livestock, wood, coffee and cocoa.[5]

Since independence, the country has not experienced any intrastate armed conflict and enjoys relative internal stability. However, Burkina Faso was unfortunately involved in two armed border conflicts with neighbouring Mali in 1974 and 1985. Today, these two countries have good relations and it is not a coincidence that President Blaise Compaoré is heavily involved in the resolution of the 2012 crisis in Mali, acting as a mediator of the Economic Community of West African States (ECOWAS).

With regard to the political dimension, Burkina Faso has experienced eleven regimes, four of which were constitutional and seven of which were states of emergency. This represents a change of regime every four years. The country had six heads of state over 52 years, only one of which was a civilian: Maurice Yaméogo, the father of independence in Burkina Faso (5 August 1960 – 3 January 1966).[6] Thus, since 1966, the country's leadership has been in the hands of the military. This has led to the relative politicisation of the military, which have difficulties returning to their constitutional role, as established by the fourth Constitution of June 1991. The 4 August 1983 revolution has greatly contributed to the politicisation of military rank, symbolised in its famous slogan "a soldier

[5] Jean-Pierre Bayala, "Burkina Faso" in S*ecurity Sector Governance in Francophone West Africa: Realities and Opportunities*, eds. Alan Bryden, Boubacar N'Diaye (Geneva: Geneva Centre for the Democratic Control of Armed Forces, 2011), 46-47.

[6] The different Heads of State have been: Maurice Yaméogo (5 August 1960 – 3 January 1966); Lamizana Sangoulé (3 January 1966 – 25 November 1980); Seye Zerbo (25 November 1980 – 7 November 1982); Jean Baptiste Ouédraogo (7 November 1982 – 4 August 1983); Thomas Sankara (4 August 1983 – 15 October 1987); Blaise Compaoré (15 October 1987 to the present day).

without political and ideological training is a potential criminal." Apparently, the military took a liking to politics and are not ready to return to their barracks. Therefore, it is important to make substantial reforms to achieve good national security governance, which should lead to the subjugation of the military to the republican order. Thanks to such reforms, institutions such as the Mediator of Burkina Faso or, possibly, an ombuds institution for the armed forces, could contribute to good governance in all its forms and promote the advancement of democracy and the rule of law in the country.

The National Security Strategy

The first security sector governance framework was established long after the independence of Burkina Faso, by *Act No. 032-2003/AN* of 14 May 2003 on internal security. Deemed necessary to ensure democracy and the rule of law and to put an end to rampant insecurity, this legal framework is somewhat simplistic in relation to what the security apparatus usually encompasses in states with more participatory systems of governance. Indeed, this Act greatly reduces the range of potential security providers, which is not conducive to sustainable human development, as established by the Organisation for Economic Co-operation and Development's Development Assistance Committee (OECD-DAC).[7] Under the above-mentioned Act on internal security, internal security forces only include: the police and gendarmerie; the fire brigade and other paramilitary forces heavily involved in national security (e.g. the customs service, the water and forestry service and prison guards); local authorities officers and private security companies;[8] and other military forces may be requisitioned on an ad hoc basis.[9]

The level of insecurity in Burkina Faso today requires bold reforms to be undertaken within the context of security sector reform (SSR). Unfortunately, the concept of SSR is still disregarded and needs to be

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[7] *OECD DAC Handbook on Security System Reform. Supporting security and justice* (OECD 2007), 5. Accessed 15 October 2012, www.oecd.org/dataoecd/43/25/38406485.pdf

[8] *Decret 2009-343/PRES/PM/SECU/DEF/MATD/MJ/MF/MTSS du 25 mai 2009* portant reglementation des activites des societes privees de gardiennage.

[9] Context in which the army intervened during the 2011 crisis to put an end to the mutiny in the garrison of Bobo-Dioulasso.

integrated into the strategies of the policymakers and various stakeholders in Burkina Faso. In this regard, while there is still widespread ignorance about SSR in Francophone countries, Anglophone states, having acquired a good understanding of the matter, have integrated security sector reform in the broader process of democratisation and strengthening the rule of law.

The necessary reform of the security sector

The Defence and Security Forces, which make up the country's security framework,[10] were seriously shaken by the 4 August 1983 revolution. This regime undermined with a lasting effect the foundations of the military, such as discipline, one of the traditional values of military and paramilitary institutions. Indeed, the establishment of committees for the defence of the revolution (CDR) within the armed forces was a way not only to "demystify" the military but also to "destroy" the former military order, which was regarded as reactionary. Military officers lost some of their authority as they were henceforth evaluated by their subordinates regarding promotion and appointment to command level positions.[11] Some military officials are still stunned by this revolutionary phase. This feeling may partly explain the passive attitude of some military leaders during the mutiny that took place within the armed forces in March 2011.[12]

In view of this, it is crucial to reform the security sector in Burkina Faso. Reforms will necessarily include the formulation of a revised security concept, broader than the definition provided in the legislation currently in force. To this end, an appropriate answer could be the new universal concept established by the OECD-DAC, which regards security as part of integral human development.[13] Only a reform of the security sector

[10] *Act No. 032-2003/AN of 14 May 2003 on internal security*.

[11] Committees for the defence of the revolution were feared by military leaders.

[12] Troops had escaped control of substantially all military command.

[13] Development within the meaning of the United Nations Development Programme (UNDP). Development within the meaning of UNDP or integral development, means the inclusion of all measures that contribute to the well-being of man, namely: food, physical, health, social, moral security, etc. "The Human Development Index (HDI) is a summary composite index that measures a country's average achievements in three

that is well-managed and effectively implemented could enable Burkina Faso to build republican armed forces and security forces that respect human rights, humanitarian law and the rule of law. Integrated armed forces that benefit from the essential cooperation of the general population will be a pillar of peace and stability. It is hoped that the revision of the conventional – and very outdated – concept of community policing, established in 2005 in Burkina Faso, will lead to the armed forces taking into account the security needs of the general population and work with it to meet those needs.

1.4. Human rights and the armed forces

As mentioned earlier, Burkina Faso is a country where the military has played a role in the management of internal affairs for 46 years. The country has had six presidents but only one peaceful transition of power, that between the first President of the Republic (Maurice Yameogo) and the second (Sangoulé Lamizana), with a poor record of human rights violations both within the armed forces themselves and against the people.

Human rights situation in relation to the actions of the armed forces

The issue of human rights violations committed by members of the armed forces worries people. In addition to the misconduct that resulted from the strong politicisation of the armed forces and defence forces, many perpetrators still enjoy impunity, driven by the slogan: "If you

basic aspects of human development: a long and healthy life (health), access to knowledge (education) and a decent standard of living (income). Data availability determines HDI country coverage. To enable cross-country comparisons, the HDI is, to the extent possible, calculated based on data from leading international data agencies and other credible data sources available at the time of writing". http://hdr.undp.org/en/statistics/indices/, accessed 22 October 2012

protest, I kill you and nothing happens."[14] Such conduct has fostered a climate of mistrust, and even fear, between civilians and the very authorities that are meant to protect them at all times and under all circumstances. Unfortunately, the recent events of March 2011 have added to the people's apprehension. The violence with which some members of the armed forces have attacked people and private property in Ouagadougou as well as Bobo-Dioulasso is a good indication of the urgent need for significant reform and for a special ombuds institution for the armed forces, whose main function would be the prevention of disputes within the army.

Human rights situation in the armed forces

Human rights violations committed in the armed forces most often happened in the context of acts of revenge, causing the death of military servicemen (e.g. seizures of power; summary executions in alleged or confirmed coup attempts), detentions, redundancies, layoffs, ruined careers and other kinds of bullying, mainly caused by the politicisation of the army, which has resulted in deep divisions.[15] Very recently, more than 500 soldiers were made redundant, following the various mutinies of March 2011 that broke out in different garrisons of the country.[16] These numerous events (collective complaints in 1999 at the Guillaume Ouédraogo Military Camp in Ouagadougou and the events of 2011) are serious and disturbing evidence of human rights violations.

Given the lack of public trust in the armed and security forces, we can legitimately ask how Burkina Faso, which is experiencing growing insecurity, could meet the challenges of sustainable human development

[14] In French: "*Si tu fais, on te fait et il n'y a rien*". This quote comes from a security officer who committed, with impunity, gross violations of human rights during the revolutionary regime.

[15] The most serious violations were committed under the revolutionary regime and the correction movement that broke out on 15 October 1987, following the assassination of leader of the revolution Thomas Sankara.

[16] Events of national significance followed the death of student Zongo Norbert in Koudougou, the birthplace of journalist Norbert Zongo, who was assassinated on 13 December 1998.

without initiating the reforms already mentioned above.[17] In view of all these actions that tarnish the image of the armed and security forces, it is important to remember that Burkina Faso endorsed the 1948 *Universal Declaration of Human Rights* and ratified the international legal instruments relating to human rights.[18] Nevertheless, the accession to and ratification of these documents are not sufficient to guarantee their practical application and the effective implementation of rights and freedoms. It must be made clear that military emergency regimes have led to mass violations of human rights, in particular under the pre-constitutional revolutionary regime, whose leader himself was assassinated.[19]

In this national context, it is easy to understand the importance of a specific ombuds institution for the armed forces, whose main function would be the prevention of disputes within the armed forces and between the military and civilians. In summary, the human rights situation linked to the actions of the armed forces and within these deserves much attention. It calls for serious reform of the security sector (army, police, judiciary), in order to set out the right conditions for the establishment of a national security framework promoting democracy and the rule of law.

1.5. The Mediator of Burkina Faso

The Ombudsman

The present study on the Mediator of Burkina Faso necessarily makes reference to the Swedish Ombudsman, after which it is modelled, like many others. Established in 1809 by the King of Sweden, the

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[17] Crime statistics compiled by the Ministry of Security show that there has been at least one armed attack per day in the country.

[18] Constitution of Burkina Faso adopted by referendum on 2 June 1991, formally adopted on 11 June 1991. See also the *African Charter on Human and Peoples' Rights*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Geneva Conventions* of 1949 and their two *Additional Protocols* of 1977.

[19] Thomas Sankara, President of the National Council of the Revolution (CNR – *Conseil National de la Revolution*), assassinated on 15 October 1987.

Ombudsman's function was to protect the general public against arbitrariness and abuse by the public administration. Indeed, the word ombudsman means "grievances spokesperson" or "complaints man." Etymologically, the word ombudsman may also be of Celtic origin, rooted in *ambactos* meaning "servant, messenger", which has also given the word embassy in French.

Definition

"An Ombudsman or Mediator is an independent and objective person who investigates complaints from citizens committed by state organs and other organisations, both private and public. After an elaborate and impartial examination, he determines if the complaint is justified and makes recommendations to the organisation in order to resolve the problem."[20]

In addition to ombuds institutions, based on the Swedish model, there are more specific institutions that are mandated to address issues arising from and within the work of armed forces. These can be grouped into three distinct categories:[21]

- integrated within the armed forces;
- exclusive jurisdiction over the armed forces;
- and general ombuds institutions.

General ombuds institutions

In some countries, such as Burkina Faso, cases relating to the armed forces are handled by an independent civilian ombuds institution: it is the classical type of ombudsman. He has a general jurisdiction to deal with complaints filed against civilian and military arbitrary action perpetrated by the Administration and other agencies. The advantage of this model is that both civilians and members of the armed forces are likely to be treated equally regarding the protection of their rights. However, a civilian ombuds institution may lack specific knowledge and credibility, and even raise concerns within the armed forces. Moreover, due to its broad mandate, it may fail to focus attention on the particular

[20] Forum of Canadian Ombudsman (archive), at *www.ombudsmanforum.ca/en/*
[21] Benjamin S. Buckland and William McDermott, *Ombuds institutions for the Armed Forces. A Handbook* (Geneva: DCAF, 2012), 29-30.

problems facing armed forces personnel. Furthermore, insufficient resources devoted to military-specific cases may cause significant delays in the resolution of complaints.

A solution to these problems could be to introduce specialisations within the ombuds institution's office, for example, by appointing a correspondent to deal specifically with military affairs. This is the case in the Philippines and in Sweden, where the ombudsman's work is subdivided into several areas of responsibility, including the armed forces.[22]

The first Mediator of Burkina Faso, General Tiémoko Marc Garango, wondering about the relations and similarities between the Mediator of Burkina Faso and other ombuds institutions modelled after the Swedish Ombudsman of 1809, wrote in his first activity report:[23] *"What, does the Mediator of Burkina Faso have in common with this distant relative, with the ombuds institutions that have been established in African countries in recent years, and with the hundreds of institutions around the world who now share this Swedish experience dating back to the nineteenth century?*
Two things seem essential in this regard:

- *in all ages and climes, ombuds institutions' main concern has been the protection, by an independent authority, of the rights of citizens against the public administration;*
- *striving for a better-functioning public administration in charge of the daily implementation of political decisions taken by the rulers."*

[22] Buckland, McDermott, *Ombuds institutions*, 33-34, on the different models of ombuds institutions.
[23] General Marc Tiémoko Garango, *First activity report of the Mediator of Burkina Faso*, 29 December 1994-31 December 1997, 9.

The Mediator

The Mediator of Burkina Faso is an ombuds institution. Its aim is twofold:

- to preserve, through the exercise of an independent, credible and impartial authority, the rights of citizens against arbitrariness and abuse of power by the public administration;
- to ensure the proper functioning of the administration, which constitutes the basis of peace and social security for all citizens.

Background

The idea of the Mediator of Burkina Faso was the subject of *Recommendation No. 6* of the first Annual Conference on Public Administration of Burkina Faso that was held in September 1993,[24] in response to the need for a mechanism to protect citizens' rights and interests. Following this recommendation, the Mediator of Burkina Faso was established by *Organic Act No. 22/94/ADP* of 17 May 1994.[25]

Origins

As previously mentioned, the Mediator of Burkina Faso has its roots in the Swedish Ombudsman model. It has also drawn on the texts of his French counterpart, including the Organic Act mentioned above. It took two years to set up the institution, which became operational on 17 May 1996, thanks to the dynamism, competence and strong personality of its first officeholder, General Marc Tiémoko Garango. Ms. Alima Déborah Traoré-Diallo, a high-ranking judicial officer, is in office now as the fourth Mediator of Burkina Faso.[26] Ms. Traoré-Diallo is a legal expert and specialist in multi-mode transport.

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[24] *First activity report of the Mediator of Burkina Faso.*

[25] And see *Decree No. 94-494/PRES of 29 December 1994 appointing the Mediator of Burkina Faso.*

[26] The different Médiateurs du Faso: General Marc Tiémoko Garango (29 December 1994 - 31 December 1997), Jean Baptiste Kafando (31 December 1997-1 April 2005), Amina Ouédraogo (1 April 2005-22 June 2012), Alima Déborah Traoré-Diallo (22 June 2012).

Media coverage of the Mediator's work

According to the Mediator of Burkina Faso, there is ongoing and open communication within the institution. It concerns all public administrations and citizens. Since its implementation in 1996, communication has played an important role in making the institution known to the public and asserting its identity. Thus, the first Mediator of Burkina Faso's organised three major information and communication campaigns. In addition, seminars, conferences, regional delegates and correspondents in public administrations, as well as mobile courts, which took place across the national territory, contribute to promote the institution. During the early years that followed its foundation, the newspaper *La Référence* was specially created to help inform the public about the work of Mediator and raise the awareness of institutional stakeholders. Unfortunately, due to financial constraints, the newspaper has not been published for five years. Its recovery is nevertheless one of the objectives of the five-year plan.

Information material and tools were developed to provide different mediums for communication. These include information leaflets, and promotional videos in French and other national languages. Besides, there are various departments in the institution that are dealing with communication and information.[27]

The Press and Public Relations Department

This department, headed by a press officer, is responsible for:

- the handling of all press and media matters relating to the Mediator of Burkina Faso, as well as issues concerning relations with other institutions, elected officials and private or state-run press outlets;
- the analysis of various publications from periodicals, magazines and newspapers;

[27] *Decree No. 95-293/PRES of 31 July 1995 on the organisation, functioning and responsibilities of the departments of the Mediator of Burkina Faso.*

- the organisation of the Mediator of Burkina Faso's activities with the various media and the public to promote a better knowledge and use of the institution.

The Central Mail and IT department

This department is responsible for the reception and computerised processing of claims, as well as the registration, internal distribution and shipping of regular mail.

The Records and Archives department

This service has the following functions:

- to acquire, select and disseminate information;
- to edit and issue reports and newsletters,
- to print, archive, bind, and classify books, newspapers, periodicals, magazines and other relevant documents;
- to maintain and classify records on the work of the Mediator and other archival documents.

The Department of Public Information

This department is responsible to welcome people, provide them with information and direct them to the appropriate department of the institution.

The Delegate and Correspondent Relations department

This division is the Mediator of Burkina Faso's point of contact of regional delegates and correspondents in public administrations within the Mediator of Burkina Faso.

Mandate and legal basis of the Mediator

Under the aforementioned Organic Act of 1994, a public agency known as the Mediator of Burkina Faso was established to intervene between citizens and the public administration. Based on the constitution, it acts independently and does not receive instructions from any authority.

The Mediator's term of office is limited to five years and is non-renewable.[28] However, if he resigns or reaches the end of his term, he remains in office until he is replaced. The Mediator of Burkina Faso must be at least forty-five years of age at the time of his appointment, have a professional experience of at least twenty years, a strong sense of responsibility, a good moral character and have the public good and the interests of the nation at heart.

The Mediator of Burkina Faso is appointed by the President of Burkina Faso after consultation with the Prime Minister, the President of the Assembly of People's Deputies (*Assemblee des Deputes du Peuple* - ADP), the President of the House of Representatives and the President of the Supreme Court. Today the Assembly of People's Deputies has become the National Assembly, the House of Representatives no longer exists and the Supreme Court has been divided into the Constitutional Council, the Court of Cassation, the Council of State and the Court of Auditors. The President of the Constitutional Council is now the authority whose opinion is required in place of the President of the Supreme Court for the appointment of the Mediator, and before whom the Mediator takes an oath during his official accession.

The Mediator's term of office may only be terminated before his mandate expires if he is permanently unable to fulfil his duties, as established by the Supreme Court (now the Constitutional Council), after the matter has been referred to the Court by the President of Burkina Faso. Nevertheless, the Mediator may resign at any time by giving notice in writing to the President of Burkina Faso.

[28] The Act was revised to extend the term from five to seven years, still non-renewable.

The Mediator of Burkina Faso cannot be prosecuted, arrested, detained or judged in respect of any opinions he may voice or any acts he may accomplish in the performance of his duties.

The Mediator of Burkina Faso shall only perform the duties and tasks defined in his mandate and may not hold any other office or engage in any other employment, unless expressly authorised by the President of Burkina Faso. In addition, he cannot run for any elected position for the duration of his term. If such a position was held prior to his appointment, the Mediator is required to resign before taking office.

Functions of the Mediator

The Mediator of Burkina Faso receives complaints concerning the working of government departments, local authorities, public establishments and other public service bodies.

He may, at the request of the President or the government, participate in any activity aimed at improving the public service or in mediation between the public administration and the social and professional forces.

The Mediator cannot intervene in:

- disputes between private natural persons or legal entities;
- political problems of a general nature;
- matters that are already under the jurisdiction of a court or challenge a court decision.

Submitting complaints to the Mediator

Any natural person or legal entity who considers, with respect to a matter concerning him or her, that an organisation referred to under Article 11 of the Act[29] has failed to act in accordance with its mission of public service, may submit an individual or a collective complaint to the

[29] Article 11: "The Mediator of Burkina Faso receives complaints concerning of government departments, local authorities, public establishments and other public service bodies".

Mediator of the Republic or may ask, through a member of parliament or a local elected politician, for the case to be brought to the attention of the Mediator of Burkina Faso. The Mediator may also, on his own initiative, intervene in any matter falling within his jurisdiction, whenever he has reasonable grounds to believe that a person or group of persons has suffered or may very likely suffer prejudice as the result of an act or omission of a public body.

The services of the Mediator of Burkina are offered free of charge. Complaint submissions shall be made in writing by mail or e-mail. All complaints must be preceded by the appropriate administrative approaches to the bodies concerned, to enable them to respond to the complainant's requests. Filing a complaint with the Mediator of Burkina Faso does not suspend the time limit stipulated for lodging administrative and legal appeals.

Organisation, capacity and functioning of the Mediator

The organisation, capacity and functioning of the Office of the Mediator are defined in *Decree No. 95-293/PRES of 31 July 1995* [30] on the organisation, functioning and responsibilities of the Mediator of Burkina Faso. In the revision of the Organic Act on the Mediator, now underway, the decree should be replaced by an order of the Mediator.[31] In addition, a project to rethink the organisational structure of the institution was also initiated.

Organisation of the Office of the Mediator

The seat of the Mediator is Ouagadougou. The Mediator can freely choose his associates. His office is divided into the Mediator's Cabinet and the Secretariat-General.

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[30] Decree made under Article 24, paragraph 3 of the Organic Act cited above. In practice though, this decree is no longer applied. The office of the Mediator has been reorganised four times, and a new organizational chart is being developed.

[31] The revision of the aforementioned decree allows the Mediator of Burkina Faso to organise its departments by decisions taken within the institution rather than by the adoption of statutory instruments made by the Council of Ministers. This reading gives it more power and strengthens at the same time his authority.

- Cabinet

The Head of Cabinet is responsible for coordinating all the departments of the cabinet:

- He assists the Mediator of Burkina Faso in all private and confidential matters and handles any case entrusted to him.
- He organises the Mediator's schedule.
- He handles official contact with ministerial offices and other institutions and may receive delegation of signature, the nature of which is to be determined by the Mediator of Burkina Faso.

The Private Secretariat of the Mediator of Burkina Faso, under the responsibility of a Head of Secretariat, is responsible for:

- the reception, registration and shipping of confidential mail;
- the typing, copying, filing and archiving of all documents of the cabinet.

The Protocol Department, headed by a Protocol attaché, is responsible for:

- the organisation of hearings and official trips of the Mediator and its associates
- the organisation of official ceremonies;
- the official welcome of prominent foreign personalities on official missions or visits.

The Press and Public Relations Department, headed by a Press attaché, carries out the tasks as previously defined.

- Secretariat-General

The Secretary-General ensures continuity of administrative action in the office of the Mediator of Burkina Faso.

- He coordinates and monitors the activities of all departments under his authority as regards technical, administrative and financial matters, and ensures the implementation of policies defined by the Mediator of Burkina Faso.

- He receives delegation of signature of the Mediator for all correspondence, administrative decisions and any documents, the nature of which is to be determined by the Mediator.
- He monitors the maintenance of relationships with government agencies.
- He occasionally represents the Mediator and may perform other related duties.
- He is in charge of drafting the annual report.

The following departments are part of the Secretariat-General:

The Secretariat of the Secretary General, which is headed by a Head of Secretariat, is in charge of:

- the hearings and correspondence of the Secretary-General;
- the reception, registration and shipping of mail;
- the typing, copying and filing of any document of the Secretariat-General;
- the liaison with other departments of the Secretariat-General.

The Departments of Inquiries are divided into three sections:

- General Administration and Local Authorities;
- Economic and Financial Affairs;
- Social and Cultural Affairs.

The Departments of Inquiries, under the direction of three Heads of Departments, are responsible for:

- assisting citizens in executing their rights and duties; receiving and investigating complaints from natural persons and legal entities; making recommendations for the quick and amicable settlement of disputes between the public administration and citizens;
- making proposals for amendments to legal, regulatory and administrative texts in the general interest;
- contributing to the improvement of public services and mediating between the government and social and professional forces;

- preparing special reports and the annual report on the activities of the Mediator of Burkina Faso.

The Department of Management deals with administrative and financial affairs. It is responsible for:

- budget proposals;
- funds allocated to the Mediator of Burkina Faso;
- funding accountancy;
- topical accountancy for real and personal property, as well as their management and maintenance;
- human resources management;
- year-end account management.

Each department is structured into divisions and has its own secretariat. The Secretariat of the management department is responsible for entering and implementing projects based on documents originating from the departments of the Mediator of Burkina Faso.

Regional delegates are appointed by the Mediator of Burkina Faso in each region.[32]

- They receive complaints and carry out inquiries with a view to reaching amicable settlement of the disputes between local governments and citizens. In complex cases or cases that fall outside of their subject-matter jurisdiction, they refer the complaints to the Mediator of Burkina Faso.
- They welcome complainants and provide them with the necessary information regarding administrative disputes. They advise and help them prepare the cases that will eventually be submitted to the Mediator. They work in close collaboration with the delegate relations department. They shall report to the Mediator, at intervals specified by the latter, on the state of progress in ongoing cases and those already settled.

The Central Mail and IT Department, the Records and Archives Department, the Department of Public information, the Delegate and Correspondent Relations

[32] There are ten regional delegations, but there are plans to create a further three delegations.

Department and *the Communication Department* are responsible for communications management within the institution.

Capacity and functioning of the Mediator

In accordance with Article 160 (2) of the Constitution, the responsibilities, organisation and functioning of the Mediator of Burkina Faso are determined by the above-mentioned Organic Act establishing the Mediator. It should be noted that this act is currently being revised, focusing on the deletion of obsolete terms such as ADP, House of Representatives, Supreme Court and their substitution (by AN, Senate and Constitutional Council), and especially on the extension of the term of office from five to seven years.
When a complaint is deemed to be justified, the Mediator of Burkina Faso issues any recommendations he believes will resolve the matter, and any proposal to improve the functioning of the body in question. The Mediator of Burkina Faso can ask to be informed of the measures actually taken to remedy the prejudicial situation. In the absence of a satisfactory response within a fixed deadline, he may submit a special report to the President of Burkina Faso, and if he deems it expedient, he may relate the case in his annual report.

The Mediator of Burkina Faso may request the competent authority to initiate disciplinary procedures against an officer for misdemeanours, or where appropriate, refer the matter to the criminal court. The Mediator may not intervene in cases before courts or question the soundness of a court's ruling, but should be entitled to formulate recommendations to the body in question. However, bringing the matter before the courts does not prevent it from being brought simultaneously before the Mediator.

If a final court decision beyond appeal has not been enforced, the Ombudsman may enjoin the responsible body to comply with it by a certain deadline. If that injunction is not respected, it will proceed as provided for in Article 19 of the Organic Act.

All ministers and public authorities must facilitate the task of the Mediator. They shall authorise officers under their authority to reply to any questions asked of them and, possibly, to any request made by the

Mediator of Burkina Faso to appear before him. The confidential nature of the evidence that he is requesting cannot serve as grounds for refusal to provide such information, except when it relates to national defence, State security, foreign policy or court proceedings. In order to ensure the respect of laws and regulations pertaining to professional secrecy, he shall take the necessary steps to ensure that nothing is mentioned in the documents published under his authority which could lead to the identification of persons whose name has thus been disclosed to him.[33]
In order to remedy prejudicial situations he has noted in the course of his interventions, avoid the recurrence of such situations or prevent similar situations, the Mediator of Burkina Faso can call to the attention of the President of Burkina Faso, the President of the National Assembly or the President of the Senate, the necessity of legislative, regulatory or administrative reform as he deems to be in the public interest. Citizens can also approach the Mediator of Burkina Faso on the necessity of legislative or regulatory reforms that they deem to improve public services.[34]

The Mediator of Burkina Faso submits annual reports on his activities to the President of Burkina Faso, the Head of Government, the Presidents of the National Assembly and Senate, and the President of the Constitutional Council. These reports are published in the State's Official Gazette. The Mediator of Burkina Faso presents a summary of the said reports to the Head of Government, the Parliament and the Constitutional Council.

[33] The reservation made to Article 19 cited above concerning documents that are classified as "confidential" or "secret" limits the effectiveness of the Mediator. Indeed, the lack of a precise definition of these terms tends to serve as a pretext to refuse to cooperate or produce information, as requested by the Mediator.
[34] The Mediator lacks enforcement or sanctioning powers. In case of non-cooperation or unsatisfactory response from an administrative authority, the Mediator can only report to the President of Burkina Faso.

Complaint procedures[35]

There are four different ways by which the Mediator may initiate investigations:

- submission of complaint by the complainant himself, filed at the institution's headquarters or through the regional delegate, once all opportunities for administrative review have been exhausted;
- submission via parliamentarians or local politician;
- own-initiative investigations;
- referral by the President or the Government of Burkina Faso.

Complaints should be made in the form of a letter signed by the complainant and addressed to the Mediator of Burkina Faso.[36]

Power of investigation

The Mediator of Burkina Faso has the power to investigate all the complaints that are brought before him, provided that they fall under his mandate. As such, he may demand information from any administrative authority to investigate complaints.

1.6. Strengths and weaknesses of the Mediator

The handling of disputes affecting civilians and military by the Mediator of Burkina Faso reflects the will of the legislator to provide the country with a unique institution. This decision is driven by a variety of reasons, including the lack of government resources and the relative importance accorded to administrative files. Most certainly, the creation of such an institution arises from a concern to ensure fair treatment of all citizens. There is no doubt that such a noble concept is not without its strengths

[35] See Organic Act, Articles 14 to 17.
[36] Website of the Mediator of Burkina Faso, accessed 15 October 2012, http://www.mediateur.gov.bf/.

and weaknesses, which can be assessed differently by the general public and the beneficiaries themselves. The Mediator of Burkina Faso, being a civil institution, it seems legitimate to question his competence to handle military matters [37]. Indeed, the military is a particularly sensitive environment, where the complex and overused concepts of secrecy, state and military security can be invoked at any time. In view of this situation, it is necessary to identify the strengths and weaknesses of the Mediator in the exercise of its functions for the armed forces.

Strengths of the Mediator

The work of the Mediator of Burkina Faso carried out since 1996 suggests that the institution is well placed to handle military matters.

Protocol rank of the Mediator

The Mediator of Burkina Faso is a high-ranking government official and, as such, holds the rank of head of institution, like the President of the National Assembly, the President of the Constitutional Council, the Grand Chancellor of National Orders or the President of the Economic and Social Council. The honour and respect conferred by his office is due by all, including members of the armed forces. In addition, we should note the strong personality of the officeholders; their professionalism, their expertise and their sense of responsibility (cf. Article 3 of the above-mentioned Organic Act).

Institutional independence

The Mediator of Burkina Faso is an independent authority. This goes for the officeholder as well as the institution itself.[38] Within the limit of his competence, he does not take orders from any other authority. The Mediator of Burkina Faso is endowed with the following powers:

- power to *subpoena*;

[37] The mediator has the authority to determine questions as to its own jurisdiction and make a decision on whether it has jurisdiction over an issue that needs to be settled.
[38] Article 2 of *Act No. 22/94ADP of 17 May 1994 on the establishment of the Mediator of Burkina Faso.*

- power to appoint and dismiss staff;
- power to launch own-motion investigations;
- power to initiate investigations on any matter involving an act or omission by the administration or a public body that is likely to cause harm to a person or group of persons;
- power to make recommendations;
- power to issue summary orders;
- power of reconciliation;
- power to call to the attention of the President of Burkina Faso the necessity of legislative, regulatory and administrative reforms;
- power to submit a special report to the President to persuade uncooperative institutions to comply with his recommendations;

In addition, the Mediator has a correspondent who deals specifically with military affairs.[39]

Financial independence

The Mediator of Burkina Faso has financial autonomy. Indeed, the institution's operating budget funds are provided by the national budget. They are released on a quarterly basis by transfers to a deposit account at the Treasury in the institution's name. The Mediator of Burkina Faso is the authorising officer. He is not subject to the financial control of the ministry responsible for finance, but submits the management account established by a public accountant to the Court of Auditors. It should be noted that the insufficient budget of the Mediator limits his financial independence. As an illustration, the institution sorely lacks the financial resources and vehicles that would allow regular mobile courts and other outreach activities.[40]

[39] Colonel Major Ali Pare, Veterans Delegate to the Ministry of Defence.

[40] Interview with the Mediator of Burkina Faso, on 16 August 2012 at 4 pm. The Mediator's budget for the year 2012 was approximately 435,136,000 CFA francs, most of which is used to pay staff salaries.

Impartiality

The Mediator of Burkina Faso's impartiality is a major asset in the handling of complaints, especially those involving members of the armed forces. The institution shall demonstrate impartiality at all times and until now, its impartiality has never been called into question by any of the military complainants. Nonetheless, this seems to upset some military leaders, who regard complaints to the Mediator as an expression of misbehaviour, and even indiscipline on the part of their men.

Own-motion investigations, subpoena and referrals to the President of Burkina Faso

Under the provisions of Article 15 of the Organic Act, the Mediator may address any issue falling within his jurisdiction on his own initiative, whenever he has reasonable grounds to believe that a person or group of persons has suffered or may very likely suffer prejudice as the result of an act or omission of a public body. However, the Mediator himself seems sometimes reluctant to exercise this power to launch own-motion investigations. It should be noted that the Head of State is not only the Commander-in-Chief of the armed forces, but also the current Minister of Defence, which may explain such reluctance.

The power to *subpoena* enables the Mediator Faso to inform in writing the different administrative authorities of complaints and to obtain all the information required for his intervention, recommendations and proposals. Unless they can invoke military secrecy, they have an obligation to provide a satisfactory response to any requisition within the time specified.[41] There are objective limits to this power, as the Mediator is unable to compel authorities to comply, and can only inform the President of Burkina Faso of the situation.

The Mediator, when seeking to enforce compliance with his recommendations, may chose to refer the matter to the President of Burkina Faso. In that case, he shall submit a special report to the President, or relate the case in his annual report of activities.[42]

[41] Articles 22 and 23 of the Organic Act.
[42] Article 19 of the Organic Act.

Weaknesses of the Mediator

It is not easy for civilian and military ombuds institutions, even if they are independent, to handle complaint that are made by or against the military and that relate mainly to individual rights and freedoms. Indeed, few African armies are truly republican[43] and respectful of the individual and collective rights and liberties of civilians and military. Passive military obedience, which meant that a complaint could not be filed if an illegal order had been carried out "without murmurings and disputing," was denounced by the Tokyo and Nuremberg military tribunals[44] that took place after the Second War World, and was definitely abolished by Article 33 of the Statute of the International Criminal Court (ICC).[45] Some military leaders consider this limitation as a significant loss of authority and an encouragement to indiscipline. In addition, military secrecy is often improperly invoked to evade the power of the Mediator, preventing the effective work of the institution. This inevitably results in significant delays and obstructions in the processing of cases.

Officials of the institution revealed in an interview that communication with military authorities was insufficient. This was also noted by the

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[43] Republican army, as a literal translation of the French "armée républicaine", concept that comes originally from the French revolutionary era.

[44] The Nuremberg Trials established some of the rules that were later adopted by proponents of international justice. These include the soldier's obligation to disobey manifestly illegal orders from his superiors, which thus runs counter to the principle of passive obedience to which he was subject "without murmurings and disputing". See Article 8 of the Charter of the Nuremberg Tribunal and *Trial of Lieutenant-General Shigeru Sawada and three others*, United States Military Commissions, Shanghai, February 1946-April 1946, Case No. 25, United Nations War Crimes Commission, Vol. 5, p. 7, available at http://www.loc.gov/rr/frd/Military_Law/pdf/Law- Reports_Vol-5.pdf, accessed 13 July 2011: "*The offences of each of the accused resulted largely from obedience to the laws and instructions of their governments and their military superiors...The circumstances do not entirely absolved the accused from guilt. However, they do compel unusually strong mitigating consideration, applicable to each accused in varying degrees.*"
And, Article 6 of the Statute of the International Military Tribunal for the Far East, Article 7 § 4 of the ICTY Statute and Article 6 § 4 of the ICTR Statute and Article 6 § 4 of the Special Court for Sierra Leone, Article 29 of the Act establishing the Extraordinary Chambers in the Courts of Cambodia, Article 3 § 4 of the Statute of the Special Tribunal for Lebanon.

[45] Nevertheless, Article 33 of the Rome Statute places cumulative conditions to relieve a person who obeyed superior orders of criminal responsibility.

military correspondent of the Mediator of Burkina Faso, who mentioned that the Mediator's requests for advice or information were often not immediately answered and should be followed by several reminder letters.[46] For example, since 2007, 123 cases involved the Ministry of Defence.[47] This represents 86 formal complaints and 37 requests for information. The claims involved about 500 people in total, as some of them were group complaints.

The number of complaints could be linked to threats of reprisals by superiors against the military who dare submit complaints the Mediator of Burkina Faso. These complaints are seen as acts of insubordination or defiance towards the military authority. In one case, a military complainant had to withdraw his complaint after being threatened by his superiors.[48] This example shows the resistances that are opposed to the process of change, which is nevertheless needed in the armed forces.

The Mediator's weaknesses include also the lack of familiarity with military technical terms and with the different elements that are or should be taken into account in the career of a soldier. The specificities of the military, especially in legal field, further complicate the work of the Mediator. Finally, mention should be made of the excessive delays and lack of reaction in the handling of cases that are of direct concern to the military administration.

Identified weaknesses point to the need to either strengthen the operational capacities of the Mediator of Burkina Faso by integrating qualified military staff into the institution, or consider the establishment of an independent ombuds institution, which would devote its attention exclusively to military matters, as it is the case in some Anglophone African countries.

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[46] Interview with the military correspondent of the Mediator of Burkina Faso, 10 August 2012, 10.15 am.
[47] See Annex.
[48] Interview with the Mediator of Burkina Faso, 16 August 2012, 4 p.m.

1.7. Capacity building needs of the Mediator

As noted about the independence of the Mediator, the proper functioning of such an institution depends more on the amount of funding committed than the formal independence it enjoys.

In a visit to the Mediator of Burkina Faso, the Prime Minister recognised the "*extraordinary work done over 16 years*" and wrote in the visitor's book of the institution: "*More than ever, in the context of sociological change taking place in our country, the role of this institution should be enhanced*". Over the sixteen years of its existence, the Mediator of Burkina Faso has processed over 4800 cases, or approximately 300 cases per year, and this despite the lack of visibility and the many difficulties encountered with government authorities. During a visit of the Prime Minister, the Head of the Department of economic, social and cultural affairs of the Mediator of Burkina Faso said: "It is quite common that our communication to government authorities remain unanswered".

Furthermore, during the interviews conducted for this study, the capacity building needs of the institution were widely discussed. Such needs relate mostly to the visibility of the Mediator, which must be improved by allocating more resources to the institution. Other identified weaknesses relate to the low budget of the institution, the absence of staff devoted to military-specific cases, the lack of vehicles and of computer system to facilitate the processing of claims, which would allow complainants to follow the processing of their files at any time via internet or mobile phone. The institution is cruelly short of human and financial resources for the tasks that it was mandated to perform.

In view of these shortcomings and weaknesses, it seems necessary to introduce a military specialisation within the office of the Mediator of Burkina Faso. Internal capacity building would be essential to this end, as would be maintaining good relations with the army. However, given the specificity of military cases, the creation of an independent ombuds

institution dedicated exclusively to military matters is the most desirable option.[49]

1.8. Best practices, procedures and standards of the Mediator

In spite of being only sixteen years old, the institution has demonstrated an exceptional dynamism and commendable professionalism. A perfect example of this is the amount of cases that have been treated by the Mediator. The best practices, procedures and standards in place deserve to be known and used by other ombuds institution.

From the very start, the Mediator of Burkina Faso has ensured the development of good practice, including:

- making the institution known to the public administration and citizens;
- disseminating information, through all available means (media, direct contacts, conferences, seminars, meetings);
- producing promotional videos;
- holding mobile courts in the different administrative regions of the Mediator;
- organising press conferences and lectures on the institution;
- processing complaints n a timely manner, reducing delays to a minimum;
- enabling specialisation of civilian personnel in charge of military-specific cases; and
- developing cooperation, both nationally and internationally.

According to the Head of the Department of communication and information, the Mediators of Burkina Faso organised at the international level the following activities to strengthen cooperation with other institutions:

[49] Could an ombuds institution for the armed forces have anticipated the events of 2012 and could it not resolve conflicts upstream? This question was asked by the Mediator of Burkina Faso himself.

- First Congress of the Association of Ombudsmen and Mediators of La Francophonie (AOMF), held in November 1999 in Ouagadougou: the Mediator at the time, General Garango, was elected Vice President of the Association;
- Eighth Regional Conference of African Ombudsmen and Mediators, held in July 2003 in Ouagadougou Conference, which gave birth to the African Ombudsman & Mediators Association (AOMA), chaired by the late Magistrate Jean-Baptiste Kafando, former Mediator of Burkina Faso;
- Former Mediator Amina Ouedraogo (2005-2011) and her Malian counterpart at the time, Mrs Fatoumata Diakite-Ndiaye, initiated the creation of the Association of Ombudsmen of Member Countries of West African Economic and Monetary Union (AMP-UEMOA) in October 2008, to support efforts at West African integration and improve the effective application of community legislation for the benefit of the citizens of the region.

All these good practices, procedures and standards have contributed to give the institution a firm foothold at the national level and extend its influence internationally. Visits by the Mediator to national institutions and other Mediators are also part of this effort. The Mediator of Burkina Faso has also welcomed staff from the ombuds institutions of Cote d'Ivoire, Mali, Senegal, Guinea, Niger, Benin, to receive one-week training sessions.

1.9. Conclusion and Recommendations

Conclusion

This study aimed to examine the Mediator of Burkina Faso, an institution that was established in a national climate of "forced democratisation". The study assessed the relevance and usefulness of such an institution in Burkina Faso, a country which seeks to establish itself within the international community as a democratic State governed by the rule of law.

Today, the Mediator is already considered as a major stakeholder in maintaining peace and as an essential pillar of good governance, which are sources of stability and safety for sustainable human development. Nevertheless, having general jurisdiction over both civilian and military cases is a major obstacle to the Mediator's credibility within the armed forces. The insignificant number of military cases handled (123 cases since 2007) tends to confirm concerns that many soldiers refrain from filing complaints to the Mediator, for fear of threats and arbitrary punishment that could be imposed by their superiors.

Another weakness lies in the lack of a specialised office within the institution, which would devote its attention exclusively to military matters. Indeed, the handling of military cases requires, in view of their complexity, a thorough knowledge of the military and specific law applicable to the armed forces. A solution to both obstacles could be the creation of an independent ombudsman with exclusive jurisdiction over the armed forces. However, respondents' views were mixed in relation to the two suggestions. Virtually all them recognised the importance of an ombuds institution for the armed forces, but only in the medium or long term, i.e. in 5 to 10 years. This would allow sufficient time for decisions to be made on the future of the institution and for its presence in the armed forces to be strengthened. The establishment of a separate ombuds institution for the armed forces would also face several constraints: limited budget, lack of political will or unwillingness to conduct an organisational audit of the army, which could lead to formal proposals regarding the creation of a specialised ombuds institution.

Recommendations

Many difficulties were identified regarding the functioning of the Mediator of Burkina Faso. That said, the following recommendations, if implemented, could contribute the greater efficiency of the Mediator as a civil rights defender, and better results. These include:

- consolidating democracy and the rule of law;
- strengthening good governance;

- initiating security reforms in the army, the police and the judiciary;
- building the capacities of the Mediator Faso, by allocating more human, financial and material resources;
- organising ongoing training of staff to enable them to specialise;
- creating a specialised office within the institution of the Mediator of Burkina Faso to deal specifically with military affairs;
- and ultimately, creating an ombuds institution with exclusive jurisdiction over the armed forces.

To carry out these recommendations, strong political will, good governance and a state free of corruption will be necessary. This in turn will lead to greater respect for fundamental rights and ensure greater social justice for all citizens.

Annex

Cases concerning military matters and associated results

- Since 2007, 123 petitions brought against the Ministry of Defense
- 86 formal complaints and 37 requests for information and legal counsel
- The number of petitioners reach 500 persons, due to the fact that many procedures are collective complaints

Statistics concerning petitions' motives:

- **60** petitions on careers and rehabilitation
- **34** petitions on lay-off and radiations
- **16** petitions on finances and pensions
- **5** petitions on compensations
- **3** judicial petitions
- **3** petitions on health matters and social security
- **2** petitions on issues concerning opportunities and exams related to promotion

Civilians have referred cases to the mediator, which are mainly allegations brought against the Ministry of Defense. Some petitions concern trade relations and others are family or collective petitions.

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Chapter 2

Burundi

Athanase Ndikumana

2.1. Introduction[50]

As a post-conflict country, Burundi remains fragile, despite a determination to take off economically and socially. Today, security is a reality throughout the country, although a few incidents of insecurity, including cases of targeted killings, have been reported here and there.

Overall**,** the demobilization, reintegration and rehabilitation (DRR) programme has facilitated the demobilization and reintegration of a large number of ex-combatants, while civilian disarmament slowly continues. Demining operations have resulted in the clearance of the worst affected provinces. Army integration, as stipulated in the Arusha Peace and Reconciliation Agreement of 28 August 2000, and the human rights training programme for all members of the security forces – supported by the Strategic Framework for Peacebuilding (SFP) – have made significant contributions to the restoration of security.

Despite the progress towards peace, relations between civil and security sectors could be improved to achieve genuine social harmony. The development of the security sector must rest on values, principles and practices of democratic governance. Good governance of the security sector is essential to successful peacebuilding processes, democratisation and socio-economic development of the country.

Establishing good governance in the security sector is part of a comprehensive peace-building framework, which requires compliance with human rights norms and the rule of law. Good governance will take place through three priority programmes, which have already been initiated:

- Update and implement the national plan of action for the control of small arms and light weapons, and for civilian disarmament;

[50] This document is part of a project led by the International Organisation of the Francophonie (OIF) and DCAF. The project's main objective is to examine ombuds institutions in three francophone African states. In this regard, DCAF was commissioned by the OIF to produce three case studies, which were written by experts from the three countries concerned.
The opinions expressed here are those of the author and do not necessarily reflect the views of DCAF.

- Continue reviewing the National Defence Policy and the Strategic Security Plan by establishing transparent mechanisms for internal and external communication to ensure democratic control over the armed forces;
- Professionalize the defence and security forces.[51]

This study will attempt to give an overview of the ombuds institutions in Burundi, by describing the relationship between these institutions and human rights, the role of the media in publicising their activities, their assigned missions, their organisation and functioning, as well as a review of their strengths and the challenges with which they are faced.

2.2. The National Defence Force and human rights

Human rights during the conflict

The National Defence Force (FDN – Forces de Défense nationale) was created through the merger of ex-rebels and the former Burundian Armed Forces (FAB – Forces armées burundaises) following the comprehensive ceasefire agreements of 16 November 2003 and 7 September 2006. The different parties to the conflict have committed gross human rights violations, which were described by the Arusha negotiators as: "*genocide, war crimes and other crimes against humanity*".[52] They have indirectly acknowledged their responsibilities and expressed their firm commitment to "*address the root causes of the constant state of violence, bloodshed, political instability and exclusion*".[53]

Hundreds of thousands of people are estimated to be have been killed and displaced internally and across borders during the war, which lasted

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[51] *Poverty Reduction Strategy Paper, second generation, PRSP II*, 2012, United Nations Development, accessed 15 October 2012, http://www.bi.undp.org/index.php?option=com_docman&task=cat_view&gid=89&Itemid=211

[52] *Arusha Peace and Reconciliation Agreement for Burundi*, (Arusha, 28 August 2000).

[53] *Comprehensive Ceasefire Agreement between the Transitional Government of Burundi and the National Council for the Defence of Democracy-Forces of democracy* (CNDD-FDD), (Dar-es-Salaam, 16 November 2003).

for over a decade. Until 2008, Burundi continued to witness massive human rights violations, which were attributed to the parties to the conflict, including the Palipehutu-FNL. In an address to the nation, the Head of State declared: "*Since 17 April 2008, this movement has thrown grenades and bombs, organised attacks here and there in the country, especially in Bujumbura, Masha, Butanuka and Gihanga in Bubanza Province, and Matongo in Kayanza Province*".[54]

The warring parties are ultimately responsible for many human rights abuses, as stressed by various human rights organisations, including League ITEKA, Amnesty International, and Human Rights Watch:[55] reports covering the conflict reveal violations, which are attributed to all parties involved in the conflict.

The different agreements have insufficiently addressed the issue of sanctioning violations committed during the war, even though the Arusha Agreement called for new mechanisms to put an end to impunity. However, the agreement also undermined this effort by establishing "*temporary immunity*", which since then became a de facto amnesty.[56]

There was much indecision regarding what was to happen to perpetrators of human rights violations. Stakeholders were torn between granting amnesties in the name of peace and fighting impunity in the name of justice. "*Indeed, some measures put forward indicate that Burundian leaders seemed eager to end impunity while other measures were taken to grant amnesty*".[57] Political stakeholders were faced with a difficult dilemma but they ultimately decided to trade justice for peace, and as result, institutionalized impunity.

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[54] *Message à la Nation du président de la République*, (Bujumbura, 25 April 2008).

[55] Read Ligue ITEKA's annual reports, from 1994 to 2008, disclosing human rights violations attributed to former Burundian Armed Forces and various rebel parties are published. Available at http://www.ligue-iteka.africa-web.org/, accessed 23 October 2012.

[56] Article 22 of the *Arusha Agreement*, Interim period: §2 al. c "*By its signature the National Assembly agrees, within four weeks to ... Pending the installation of a transitional Government adopt such legislation as is necessary for the granting of temporary immunity against prosecution for politically motivated crimes committed prior to the signature of the Agreement*."

[57] Eugène Nindorera, *Pas de réconciliation véritable sans la justice*, (Bujumbura, 30 March 2006), available at www.eurac-network.org/web/uploads/.../20060403_7563.doc

The Burundian army and human rights after the integration process

As a result of the various agreements reached and the initiation of the merger between the former FAB and the ex-rebels, the number of human rights violations has decreased. Still, violations of the peace agreements have led to the loss of human life. Parties to the conflict have referred to these transgressions in various statements, including the press release of 4 February 2008, in which the government brings accusations against the FNL.

The integration process did not go smoothly, which had a profound impact on human rights, but overall, the new army was able to adapt quickly: in the end, only few human rights abuses were attributed to the FDN. This finding was confirmed by various parties, including members of the army as well as ombuds institutions. Unfortunately, there have been a few isolated cases of abuse in the ranks of the FDN: armed robberies, fights between civilians and the military, family abandonments, homicides, etc.[58] But in general, the army committed few human rights-related offenses. The Independent National Human Rights Commission (CNIDH) confirmed that it had not received any complaints regarding human rights abuses perpetrated by the FDN.[59] The Office of the Ombudsman also declared that they had not received any such complaints.[60] However, long-lasting frustration among the FDN occasionally led to violations of the rights and freedoms of its members: dismissal without the possibility of an appeal – often due to a lack of awareness or opportunity to appeal – war-wounded left without assistance or with insufficient support, and rigid military orders stemming from outdated regulations modelled on Napoleon's army regulations, which provide for sanctions that are inconsistent with the National Constitution.[61]

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58 Interviews with different military officials.

59 Statement by a CNIDH Commissioner.

60 Statement by a Head of department of the Office of the Ombudsman.

61 *Presidential Decree No. 1/54 of 12 August 1968 establishing the Regulation of General Discipline for members of the Armed Forces.*

Successes and challenges

The FDN has made significant improvements in terms of promoting human rights. The following achievements have been reported internally:

- The military have the necessary resources to strengthen their capacity.
- Monitoring has been and is further enhanced.
- The global incentive to make information on human rights available, is now extended to include the military, which reduces the risks of human rights violations.
- The military, benefiting from the overall progress towards democracy and freedom in the country, enjoys greater respect for their rights and show greater respect for those of citizens.
- The successful integration process of the FAB and the ex-rebels into the FDN has promoted harmony and lessened frustrations.
- Using existing frameworks to resolve conflicts through informal mediation reduces the need for recourse to judicial institutions.

But challenges related to the protection of human rights still remain:

- Outdated disciplinary regulations of the armed forces, no longer consistent with the Constitution.
- Dual legal proceedings allowing internal legal or administrative proceedings within the FDN to obstruct action before civil courts.
- Due to insufficient means, modernization of the armed forces does not proceed at the pace desired by its members.

2.3. Ombuds institutions and the media

Recognized ombuds institutions, namely the Ombudsman and the Independent National Human Rights Commission (CNIDH), have generally received considerable media coverage. In addition, it should be noted that in Burundi, there is no censorship and public institutions can therefore use and benefit greatly from the media. They are also

frequently approached by the media for information. Overall, information is given within the limits of what is permitted by law and according to the ethical standards of each institution; access to information is sometimes limited at that level.[62]

The media is a valuable source of information, which can help or guide ombuds institutions on some of the issues they are dealing with. This is the case, for example, with some of the Ombudsman's oversight tasks, such as files dealing with corruption. The CNIDH can also initiate investigations on the basis of information produced and disseminated by the media.

Both ombuds institutions possess information services, spokespeople and information bodies. These services are constantly communicating with the media, which they use to access information, publicise their activities and promote themselves. The FDN too has a spokesperson, who works closely with the media and is usually very busy, especially in periods of armed conflict.

2.4. Mission and independence of ombuds institutions

The main public ombuds institutions are the Ombudsman and the Independent National Human Rights Commission (CNIDH). Both institutions are mandated, among other things, to act as mediators. Parliamentary committees responsible for the security sector can also fill the same role within the army, between the army and the civilians or between the army and other institutions. The armed forces have departments that can fulfil mediation functions, but only on an informal basis.

[62] Some inquiry reports carried out by ombuds institutions – the Ombudsman, the CNIDH and parliamentary committees – are withheld. The media does not have access to all these reports.

Legal framework

The Ombudsman

The initiative to establish the Ombudsman stems from the Arusha Agreement of 28 August 2000, according to which: "*An independent Ombudsperson shall be created by the Constitution. The organization and functioning of her/his service shall be determined by law*". [63] Articles 237-239 of the Constitution of 18 March 2005 are devoted to the creation of this institution. Law No. 1/03 of 25 January 2010 establishing the organisation and functioning of the Office of the Ombudsman implements these two instruments.

The tasks of the Ombudsman are further elaborated in Article 6 of Law No. 1/03 [we translate]:

- "*to hear complaints and conduct inquiries relating to mismanagement and infringements of human rights committed by members of the public administration, the judiciary, local authorities, public establishments and any public service organisation*" and,
- "*to make recommendations thereon to the appropriate authorities*";
- "*to mediate between public administration and citizens*".

The Act however omits two functions originally provided by the Arusha Agreement and subsequently enshrined in the Constitution: first, the possibility to refer matters concerning the professional conduct of magistrates to the Judicial Service Commission, and second, the ability to mediate between ministries and public administration. In the latter case, the Ombudsman, to mediate, must refer to the country's supreme law, the Constitution.

The Independent National Human Rights Commission (CNIDH)

The CNIDH was created by Act No. 1/04 of 5 January 2011 and later established by Parliament. On 23 May 2011, the President of the Republic signed Decree No. 100/142 appointing the seven members of the Commission, following election by the Parliament.

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[63] *Arusha Agreement,* Chapter 1, Article 10, paragraphs 7-10, p. 37.

With regard to Article 4 of the above-mentioned Act, part of the CNIDH's mandate is to:

- receive complaints and investigate human rights abuses;
- undertake regular, announced or unannounced visits to all detention facilities and make recommendations to the appropriate authorities, in an effort to improve the treatment and conditions of persons deprived of liberty; prevent torture and other cruel, inhuman or degrading treatment or punishment, in accordance with the relevant universal, regional or national standards; combat rape and gender-based violence;
- refer cases of human rights violations to the Public Prosecutor;
- provide or facilitate the provision of legal aid to victims of human rights violations;
- draw to the Government's attention any case of human rights violations, wherever they occur, and propose any measures likely to promote the protection of those rights.

The CNIDH has a broad mandate to ensure the protection of fundamental rights in Burundi. To this end, the Commission is invested with powers of investigation, requisition, enforcement, inquiry, and the ability to launch own motion investigations and access information.[64]

Operational independence

The Ombudsman

By giving the Ombudsman a special status, the Burundian legislator recognized his fundamental role. First, in terms of protocol: the Ombudsman has the rank and benefits of a former President. In addition to this protocol rank, the Ombudsman enjoys institutional and financial independence from the executive branch and its administrative divisions.

The Office of the Ombudsman is a constitutional institution, which thus cannot be easily abolished, unless the conditions for amending the

[64] Article 36 of the Law.

Constitution are met.[65] In Addition, the Ombudsman is elected by 3/4 of the members of the National Assembly and his election must be approved by 2/3 of the Senate, in accordance with Article 237 of the Constitution.

In accordance with Article 8, paragraph 1 of the Act establishing the organisation and functioning of the Office of the Ombudsman, the Ombudsman is an independent authority, does not receive instructions from any other authority, and must act within its mandate.

The Act provides for the Ombudsman to appoint and dismiss his associates by means of decrees. In addition, the Ombudsman enjoys immunity from prosecution for any statements or acts made in the performance of his duties. However, such immunity is not absolute, as the Ombudsman may be removed from office for gross misconduct, which must be determined by a Special Inquiry Commission. The grounds for removal, however, are not specified in the legislation establishing the Ombudsman.

The Office of the Ombudsman enjoys significant *financial independence*. Under Article 238 of the Constitution, "*the Ombudsman has the necessary authority and resources to exercise its functions*". Its operating budget funds are provided by the national budget, but it may receive donations and bequests, an important innovation compared to the laws in force in most African countries that clearly prohibit private funding of the institution, in whole or in part. These privileges, on the one hand, ensure financial independence from the executive branch, as well as functional efficiency, although donations and bequests may just have the adverse effect, creating dependency on private benefactors.

As for relations between the Ombudsman and the CNIDH, while their mandates overlap, they are not completely identical. Indeed, each institution has the authority to receive complaints and investigate human rights violations. The texts establishing the two institutions make no

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[65] Article 169 of the Constitution: "*The initiative for the revision of the Constitution shall belong concurrently to the President of the Republic, after consultation with the Government and the National Assembly deciding by an absolute majority of its members.*
In order to be taken into consideration, the draft or proposal of amendment shall be adopted by a fourth-fifths majority of the members composing the National Assembly."

mention of how they could cooperate. A memorandum of understanding is currently being drafted, according to sources from the Ombudsman's Office.

The Independent National Human Rights Commission

Act No. 1/04 of 5 January 2011 enshrines the independence of the Commission, which is reflected in different ways, including:

- the insertion of the word "independent" by the legislator in the name of the Commission;
- the Commission receives no orders from any state organ and is subject to no authority other than the law;
- the irrevocability of office of the commissioners
- a very strict regime of incompatibilities;
- a privilege of jurisdiction;[66]
- members of the Commission enjoy full immunity for opinions expressed or actions undertaken in the exercise of their functions;
- the inviolability of the Commission premises;
- protection of the physical integrity and residence of the members of the Commission;
- the Commission enjoys legal personality as well as administrative and financial autonomy;
- full control over its staff;
- the Commission manages its own budget independently, and has the financial means to effectively discharge its responsibilities;[67]

However, despite legal provisions and provisions under the Rules of Procedure, which aim at ensuring the independence of the Commission, other provisions may alter its independence in one way or another without explicitly undermining it. This is the case for:

- the selection process of the members of the Commission that

[66] Article 19, paragraph 1 of the Law establishing the Commission.
[67] Fulgence Dwima Bakana, *Analyse du fonctionnement de l'institution de l'Ombudsman au Burundi* (Bujumbura: OAG, June 2011), 88-89.

draws largely on the Paris Principles, which require that "*a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces involved, including the civil society, is ensured*";[68]

- the appointment process, through which the Commission is attached to the executive branch;
- the remuneration of members, established by decree;
- the four-year term of office of the members of the Commission.

As mentioned above, while the Commission and the Ombudsman have almost the same mandate of protecting and defending human rights, i.e., receiving complaints and investigating violations, the type of collaboration that should exist between both institutions remains unclear.

2.5. Organisation and functioning of ombuds institutions

The Office of the Ombudsman and the CNIDH, as ombuds institutions, enjoy organisational and functional independence, whereas Parliamentary Committees are under the authority of the National Assembly and the Senate. As to the FDN services, which could potentially play an informal mediation role, they are not independent of the military chain of command.

The Ombudsman

According to the Constitution, the organisation and functioning of the Office of the Ombudsman should be established by law.[69] However, Act

[68] Article 7 of the Act establishing the Commission. And Principle B.1 of the *Paris Principles relating to the status and functioning of national institutions for protection and promotion of human rights*, Recommendations approved by the United Nations Commission on Human Rights in March 1992, (resolution 1992/54) and General Assembly (resolution A/RES/48/134 of 20 December 1993).

[69] Act No. 1/03 of 25 January 2010 establishing the organization and functioning of the Office of the Ombudsman.

No. 1/03 of 25 January 2010 is silent as to the organisation of the Office of the Ombudsman, despite it being one of its two stated objects.[70]

Structure

The Office of the Ombudsman consists of the following departments:

- Cabinet;
- Executive Board;
- Administration and finance department;
- Department of receipt, analysis, investigations and monitoring of complaints relating to maladministration;
- Department of receipt, analysis, investigations and monitoring of complaints relating to injustice and human rights violations;
- Department of mediation, civic education and communication.

The Office of the Ombudsman may be decentralized at the provincial level but is represented in just one province at the moment: Ngozi.

The composition of the institution shows some weaknesses. First, all appointed staff are political representatives rather than independent experts. This affects the stability and effectiveness of the institution and, hence, its credibility. Second, the tasks of each department are not clearly identified, which sometimes creates confusion. Finally, there is no advisor specifically responsible for mediation, this task being entrusted to the Civic Education Advisor.

Complaint procedures

There are three different ways by which the Ombudsman may initiate investigations:

- *Individual complaint (oral or written)*: in the event of maladministration or human rights violations, free individual claims, whether written or oral, can be made. It should be noted that NGOs promoting human rights are not allowed to submit complaints to the Ombudsman. No mention is made,

[70] Fulgence Dwima Bakana, *Analyse du fonctionnement*, 44.

both in the legislation and the Rules of Procedure, of the modalities for submitting complaints relating to disputes between citizens and the administration. It is a gap that needs to be filled, as the Ombudsman's primary responsibility is to resolve these types of issues.

- *Referrals by the Head of State*: the Head of State is the only person allowed to refer matters to the Ombudsman for investigations on:
    - conciliation between the public administration and social and professional forces;
    - rapprochement and reconciliation on general issues related to relations with social and political forces;
    - specific missions dealing with peace and reconciliation at the regional or international level.

- *Own-initiative investigations:* the Ombudsman can conduct examinations on his or her own initiative, with the exception of disputes concerning the working relationship between the public administration and civil servants or other public officials.

Powers of investigation

The Ombudsman has:

- a right to set strict deadlines for replying to submitted requests;
- a right to investigate on site or using available resources;[71]
- a right to access information, which cannot be hampered by professional secrecy;
- a right to be assisted by experts.

The complaints procedure is structured around the following stages:

1. prior permission to seek assistance from supervision or inspection bodies;
2. prior permission from the hierarchy for any case deferral;
3. the making of recommendations;

[71] Article 12 of the Act establishing the Ombudsman.

4. referral to the appropriate Director within the Office of the Ombudsman for any possible deliberation;
5. referral to the Executive Board by the Director before making any decision;
6. transmission of the conclusion by the Ombudsman to the relevant authority;
7. transmission of the information to requestors through the Department of mediation, civic education and communication.

Access to information

To fulfil its mandate, the Ombudsman must receive support, as specified in Article 13 of the Act establishing the Ombudsman. The article requires public authorities to provide the necessary information requested by the Ombudsman. This enables the office to access the information it needs without meeting with any objection. The legislation however does not explicitly specify the practical procedures to access information, which can prove problematic, particularly in relation to classified information.

Reporting and recommendations

The Ombudsman shall notify the claimant of its decision as to whether or not the office would deal with the complaint and notify the administrative authority concerned of the claim that will be investigate. Reasons must be given for any refusal to investigate, but the decisions of the Ombudsman are not subject to appeal and have an undeniable moral force when they are issued. The administration is bound to act upon it, or faces political sanctions that may result from referral to the President of the Republic, the President of the National Assembly or the President of the Senate.[72]

Communication with public authorities occurs through annual activity reports, quarterly interim reports, and special reports on specific cases, written whenever the need arises. They are intended for the President of

[72] Article 16 of the Law establishing the Ombudsman.

the Republic and the Presidents of the National Assembly and the Senate. In addition, those reports are published in the Burundi Official Gazette (BOB - Bulletin officiel du Burundi). They can be submitted to the National Assembly for discussion and debate.[73]

The CNIDH

Article 4 of the Act No. 1/04 of 5 January 2011 establishing the CNIDH lays down a number of tasks entrusted to the Commission, dealing with the prevention of human rights violations, and the protection and promotion of human rights.

Structure

The CNIDH has its own means of action. The Commission has a very broad mandate and its composition ensures a pluralist representation.[74] Its current membership consists of three women and four men, who are independent, non-partisan individuals with no hierarchical link between them. Their term of office is limited to four years, renewable once and irrevocable. The Board of the Commission includes a President, a Vice-President and a Secretary.

Complaint procedures

The procedure to file complaints with the Commission has been simplified in order to ensure that "*each citizen is able to access the protection afforded by the CNIDH*".[75] Moreover, "*the various ways of submitting a complaint, the free procedure, the absence of special requirements regarding the admissibility of requests and the right to use the language of his or her choice reflect the Commission's ease of access*".[76] Complainants may be given the assistance of an interpreter.

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[73] Article 17 of the Law establishing the Ombudsman.
[74] Michel Masabo, *La Commission Nationale Indépendante des Droits de l'Homme. Une institution porteuse d'espoir* (Bujumbura: OAG, July 2012), 39.
[75] Masabo, *La Commission*, 52.
[76] Masabo, *La Commission*, 52.

Powers of investigation

The CNIDH has considerable powers, including:

- extensive inquiry powers;
- the power to get the assistance of the police and other law enforcement agencies to enforce the powers granted by law;
- the power to compel individuals to testify, and the power to request both public and private services to provide the relevant documents;
- the power to conduct examinations on its own initiative, in addition to human rights NGOs or any natural person being allowed to refer matters to the Commission;
- the power to disclose information through the publication of reports, which may have a substantial psychological impact and eventually lead to positive changes;
- the power to investigate cases: the Commission appoints one of its members to investigate a case and look for ways and means to put an end to the alleged violations.[77]

Access to information

Thanks to its extensive powers of investigation and the ability to get the assistance of the police and other government agencies, the CNIDH is able to gather the information it needs.

Reports and recommendations

The CNIDH submits its reports – an annual report of activities and reports on the human rights situation in Burundi – to the National Assembly and the President of the Republic. Reports, proposals and recommendations are public and anyone wishing to consult them can come and do so at the Commission. These reports indicate the state of human rights in the country and their publication has an undeniable psychological impact on the Burundian public as a whole, which can, ultimately, lead to positive change.

[77] Article 45 of the Law establishing the Commission.

2.6. Burundian Ombuds institutions: strengths and challenges

Strengths

Of the Ombudsman

The Ombudsman has many assets it can leverage in order to face the many challenges related to its mission. These strengths include:

- the constitutional basis for the Office of the Ombudsman;
- decisional and organisational independence, as provided by law;
- the special status and visibility of the Ombudsman ensured in the political and institutional landscape;
- the legitimacy conferred by its Parliamentary-led recruitment;
- administrative, budgetary and financial autonomy
- the establishment of the Ombudsman at a time when a project of administrative, legal, judicial, accounting, budgetary and financial reform was initiated, and finally,
- the emergence of a culture of mediation, arbitration and conciliation, and of good offices in social, professional and political forces in Burundi, i.e., a culture conductive to mediation.

Of the CNIDH

The strengths of the CNIDH are:

- At the political level: support from the government, trust of the Burundian people, and financial and institutional assistance from the international community.
- At the logistical level: the CNIDH receives government support through the provision of the financial and material resources necessary for the Commission to operate properly and efficiently.
- At the legal level: legislation grants the Commission extensive powers to protect human rights. Moreover, the composition of the Commission is consistent with the *Principles relating to the*

> *Status of National Institutions for the Promotion and Protection of Human Rights* (The Paris Principles), as it reflects the ethnic, regional and gender diversity of the country.[78]

Other institutions, including the Parliament and the armed forces, have the power to conduct mediation proceedings within the army and between the army and third parties. The military respondents reported that some military departments provide informal mediation services internally but also between members of the armed forces and third parties.

Challenges

For the Ombudsman

Despite the strengths identified above, the Office of the Ombudsman has some weaknesses, which it must overcome in order to establish its authority and legitimacy. Some of these weaknesses stem from legal loopholes, while others are intrinsic to the functioning of the Ombudsman. The major weaknesses identified are:

- incomplete or confused texts relating to organisation, procedures and staff regulations;
- a lack of transparency in the recruitment process;
- the political mandate of the Ombudsman's staff, which causes instability and discredits the institution in the eyes of the public;
- the lack of proper human resources to carry out its mandate concerning maladministration;
- the lack of an effective communication strategy on the tasks and the role of the institution;
- the lack of an express legal provision that would enshrine the administrative, budgetary and financial autonomy of the institution;
- the lack of legal provisions explicitly prohibiting the

[78] *Paris Principles relating to the status and functioning of national institutions for protection and promotion of human rights, Recommendations approved by the United Nations Commission on Human Rights in March 1992,* (resolution 1992/54) and General Assembly (resolution A/RES/48/134 of 20 December 1993).

Ombudsman from endorsing any political activity, demonstration or stance during his term of office. Such a prohibition would avoid any appearance of partisanship.

For the CNIDH

The CNIDH's weaknesses relate to three areas:

- The politicisation of the Commission, as the selection process of its members connects them to hidden sponsors.[79] Article 12 of the Act establishing the Commission does not prohibit candidates from being affiliated to a political party, which may raise some concern regarding their actual independence;[80]
- Through the appointment process, the Commission is attached to the executive branch; "*members, together with the Board, are appointed by the President of the Republic*";[81]
- The Commission's funding is allocated from the national budget. The legislator is careful to limit the resource mobilisation initiatives of the Commission, so it can avoid being influenced one way or another.[82]

2.7. Conclusion and recommendations

Peace building and democratic consolidation require the defence and security forces to be well organised, professional, based on republican values and subordinate to civil and military authorities. Thus, it is important that the different national, social and political stakeholders, including senior military officials, agree on the need to drastically change the outdated attitudes that impede necessary reforms and adjustments. A formal ombuds institution is a powerful tool, which encourages public trust in the defence sector and promotes harmony among members of

[79] Michel Masabo, *La Commission*, 60.
[80] Members are prohibited by law to belong to the governing body of any political party.
[81] Article 11 of the Law establishing the Commission.
[82] Article 32 d of the Law establishing the Commission.

the army.[83] Such an institution would provide essential protection to members of the military against the abuses of the military institution, without subjecting them to lengthy and costly judicial procedures.

Therefore, it seems only reasonable to establish a specific ombuds institution for the FDN to:

- exercise democratic control over the security sector;
- ensure respect for the rule of law within the armed forces;
- promote transparency and accountability within the defence sector;
- focus attention on problems and malfunctions within the military requiring corrective action;
- improve the efficiency and effectiveness of the defence sector;
- increase the confidence of the general public and security sector staff in the army.

The ombuds institution for the FDN shall:

- enjoy operational independence;
- be defined and established by law;
- have capacity for initiative and powers of investigation;
- access any information, person and place necessary to conduct investigations;
- be able to work in strict confidentiality, considering the specific nature of the security sector
- be able to make recommendations to military and civilian authorities;
- be financially independent.

[83] All military officials met were unanimous as regards the need to create an ombuds institution for the FDN.

Recommendations

In view of the above and taking into account the advice provided by the institutions and services visited, it is recommended that:

For the Government

1. Establish a fully independent ombuds institution for the FDN, which would run parallel to the national Ombudsman, cooperate with it, or even operate as a specialised unit within the Office of the Ombudsman – the latter option having the advantage of reducing operating costs. Views on this matter are divided, whether at the Office of the Ombudsman, in the army or the National Assembly Committee responsible for defence and security issues. All agree on having to guarantee the independence of the mediator, but there are differing opinions as to the type of institution to be created and the way it should operate.

2. In light of the above, carry out a study on the way each institution operates to assess the options for the ombuds institution for the FDN and draft a project proposal.

3. Undertake missions and surveys within the FDN on ombuds institutions for the armed forces, in States where they have existed for a long time.

4. Explain to members of the FDN the importance of ombuds institutions for the armed forces.

For the Parliament

1. Ensure effective parliamentary oversight of the security sector, including respect for human rights by and within the military.

2. Initiate a law to establish an ombuds institution for the FDN.

For the Ombudsman and the CNIDH

1. Formalise as quickly as possible memoranda of understanding

and cooperation with the FDN to prevent human rights violations, and develop methods to ensure the protection and promotion of the human rights within the army and by the army.

2. Implement the mandate to mediate between the army and third parties and within the army for greater prevention, protection and promotion of human rights within the army and by the army.

3. Develop a capacity building strategy incorporating the mediation dimension into society in general and the security sector in particular.

4. Develop a communication strategy to promote greater understanding of the functions and tasks of the Ombudsman and the CNIDH, including their mediating role in general and mediation for the FDN in particular.

Annex

Visited services/departments

1. Department for mismanagement of the Office of the Ombudsman
2. Committee for Defence and Security of the National Assembly
3. Office of the Minister of National Defence and Former Combatants
4. Military Court
5. Conseil de Guerre (War Council)
6. General Inspectorate of the National Defence Force
7. Department of Administration and Public Relation of the Directorate General for Former Combatants

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Decree No. 100/26 of 26 January 2006 on the reorganisation of the Ministry of National Defence and Former Combatants

Act No. 1/22 of 31 December 2004 on the creation, organization, mandate, composition and functioning of the National Defence Force

Statute of non-commissioned officers and officers of the National Defence of Burundi

Act No. 1/19 of 31 December 2010 amending Act No. 1/17 of 29 April on the Statute of troops of the National Defence Force

Presidential Decree No. 1/54 of 12 August 1968 establishing the Regulation of General Discipline for members of the Armed Forces

Internal regulations of the Ombudsman of 21 January 2011

Act No. 1/04 of 5 January 2011 establishing the Independent National Human Rights Commission (CNIDH)

Decree No. 100/142 appointing the members of the CNIDH

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Eugène Nindorera, Pas de réconciliation véritable sans la justice, (Bujumbura, 30 March 2006), available at www.eurac.network.org/web/uploads/.../20060403_7563.doc

Chapter 3

Senegal

Dior Fall Sow

3.1. Introduction[84]

Isabelle Guisnel defines governance as: "*the manner in which political, economic and administrative authority is exercised to manage a country's affairs.*"[85] Good governance therefore involves setting up accountable, transparent and participatory government and administration, while ensuring the rule of law. These management principles help establish good governance.

Senegal is regarded as a country with a longstanding democratic tradition, as elections are regularly held and it has never experienced a military coup d'état.[86] The Constitution adopted in January 2001 confirms the Republic of Senegal as a secular, democratic and social state, and the balanced separation of powers is regulated and exercised through democratic procedures. The Constitution states that political parties and coalitions assist in expressing the will of the people, and it guarantees opposition parties the right to oppose government policy; parliamentary opposition is indeed represented at the National Assembly. The Constitution emphasizes that all human beings are equal before the law, men and women having equal rights.[87] Basic individual freedoms and civil and political liberties are proclaimed and guaranteed, embodying the foundation of a democratic and egalitarian society.

The principles of good governance, transparency of government affairs, respect for human rights are also established as governing principles. The military can now vote, but are not eligible to run for office. Senegal,

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[84] This document is part of a project led by the International Organisation of the Francophonie (OIF) and DCAF. The project's main objective is to examine ombuds institutions in three francophone African states. In this regard, DCAF was commissioned by the OIF to produce three case studies, which were written by experts from the three countries concerned. The opinions expressed here are those of the author and do not necessarily reflect the views of DCAF, nor of the OIF.

[85] Isabelle Guisnel, *Les indicateurs de bonne gouvernance: fabrique et pratique des indicateurs de gouvernance*, Réunion sur la Gouvernance vue du Sud (Cotonou, 9-11 July), 1. Available at http://unpan1.un.org/intradoc/groups/public/documents/ofpa/unpan004361.pdf, accessed 29 October 2012

[86] The last presidential elections of March 2012 are evidence of that. Despite a very tense political climate and serious incidents that took place before the elections, they were conducted in a peaceful and transparent manner. The same goes for the July 2012 parliamentary elections, which went smoothly despite the high rate of abstention.

[87] Article 7 of the Constitution

which strives for sustainable development, will only be able to achieve these goals by advocating respect for human rights and placing respect for human rights and fundamental freedoms at the forefront of its political agenda. Only an effectively enforced political commitment can enable genuine political, economic and military stability to be established in the country, thus ensuring the safety and security of its people. Indeed, democracy and respect for human rights are closely related. Respect for human rights and transparent elections involving universal suffrage are essential ingredients of democracy. Democracy is the natural environment for the protection and effective enforcement of human rights.[88] It is essential that citizens are not only protected from harm against military threats, but also against the abuse of authority and power by the government or individuals. This requires an institution with legal and judicial oversight of government activities and actions.

The Mediator of the Republic is an enforcer of good governance, in the sense that it acts as a guarantor of the principles of legality and equality in the work of the public authority. Legality for the law applies to all, and all citizens are equal before the law. The Mediator aims to create a balance of power between people and government. The Mediator of the Republic of Senegal was established by Law 91-14 of 11 February 1991. It is mandated to cover all areas of the public sector.[89] There is no separate ombuds institution for the armed forces, and it is up to the Mediator of the Republic to intervene to settle disputes within the army, between the army and other services, or between the army and Senegalese citizens or foreign residents living in the country.

It should be noted that the army, whose mission is to ensure national defence, is bound to respect human rights and ensure compliance with international and regional instruments ratified by the State. It must ensure the enforcement of national legislation, especially that regulating

[88] See the *Universal Declaration of Human Rights* of 1948, article 21(3): "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures".

[89] Certainly every country has its own definition of public service, which may change over time. In Senegal, a public service is a service that is directly provided by the Government, namely the State, local or regional authorities, or by structures that are under its control, to meet a need in the general interest.

the conduct of troops and soldiers.[90] The mission of the Senegalese Armed Forces is to ensure national defence, namely to protect the nation's security and integrity, as well as the lives of its people,[91] while ensuring respect for their rights,[92] at all times, under all circumstances and against all forms of attack. Such protection is both material and intangible. In order for every citizen to develop his abilities to their full potential, live in harmony with his fellow citizens, and take full part in society, it is essential that his inherent rights and basic freedom are ensured. These include rights to personal safety and security, civil liberties, respect for the rights of migrants, minorities and other vulnerable members of society. Denial of these human rights and liberties leads to disorder and conflict.

The scope of the Armed Forces is determined by The Constitution of Senegal, Law No. 70-23 of 6 June 1970 on the Organisation of the National Defence, the Code of Criminal Procedure, the Penal Code, the Code of Military Justice, the Regulations on General Discipline.

The Armed Forces have the obligation to ensure respect for constitutionally guaranteed human rights, as well as rights enshrined in international conventions binding on Senegal. They also rely on international humanitarian law in the case of international or non-international armed conflicts, particularly the four Geneva Conventions of 1949 and their two Additional Protocols.[93] International humanitarian law concerns the use of methods and means of warfare and aims at ensuring the protection of persons not or no longer actively participating

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[90] *Code of Military Justice* of 27 May 1994, *Act No. 81-52 of 10 July 1981 on the Civilian and Military Retirement Pensions Code* and *Act of August 2002* repealing and replacing certain provisions of Act No. 81-52, *Decree No. 90-1159 of 12 October 1990 on general Discipline in the Armed Forces*, *Act No. 62-38 of 18 May 1962*, Title II, establishing the status of regular non-commissioned officers, *Act No. 62-37 of 10 May 1962*, Title II, determining the general status of active officers in the Armed Forces, *Act No. 63-15 of 5 February 1963*, Title II, establishing the status of reserve officers, *Act No. 70-23 of 6 June 1970 on the Organisation of the National Defence, Decree N° 91-1173 of 7 November 1991 on recruitment in the armed Forces, Decree 2007-1244 of 19 October 2007 on the recruitment of women in the armies*.

[91] See *Act No. 70-23 of 6 June 1970 on National Defence Organisation*.

[92] See *Act No. 70-23 of 6 June 1970 on National Defence Organisation*.

[93] Senegal ratified the Geneva Conventions on 18 May 1961 and the two Additional Protocols on 7 May 1985.

in hostilities, such as the wounded and sick, the shipwrecked, prisoners of war and civilians.

In addition to these rules, which apply exclusively to situations of armed conflict, the Armed Forces must comply with all human rights standards, when not engaged in armed conflict. As any state agency, they help ensuring compliance with the international commitments ratified by Senegal. International human rights agreements will guide the behaviour of state agents in circumstances where international humanitarian law does not apply, such as operations of the Armed Forces carried out in situations of internal disturbances and the maintenance of public order.

International humanitarian law and human rights are included in core military training. This is a well-established tradition in all schools and training facilities, which responds to the ethical imperative of the Senegalese military culture. The use of force is subject to strict controls and soldiers must know and understand the established rules of international humanitarian law to perform their roles properly. To this end, the Armed Forces have signed a partnership agreement with the International Committee of the Red Cross to teach humanitarian law and human rights in the context of armed conflict in military training schools.

During training and pre-deployment periods, UN military contingents with Senegalese participation also receive training on international humanitarian law. In addition, several training modules on children's rights were provided in partnership with Save the Children Sweden. Furthermore, military academies, in collaboration with Femmes Africa Solidarité (FAS), are working to raise awareness of women's rights.

Lastly, since 1994, when women were first integrated into the army, the Armed Forces have pursued a gender sectoral strategy in line with Senegal's national strategy for gender equity and equality (*Stratégie Nationale d'Egalité et d'Equité de Genre*; SNEEG). The integration of gender equality and gender mainstreaming have become a reality in the military. However, for skills and abilities to be the sole criteria for selection of candidates, including access to all corps and jobs for female recruits, there is an urgent need to address all stereotypes, prejudices and arbitrary decisions of the military command, which do not conform to

the prevailing legislation.[94] To promote the integration of women in the institution and create a gender-sensitive environment, it is essential to revise and amend legal and regulatory frameworks. In order for the Code of Military Justice to become gender-sensitive, it must be supplemented by provisions for mainstreaming gender, particularly with respect to sexual violence and abuse. Changes and comments made to existing legislation should be taken into consideration during the drafting and promulgation of new laws. The effective and equitable enforcement of the new rules will still need to be ensured, while conforming to conventions ratified by the State.

Social and legal measures relating to military staff management should be taken to provide all members of the Armed Forces with the best work environment. Achieving this goal will require incorporating a gender perspective, making all necessary arrangements to ensure real gender balance, and fighting any form of inequality that might lead to frustrations among staff.[95]

Disputes between the Armed Forces and its military and civilian personnel, or between the army and other administrative authorities or citizens – Senegalese or foreign – fall within the scope of the Mediator's remit. His competence to intervene in cases involving the Armed Forces has always been acknowledged by the Minister for the Armed Forces and the General Chief of Staff. They cooperate fully with the Mediator, in accordance with the principles of secrecy necessitated by national defence as provided by the Law establishing the Mediator of the Republic.[96]

It should be noted that the Mediator is able to carry out his work effectively only if the institution is both well known and widely recognised. The need to publicise its work will be discussed in the next section.

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[94] *Rapport d'évaluation de l'intégration des femmes dans les Forces Armées, étude réalisée par Madame Dior Fall Snow* (November 2011), 52-54, indicates that women are excluded from certain army corps despite there being no law against it.

[95] Rapport d'évaluation de l'intégration des femmes dans les Forces Armées.

[96] Article 17 of Act No. 99-04 of 29 January 1999.

3.2. Media coverage of the Mediator of the Republic's work

The mission of the Mediator requires the institution to be accessible and known to the public, and also to respond efficiently to submitted inquiries. Until it achieves this objective, the Mediator must make "itself known and recognized" and develop a *marketing culture* based on satisfying needs by defusing tensions between administrative authorities and complainants.

The Mediator of the Republic of Senegal has a few internal tools at its disposal**,** which it may use freely as part of its communication strategy. These are:

- reception and information desks;[97]
- internal publications;[98]
- hearings, visits and tours: the lack of decentralised offices has compelled the Mediator to travel to reach communities in remote areas;[99]
- Meetings and conferences: these should draw attention to the Mediator's importance, role and means of action - not subject him to controversy irrelevant to his mission.

In addition to the above internal mechanisms, the Mediator recognises the media as a powerful mean of mass communication, enabling him to release information on the institution without necessarily violating the principles of confidentiality and discretion that should guide its activity.[100] Indeed, the mission of the media, just like the Mediator's, is to

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[97] Professor Seydou Madani Sy, second Mediator of the Republic of Senegal, said that the Office of the Mediator was like a hospital where anyone should feel welcomed, and when leaving, be able to say: "I feel better, I was heard and understood even if my complaint was not successfully resolved."

[98] These are pedagogic brochures, leaflets, booklets and periodical newsletters, providing very useful information about the Mediator of the Republic. The only problem lies in their translation into Senegal's national languages.

[99] In Senegal, the Mediator regularly travels across the country as sessions involving local administrative authorities and local representatives are organised: these are called Regional Development Committees (RDCs).

[100] The first Mediator of the Republic of Senegal thought that the best strategy to make this institution functional was to use what he called his "secret weapon", namely public opinion, whose awareness should be raised through effective use of the media.

denounce and combat inequality and injustice. Thus, they play an important role in raising public and political awareness, increase the likelihood that the Mediator's recommendations are complied with, affirm his moral authority, and put pressure on elected officials.

The question that arises is how the Mediator can best use the media and various techniques and technologies of information, communication and marketing to carry out his mission.

The way the Mediator of the Republic uses the media is entirely up to him, as he assesses the particular context and circumstances surrounding each case. It is therefore important that the Mediator provide the media with clear, simple information on the functioning of the institution and on cases that best illustrate its significance.[101] The media can be an important ally but can only serve the Mediator efficiently if the flaws of this tool are understood and ameliorated. Indeed, because the media are often more inclined to report on sensational news than positive results, a great challenge for the Mediator is to work with them while respecting the guiding principles of the institution.

The emergence of new information technologies has amplified the role and increased the powers of the media in society, and compelled the Mediator to diversify his communication skills and open up even more to the public, using different mediums depending on the targeted audience.

Despite being an institution that has come to play an essential role in the settlement of disputes between the people and the administration, the Mediator of the Republic must strive to make his work interesting, prove its indispensability in a democracy and make itself widely known.

[101] The Mediator shall provide information on complaints that are dealt with promptly and on reform proposals to achieve good administration. He shall demonstrate his accessibility and popularise the regulations governing the institution, in order to make them available to the largest number possible.

3.3. Institution of the Mediator of the Republic

In Senegal, taking legal action was for a long time the only manner to protect citizens engaged in disputes with the administration. However, such remedies showed their limits very early on, due to a number of factors including:

- complex and lengthy complaint procedures;
- illiteracy among a large portion of the population;
- traditional means of dispute settlement such as conciliation or mediation usually involving public figures that are recognised and accepted by the entire community as intercessors and other regulating bodies.

Given the lack of judicial review of administrative action, it became necessary to create an independent authority that could be approached by citizens claiming to be victims of maladministration. Law No. 91-14 of 11 February 1991 forms the basis for the institution of the Mediator.[102]

Status of the Mediator of the Republic

By law, the Mediator of the Republic is an independent administrative authority.[103] This is not a trivial classification, as it shows the legislators' deliberate intention to establish a new specific body of a *sui generis* nature and distinct from the three main branches of government: legislative, executive, and judicial.

An analysis of the Law establishing the institution of the Mediator of the Republic indicates that the Mediator's independence is based on the following principles:

A non-renewable term of six years, during which he enjoys:[104]

- Complete security of tenure, as he cannot be replaced before the usual date of expiry of his term, except in case of impediment duly recorded by the highest judicial authority of

[102] This Act was repealed and replaced by *Act No. 99-04 of 29 January 1999*.
[103] See Article 1 of *Act No. 99-04 of 29 January 1999*.
[104] See Article 5 of *Act No. 99-04 of 29 January 1999*.

the country, namely the Supreme Court;[105]

- Immunity from prosecution in respect of any opinions he may voice or any acts he may accomplish in the performance of his duties.
- Great freedom of initiative and action in implementing his mandate, which makes it possible for the Mediator not to receive instructions and orders from any authority;[106]
- Freedom of the Mediator to choose the men and women, public servants or public officials, which will assist him in carrying out his duties.[107] These associates consist of five people:
    - A Secretary-General holding the rank of Chief of Staff;
    - Four project officers, holding the rank of ministry expert advisers, "freely chosen" from among the judiciary and active military and civil-service officials.

The discretion left to the Mediator regarding the appointment of personnel is a token of loyalty, as the he will only appoint people in whom he has full confidence. They will leave office at the same time as the Mediator. His immediate office aside, the Mediator is also assisted by additional support staff and a secretary. It should be noted that the Mediator, in consultation with the relevant ministries, designates correspondents in the various state bodies with which he will frequently be required to work. He will thus have correspondents in the various structures of the armed forces.

To stop the administration from preventing the Mediator to properly exercise its regulatory role through budgetary policies or financial deprivation, accounting procedures different from the provisions under general law are established. Appropriations will be provided through a block grant from a specific budget line in the general budget of the Presidency of the Republic, under the heading "Public Allocations." In this case, appropriations are specifically tailored and the Mediator manages them.

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[105] See Article 5 Paragraph 2 of the above-mentioned act.
[106] Article 3 of the above-mentioned act.
[107] Article 19 of the above-mentioned act.

The independence of the Mediator of the Republic takes many forms:

- independence from the authorities he is mandated to oversee;
- independence from citizens, since the Mediator in not a lawyer in the narrow sense of the term;
- institutional independence from the authorities he is mandated to report to. Indeed, the fact that the Mediator reports to the legislative and/or executive bodies, and ultimately to the public at large, does not mean that they can interfere with the conduct of investigations requiring neutrality and impartiality;[108]
- financial independence.

The independence of the Mediator of the Republic is essential to its success. Moreover, he carries out many functions, whose effectiveness largely depends on the complaint-handling mechanism.

Making complaints

Procedure

Any natural person or legal entity who considers, with respect to a matter concerning him or her, that an organisation referred to under Article 1 of the 1999 Law has failed to act in accordance with its mission of public service, may submit a complaint to the Mediator of the Republic.[109] The Mediator may also receive complaints referred by the President of the Republic.[110] There are two important components of the mechanism established to submit a complaint: the claim itself and the type of investigations it requires.[111]

The Mediator's scope of action is very broad, when using the definition of what might constitute a public service. However, under the Law of 11

[108] Daniel Jacoby, *Les « ombudsmédiateurs » dix ans d'évolution dix ans de transformation*, 9, available at http://democratie.francophonie.org/IMG/pdf/bamako.299.pdf, accessed 16 October 2012.
[109] Article 8 of the Act.
[110] Article 8 Paragraph 2 of the Act.
[111] Article 8 of the Act.

February 1991, his intervention was subject to the following two conditions:

- Complaint submissions by individuals shall be made in writing. The legislator sought to simplify the procedure by requesting that complaints be made in a specific way, so that they can be easily interpreted. The Mediator of the Republic's annual report for 1993 provides some guidance on how to submit them.[112]
- Grievances shall involve a government department, local authority, public establishments or any other public service body.

Law No. 99-04 of 29 January 1999 regards this dual requirement as limiting the benefits of the Mediator as one of the guarantors of the rule of law. It thus brought two main innovations to the process by which the Mediator receives and processes complaints, namely:

- Own-initiative investigations:[113] the Mediator may also conduct investigations on his own initiative, concerning any matter falling within his area of responsibility, whenever he has reasons to believe that a person or a group of persons has been wronged by the poor functioning of a public service.
- Its role as an interface and facilitator between the administration and companies: the Mediator shall, as part of its duties, intervene in institutional and economic issues of companies, especially in their relations with public authorities. It must ensure the flourishing of entrepreneurship, which is the engine of development.[114]

[112] In his annual report for 1993, the Mediator indicates that the complaint must be clearly legible in both style and content; provide specific information on the grounds for the complaint; be well structured; have an unambiguous conclusion; be accompanied by other supporting documentation for any claim related to the application or adoption of a remedy based on breach of an individual administrative act.

[113] Article 9 of the Act.

[114] Article 2 of the Act.

Limitations

It should be noted that the Mediator may not intervene in cases before courts or question the soundness of a court's ruling. However, referral to a court shall not prevent the Mediator from intervening to seek an amicable settlement to the dispute.[115]

The Mediator's scope for investigation is also limited, in that he may not intervene in matters, conflicts, disputes and disagreements between:

- natural persons;
- a natural person and a private legal entity;
- a natural person and a legal entity or institution representative entitled to immunities under international law;
- a natural person or legal entity and a foreign administration.

Lastly, the Mediator may not order the administration to comply with a court decision or make decisions on the behalf of the administration.

Functions of the Mediator of the Republic

As part of its mission, the Mediator has different functions. First and foremost, the Mediator of the Republic intercedes between public service users and the administration to improve relations between them. Next, it plays a role in promoting reforms. It may indeed propose legislative or regulatory reforms to the competent authorities.

Legislation and fairness in the handling of complaints

The Mediator may intervene to settle disputes amicably. When he receives a complaint, he takes the appropriate steps to settle disputes between citizens and the administration. Any natural person or legal entity, who considers, in a matter concerning that person, that the administration, local authority, public establishment or any other public service body failed to act in accordance with its mission or violated the law, is free to submit a complaint to the Mediator. The President of the Republic may also refer complaints to the Mediator, who handles them:

[115] Article 15 of the Act.

- with regard to legislation: in the event of a dispute, the Mediator must check whether the public service body acted in accordance with the administrative instructions governing its work. "Through its recommendations, the Ombudsman urges public services to abide by the spirit of the law."[116]
- with regard to fairness: the law allows the Mediator to appeal to principles of fairness in dispute resolution, when a person feels aggrieved by the strict application of the rule of law.[117]

Promoting reforms

When in respect of a recent complaint, it appears to the Mediator that the application of appropriate legislation or regulations would result in an injustice, he may propose to the relevant authority any measure he considers appropriate to remedy the situation. He can also suggest modifications to the legislation. The Mediator thus seeks to prevent the recurrence of public services malfunction, while working towards the improvement of the rules and procedures governing public services.[118]

The Mediator of the Republic has the competences necessary for the success of his mission. He is thus empowered to carry out investigations and prosecutions, access all information necessary to the fulfilment of its mandate, and inform the general public by issuing recommendations and annual reports.

Powers of the Mediator of the Republic

A range of powers is available to the Mediator, in particular:

- *Powers of investigation*: Senegalese ministries and other Government authorities shall facilitate the task of the Mediator of the Republic. They shall authorise officials under their authority to reply to any questions asked of them and, possibly,

[116] Article 4 of the Act.
[117] Article 11 Paragraph 2 of the Act. It should be noted that compliance with the decisions that have acquired the force of res judicata does not preclude the Mediator from requesting the beneficiary to waive all or part of its rights in case of inequity.
[118] Article 11 Paragraph 2 of the Act.

to any request made by the Mediator of the Republic to appear before him. Supervision or inspection bodies are required to carry out the verifications and inquiries requested by the Mediator of the Republic within the scope of their competence. Such officials and supervision or inspection bodies must either reply to such requests or refer them to other authorities.[119] The First President of the Supreme Court, the Chairman of the *Commission de Vérification des Comptes et de Contrôle des Entreprises Publiques* (state and public company audit commission), and the Head of the *Inspection générale d'État* (state inspectorate) shall undertake such investigations as the Mediator of the Republic may request.[120]

- *Access to information*: the Mediator of the Republic may ask the relevant Minister or authority to communicate to him any document or file concerning the matter under investigation. The secret or confidential nature of the evidence that he is requesting cannot serve as grounds for refusal to provide such information, except when it relates to court proceedings, national defence, State security or foreign policy.[121]

- *Escalation to another body*, which gives the Mediator of the Republic the following option: when a public officer commits a serious breach of his professional obligations, leading to administrative malfunctions and causing harm to an individual, the Mediator may request the competent authority to initiate disciplinary proceedings against such an officer. He however lacks enforcement powers with respect to the said authority. In cases of non-compliance with his recommendations, he shall inform the President of the Republic who will decide how to proceed. The Mediator may also, on his own initiative, refer the matter to the criminal court that is deemed appropriate to settle the dispute.[122]

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[119] Article 16 of the Act.
[120] Article 16 Paragraph 3 of the Act.
[121] Article 17 of the Act.
[122] Article 14 of the Act.

- *The duty to report and inform*: the duty to inform the public is exercised by the Mediator through his recommendations and annual report to the President of the Republic. When he considers that a claim is justified, the Mediator of the Republic shall make such recommendations as he deems necessary to resolve the difficulties referred to him and, where appropriate, shall make any proposals, which may improve the workings of the organisation concerned. When it appears to the Mediator of the Republic, in respect of a claim that has been referred to him, that application of the legislation or regulations would result in an injustice, he may propose to the relevant authority any measures as he considers appropriate to remedy the said situation and suggest such modifications to the legislation or regulations as he deems fit. Through its recommendations, the Mediator of the Republic urges the service in question to cease its wrongdoings and properly enforce legislation, while ensuring fairness. In addition, it contributes to improved functioning of the said service and general administration.

The Mediator of the Republic submits annual reports on his activities to the President of the Republic. These reports, which provide the most comprehensive information on the Mediator's work, are published in the State's Official Gazette.[123] They outline the nature of the investigation process of the different cases handled by the Mediator and report on the outcome of his interventions. The Mediator of the Republic strives to make his reports as easy to read as possible so that they are accessible to all segments of the population. These reports are available to interested parties. They establish a link between the Mediator and public opinion, which may increase public support to the work of the Mediator in dealing with cases of maladministration.

It should be noted, however, that the follow-up to the recommendations and reports of the Mediator of the Republic is classified. Public authorities should be required to disclose publicly how they intend to follow-up on the proposals and suggestions made by the Mediator or how they have already done so, by issuing a report on their

[123] Article 18 of the Act. See the Official Gazette of Senegal website, at http://www.jors.gouv.sn/.

implementation for example. In Senegal, the Mediator has no decision-making power, which would enable him to replace the competent authorities. Hence, although having many advantages and broad powers, the institution has also a number of shortcomings, limiting its effectiveness and expertise.

3.4. Strengths and weaknesses of the institution

As summarized by David Jacoby, the strength of the Mediator lies in that it is a "*mechanism that encourages and facilitates democratic practices and the rule of law. It is an institution that is accessible, time-efficient, credible, democratic, efficient, approved by the government, non-coercive, non-partisan, inexpensive, reforming, flexible, and innovative. In short, it not only meets the needs of the government, but also those of citizens.*"[124] This statement perfectly captures the Mediator of the Republic of Senegal. Indeed:

- *For the complainants*: the benefits of the institution are manifold. It is a simple method of recourse, with easy-to-meet conditions of admissibility (for complaints), which can provide redress in cases where it is practically impossible through legal action. Complainants do not have to prove serious abuse of authority or obvious illegal conduct, nor do they have to demonstrate a personal interest distinct from that of the public, which are normal requirements of court proceedings. They are not required to write long accusations, statements or complaints listing all the elements of the disputed situation. They do not have to carry the burden of proof to the same extent as they would in courts. In addition, the procedure is free of charge, even if they lose the case. Complainants know that if they are proven right, the Mediator's recommendations are generally complied with and followed, with the Mediator being regarded, both by the complainant and the administration, as an independent and impartial person of high moral character. For the individual, having recourse to the Mediator of the Republic

[124] Daniel Jacoby, *Les « ombudsmédiateurs » dix ans d'évolution dix ans de transformation*, 9.

combine the advantages of hierarchical escalation and recourse to the judiciary.

- Like a judge, the Mediator is impartial and independent of the executive, but compared to him, his methods of work grant him privileges and facilities. Initially, he attempts to resolve disputes amicably, which he often manages to do, without having to conduct an investigation. If he initiates an investigation, the proceedings are not subordinated to the evidence that must be provided by the complainant's lawyers; his action is independent, discreet and far more informal than a typical court proceeding. Once an amicable settlement has been voluntarily reached by all disputing parties, the matter can be considered resolved. In such cases, the Mediator of the Republic will not be bound to continue its investigations to get to the point of making recommendations.
- The convivial and informal nature of the relationships between the Mediator of the Republic and the complainant constitutes the main advantage of mediation over litigation. The complainant can turn to the Mediator in confidence and without fear, knowing he will be listened to and understood, even if he does not win the case.
- *For the government*: similarly, the system offers certain benefits to the public administration. It leads the administration to improve its efficiency, fairness, transparency and awareness of its obligations. The Mediator is listened to because it identifies and understands the needs of the public administration. As a result, the Mediator is seen as protecting the interests of all parties.
- Another advantage of the system lies in its preventive function. It prevents civil servants from repeating the same mistakes and making new ones in the future. It also saves the public administration formal court procedures that can be long and expensive.

The benefits of mediation are undisputable. However, the institution is by no means perfect. One of its weaknesses is that a lot is expected of the officeholder. The institution is personalized. It is thus shaped in the image of the office holder. This person "*must be of high moral stature, possess sound judgment, be calm and generous and most importantly, understand that he or*

she is not the government and does not have political power."[125]

The Mediator of the Republic lacks implementation and enforcement powers, a major obstacle to the fulfilment and effectiveness of its mission. Unlike administrative authorities, it cannot issue binding orders. Even if its recommendations are sound and effective in ensuring the smooth running of the government, they do not have the force of *res judicata*, and are therefore not necessarily implemented.

If we look at scope of his remit and the number of complaints he receives regularly, the Mediator of the Republic has a huge task on his hands. The human resources available to the institution are inadequate to effectively carry out its mandate, specifically to address all the complaints received. Staff capacity should therefore be increased, specifically with professionals with a working knowledge of the principles and practices of public administration, a clear understanding of the role of the institution, and the ability to raise awareness and support for the institution's practices.

In addition, there is an obvious need to strengthen the capacities of the individuals that are operating within and outside the institution.

3.5 Capacity building

Research carried out within the institution [126] has shown that the Mediator of the Republic set up an extensive capacity-building programme for its staff in 2008. This programme has several components, including:[127]

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[125] In Sénégal, since Act No. 91-14 establishing the Mediator of the Republic until now, there have been four Mediators: the firs was a magistrate, the second, a professor of constitutional law, the third, a magistrate and the fourth, a professor of constitutional law. Some of them have held several ministerial positions.

[126] They mainly consisted in interview with the Advisor of the Mediator of the Republic, Mr. Chérif Mamadou Thiam, who has been in the institution since its creation.

[127] The programme began in 2009 and has been implemented in several stages.

- Computer literacy (introduction and refresher courses) for all staff. This programme was completed by key personnel (the Mediator, Secretary General and Advisors), support staff, middle managers and enforcement officers. The training focused on word processing and web content management, and software such as Word, Excel and Power point. It was found to be most useful and continues to be provided.
- Mediation training: The Mediator of the Republic has made the training of its staff a priority. To this end, it uses the services of various organisations, including: the AOMF project, [128] in cooperation with the Mediator of the Kingdom of Morocco, organises training sessions every six months for the Mediator's associates. These sessions are held twice a year at the Rabat Centre of training, exchanges, studies and research in mediation. This initiative has aroused a great deal of interest even beyond the borders of the French-speaking world, due to its effectiveness and practicality. The Mediator of the Republic takes part in these sessions in two ways: by sending participants and by providing expert trainers.[129]
- AMP/UEMOA:[130] this association organised training sessions that were attended by several members of staff of the Mediators of Senegal and of other member states. During these sessions, a number of topics are discussed, leading to a fruitful exchange of experience and good practices.[131]
- Specific training: with the support of PIC Luxembourg,[132] the Mediator of the Republic of Senegal was able to send one of his agents to a training session on "Ombudsman, Mediators and

[128] The Association of Ombudsmen and Mediators of La Francophonie (AOMF) main mission is to promote understanding of the role of Mediators and Ombudsmen in the Francophone and encourage the development of independent institutions of mediation in the French-speaking space.

[129] From 2008 until now, the Mediator or the Republic has sent eighteen participants and two expert trainers.

[130] Association of Ombudsmen of Member Countries of West African Economic and Monetary Union (AMP/UEMOA). The association's approach is consistent with the ongoing efforts to achieve greater regional integration in Africa, promote a culture of peace and encourage the use of institutional mediation as a way of settling disputes.

[131] Several training sessions took place: in 2009 in Lomé (Togo), in 2010 in Porto Novo (Benin), and in 2011 in Dakar (Senegal).

[132] Peace Implementation Council (PIC).

> the Media," organised by the Ombudsman of Belgium. Media play an important role in the Mediator's activities, but remain a "double-edged sword" that must be used wisely, hence the need for such training.

Training also complements other initiatives: the Mediator of the Republic welcomes each year cadets from the Thiès National Active Officers School (*École Nationale des officiers d'active* - ENOA)[133] to inform them on the nature and function of the institution, and its missions, prerogatives and competencies. It is also the opportunity to provide extensive literature on the activities of the Mediator. The visit, under the aegis of the Mediator and the High Military Authorities, shows the desire of these institutions to establish close cooperation between them, which could be enhanced by the creation of a training program for all military personnel. This program could address topics such as the study of republican institutions and the protection and respect of human rights. This training should also be extended to all defence and security forces personnel.

It should be noted that the Mediator of the Republic of Senegal, at the express request of the Senegalese Ministry of the Armed Forces, received the visit of thirty members of the Nigerian Institute of Security Studies in Abuja. The purpose of this visit was to familiarise them with the Senegalese institutions that are viewed as the pillars of democracy and the rule of law.

Through capacity building, the Mediator of the Republic wants to give the institution every chance to be successful and legitimate. However, to achieve this goal, he needs adequate human and financial resources, hence the importance of collaborating with national and international organizations working in the same field and able to finance the recommended training programmes.

[133] One of the largest towns in Senegal located 70 kilometres east of Dakar.

3.6. Conclusion

Since the inception of Mediator of the Republic, Senegalese citizens have an institution whose task, among others, is to ensure respect for their rights and to provide additional guarantees to safeguard their interests. In addition, another function of the Mediator is to avoid disputes and social tensions within the public sector, through the flexible and efficient monitoring of its actions and decisions, as well as the amicable settlement of disputes.

Rule of law cannot exist, let alone flourish, without respect for human rights and the practical implementation of the obligations of the State's human rights obligations in the matter. Strengthening the rule of law in Senegal also depends on the intervention of certain groups, such as political leaders. The presence of a real political opposition is essential to the preservation, protection and consolidation of the principles of the rule of law and democracy. It is also worth noting the role played by civil society pressure groups such as the media and human rights organisations.

The Mediator of the Republic plays thus a crucial role in strengthening and consolidating the rule of law in Senegal.

Annex

Cases concerning discharged soldiers:

Petitioners are mostly young Senegalese citizens, who have enlisted for various reasons, as a vocation or as an alternative option to unemployment. Some of them have faced unexpected difficulties, which have hindered their professional path. During military operations, many soldiers become disabled as a result of serious injuries, as others contract disease during their service. A Discharge Commission has dealt with some of the cases. The Commission usually takes a decision upon medical record and sets up the incapacity benefit that will be allocated to these discharged soldiers.

Some cases have been also deferred to the Mediator:

- Case R2003.092 of 16 May 2003
- Case R2003.045 of 13 March 2003
- Case R2003.016 of 24 January 2003
- Case R2002.082 of 30 May 2002

The Mediator of the Republic made the following recommendations:

- Popularization among troupes of the Law related to Military Incapacity Benefits Code
- Modification of the above-mentioned law, in order to fix incapacity benefit, which is tolerable on a humane and a social plan
- Reintegration of the invalidated-out soldiers in appropriate business sectors

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