

# Museveni, Burundi and the Perversity of *Immunité Provisoire*

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## ABSTRACT<sup>1</sup>

To enhance the inclusiveness of Burundi's political dialogue, Ugandan president and East African Community mediator Yoweri Museveni suggested granting temporary immunity to Burundian opponents living in exile, some of whom are wanted by the government for their participation in the May 2015 failed military coup attempt. While from a short-term conflict-settlement perspective this is a valuable suggestion, an analysis of Burundi's previous experience with temporary immunities reveals some longer-term perverse effects. First, temporary immunity turned out to be anything but temporary. Secondly, it created an incentive structure that discouraged Burundi's elites from launching a transitional justice process. Thirdly, despite its initial purpose, it benefited both insurgents and incumbents. Fourthly, temporary immunity offered more than mere immunity to its beneficiaries. Finally, it was a stepping stone towards long-lasting impunity for human rights atrocities. Unless lessons are learned from the past, there is reason to fear that the repeated and – once more – internationally legitimized use of temporary immunity reproduces the same perverse effects. Burundi's past use of temporary immunity, an integral part of its larger – and initially seemingly successful – experiment of peace without truth and accountability, thus casts a dark warning shadow over Museveni's proposal.

**KEYWORDS:** Burundi, conflict, mediation, temporary immunity, impunity

## INTRODUCTION

On 28 December 2015, President Yoweri Museveni of Uganda hosted a political dialogue on the crisis in Burundi at the State House in Kampala. On 6 July 2015, Museveni had been appointed as mediator on the Burundian crisis<sup>1</sup> by the East African Community (EAC). Participants included government representatives, civil society members and representatives of a variety of officially recognized political parties and other political movements based outside Burundi. The presence of the

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1 The crisis was sparked by incumbent President Pierre Nkurunziza's nomination, on 25 April 2015, as presidential candidate for a third term in office. This gave rise to an internal split within Nkurunziza's party and to unprecedented street protests in the capital city Bujumbura, culminating in a failed coup d'état attempt on 13 May 2015. One year after the start of the crisis, hundreds of people have been killed and/or tortured, while more than 200,000 refugees have left Burundi. See, in more detail, Stef Vandeginste, 'Burundi's Electoral Crisis: Back to Power-Sharing Politics as Usual?' *African Affairs* 114(457) (2015): 624–636.

opposition coalition, the National Council for the Respect of the Arusha Agreement and the Rule of Law (CNARED), at the Kampala meeting was deplored by Burundi's Minister of Foreign Affairs Alain-Aimé Nyamitwe.<sup>2</sup> The Burundian government reaffirmed its position that those responsible for the failed coup d'état attempt of 13 May 2015 and for the political violence in Bujumbura before and after the coup had no place at the dialogue.<sup>3</sup> President Museveni, however, insisted that all parties must be able to participate in the talks and called upon the government not to exclude the so-called 'radical' opposition, but rather to grant them temporary immunity. 'Don't bring conditionalities . . . These may be criminals. But for the sake of peace, let's assume . . . Just give them *immunité provisoire*,' he told the government delegation in Kampala.<sup>4</sup> In January 2016, two rebel movements – *Forces républicaines du Burundi* (Republican Forces of Burundi; FOREBU) and *Résistance pour un Etat de droit au Burundi* (Resistance for the Rule of Law in Burundi; RED TABARA) – announced an armed struggle to topple the Pierre Nkurunziza government. As a result, the issue of inclusiveness of the talks and the granting of temporary immunity has become even more complex.

Museveni's suggestion to grant *immunité provisoire* to the opposition was a clear reference to Burundi's earlier experience with peace talks and temporary immunities. In November 2003, when the main rebel movement National Council for the Defense of Democracy – Forces for the Defense of Democracy (CNDD-FDD) of Nkurunziza signed the Global Ceasefire Agreement (GCA), *immunité provisoire* protected the movement's leadership against the risk of judicial prosecution upon its return to Bujumbura. The 2006 peace agreement with the other, last-remaining rebel movement – Agathon Rwasas's National Liberation Forces (FNL-Palipehutu) – also included temporary immunity.<sup>5</sup> The current government established after the strongly contested polls of 2015 is dominated by the CNDD-FDD party of re-elected President Nkurunziza and includes representatives of Rwasas's FNL party. Museveni's call to grant temporary immunity to political opponents thus clearly found inspiration in Burundi's recent history and in its, until recently, successful transition to peace after a decade of civil war. Like Nkurunziza and Rwasas before, several current opposition leaders living in exile are the target of arrest warrants and extradition requests.

From a short-term conflict-settlement-oriented perspective, it seems logical and necessary to grant temporary immunity to opponents invited to the negotiations table. This is by no means unique to the case of Burundi. Mediator Museveni may in fact also have found inspiration in customary international humanitarian law, which includes a rule that

2 Ministère des Relations extérieures, *Communiqué de Presse*, 28 December 2015.

3 The government found support in UN Security Council Resolution 2248 of 12 November 2015, which calls for an inter-Burundian dialogue involving all 'peaceful stakeholders' (para. 3). For a government-friendly account of the crisis in Burundi, see, Laurent Kavakure, *Burundi: la démocratie à l'épreuve, Août 2010–août 2015* (Bujumbura: Presses Lavigerie, 2016).

4 'Burundi Peace Talks Kick off in Kampala,' YouTube Video, 3:21, 28 December 2015, <https://www.youtube.com/watch?v=s9PSaNeKZVk> (accessed 31 May 2016).

5 Museveni was one of the international co-signatories and guarantors of both peace agreements.

At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes.<sup>6</sup>

In some of the literature, amnesties – or other safeguards against criminal prosecution – have been considered a ‘necessary evil’ for those situations in which a negotiated settlement (rather than a military victory) is the only viable option.<sup>7</sup> Museveni’s suggestion to grant temporary immunity to those allegedly involved in a military coup attempt is therefore, at first sight, not problematic.<sup>8</sup>

This Note sheds light on five developments that perverted the previous, initially well-intended use of temporary immunity in Burundi. It is based on an analysis of Burundi’s transitional justice process – or, rather, its absence – during and after the peace process that started in 1998. It shows how an initial ‘light’ version of temporary immunity incrementally developed into de facto full impunity for the human rights crimes that were committed during decades of oppressive single-party rule and during the civil war that started after the assassination of President Melchior Ndadaye on 21 October 1993. While the Burundian trajectory is unique, its experiment with internationally legitimized temporary immunity provides an insight into the short- and longer-term dynamics of the general peace versus justice dilemma that also arises in many other contexts.

History may not necessarily repeat itself. At the time of writing this Note, it is still not clear whether there will be any inclusive and genuine political dialogue or peace talks that might give rise to another round of temporary immunity. On 2 March 2016, the EAC heads of state appointed former Tanzanian president Benjamin Mkapa to assist and facilitate the mediation led by Museveni. At a first round of internationally requested<sup>9</sup> dialogues under his facilitation on 22–24 May 2016, no meaningful progress was made towards a political solution. As long as there is no mutually hurting stalemate for all parties involved, the crisis – and the targeted assassinations and reprisal killings and disappearances that come with it – may well linger on. Another scenario in which temporary immunity will not be used is that of an escalation of the crisis into an open (possibly even international)<sup>10</sup> armed conflict,

6 International Committee of the Red Cross, ‘Rule 159. Amnesty,’ [https://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule159](https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule159) (accessed 31 May 2016).

7 Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge: Cambridge University Press, 2010).

8 A military coup attempt is not to be confused with a violation of human rights and international humanitarian law. Regarding those violations, states have the duty to undertake investigations and ‘to take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished.’ ‘Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity,’ UN Doc. E/CN.4/2005/102/Add.1 (8 February 2005), 12.

9 In early March 2016, the European Union imposed aid sanctions on Burundi under art. 96 of the ACP-EU Cotonou partnership agreement. The steps required to ease those sanctions include the government’s participation in an internationally mediated dialogue.

10 The government has repeatedly accused Rwanda of training and supporting the armed insurgency.

with one party staging a military victory. However, in the scenario of a genuine dialogue followed by a negotiated settlement, the issue of temporary immunity is most likely to reappear on the agenda and in the toolbox of international mediators. There are at least three reasons to fear that a new round of temporary immunity may reproduce the same longer-term effects, unless lessons are learned from previous experiences: Burundian elites' learning curve, the leniency of Burundi's international development partners vis-à-vis political governance setbacks and the political weakness of domestic voices speaking out against impunity. First, through learning by doing and trial and error, most of Burundi's political elites – who were mostly the same actors involved in previous peace talks<sup>11</sup> – have conceptualized politics as a continuous process of balancing their (political, security, business and other) interests, if need be at the expense of collective goods such as truth and accountability.<sup>12</sup> In all of the previous elite-driven settlements, notwithstanding some lip service paid to it, justice was notably absent. There is no reason to assume that they would behave differently this time. Secondly, over the past decade, Burundi's international development partners have tolerated – or even encouraged<sup>13</sup> – a situation of 'good enough' peace, namely, stabilization and control even if that goes hand in hand with militarized governance, executive control over the judiciary and the gradual closing down of democratic space for civil society. In addition, they may – rightly – not see any short-term cost of granting (seemingly) temporary immunity to negotiating parties. Thirdly, domestic voices calling for an end to a long-standing culture of impunity (both in terms of human rights crimes and financial crimes) exist but have never had strong political leverage. Nor have they been able to rely on an independent judiciary. As a result of the crisis, these voices have, on the one hand, been oppressed and silenced by the government and, on the other, politically instrumentalized by opposition elites who may well not take them seriously when striking a next deal that includes temporary immunities.

### TEMPORARY IMMUNITY IS NOT TEMPORARY

A first conclusion that can be drawn from Burundi's previous experience with temporary immunity relates to its allegedly temporary (or provisional) nature.<sup>14</sup> Despite their name, temporary immunities are not temporary. An agreement on temporary

11 One important aspect of the composition of the leadership in exile of the CNARED opposition coalition is that both its president (Jean Minani) and its vice-president (Bernard Busokoza) have suffered important financial losses, respectively, in the hotel sector and in the telecom business. While this may not necessarily explain their initial decision to oppose Nkurunziza's third term, it may well shed some light on what might motivate them to reach a negotiated settlement. Furthermore, both of them have been accused – in particular by each other's political party – of playing a role in the coup d'état and the assassination of Ndadaye on 21 October 1993 (Busokoza) and in the massacres that followed (Minani). The truth about those – and many other – dramatic events remains to be told, which is unlikely to happen as long as too many suspected protagonists in these events are at the forefront of Burundi's political scene.

12 Stef Vandeginste, 'Power-Sharing, Conflict and Transition in Burundi: Twenty Years of Trial and Error,' *Africa Spectrum* 44(3) (2009): 63–86.

13 Devon Curtis, 'The International Peacebuilding Paradox: Power Sharing and Post-Conflict Governance in Burundi,' *African Affairs* 112(446) (2013): 72–91.

14 The terms 'temporary' and 'provisional' have been used interchangeably in Burundi's peace agreements and in the legislation adopted on that basis.

immunity legislation was included, first of all, in the Arusha Peace and Reconciliation Agreement (APRA) of 28 August 2000 in order to ensure that no one was prosecuted for politically motivated crimes committed prior to the signature of the agreement.<sup>15</sup> Secondly, temporary immunity legislation was adopted in parliament immediately after the signature of the GCA of 16 November 2003 between the transitional government – established on the basis of the APRA – and the CNDD-FDD movement. For CNDD-FDD, this legal endorsement of the safeguard initially included in the APRA and (politically) reaffirmed in the GCA<sup>16</sup> was an important precondition to its signature of the GCA. The temporary immunity in the APRA was intended as a provisional measure applicable only in the transition period.<sup>17</sup> Although the technical commission that drafted immunity legislation to implement the GCA proposed limiting its application to a period of two years,<sup>18</sup> the law of 21 November 2003 adopted a different, open-ended approach: temporary immunity applies as long as the Truth and Reconciliation Commission (TRC) and the International Judicial Commission of Inquiry (ICJI) have not completed their work.<sup>19</sup> For reasons it would take too long to enter into here,<sup>20</sup> the TRC was not established until 2014 while the ICJI was never established. As a result, temporary immunity continues to apply.<sup>21</sup> Temporary immunity was also requested during the peace negotiations with the last remaining rebel movement FNL-Palipehutu and included in the peace agreement signed in Dar es Salaam on 7 September 2006.<sup>22</sup> Adopted further to this agreement, the law of 22 November 2006 defined the temporal scope of application of temporary immunity, stating that it would have effect until the establishment of the TRC and the Special Tribunal for Burundi. The Tribunal was never established.<sup>23</sup> As a result, temporary immunity continues to

- 15 APRA, Protocol II (Democracy and Good Governance), chap. II (Transitional Arrangements), art. 22. At the same time, in order to combat impunity, it was agreed that a national truth and reconciliation commission would be established (which did not happen until 2014) and that an international judicial commission of inquiry (which was never established) would investigate acts of genocide, war crimes and other crimes against humanity (Protocol II, chap. II, art. 18).
- 16 'The parties agreed that all leaders and combatants of the CNDD-FDD shall receive temporary immunity.' GCA Pretoria Protocol on Outstanding Political, Defense and Security Power Sharing Issues in Burundi, art. 2.1 [hereinafter 'GCA Protocol'].
- 17 The Transition Constitution of 28 October 2001 limited the transition to a period of 36 months.
- 18 Note de présentation. Projet de loi portant immunité provisoire de poursuites judiciaires en faveur ces personnes accusées d'avoir commis certaines infractions, art. 3.
- 19 Loi No. 1/22 du 21 novembre 2003 portant immunité provisoire de poursuites judiciaires en faveur de leaders politiques rentrant de l'exil, art. 5.
- 20 See, David Taylor, 'Transitional Justice and the TRC in Burundi: Avoiding Inconsequential Chatter,' *Contemporary Justice Review* 17(2) (2014): 195–215; Stef Vandeginste, 'Burundi's Truth and Reconciliation Commission: How to Shed Light on the Past while Standing in the Dark Shadow of Politics?' *International Journal of Transitional Justice* 6(2) (2012): 355–365.
- 21 It continues to offer protection against prosecution only for those crimes covered by the material scope of the immunity as initially defined. It does not cover the crimes committed during the recent crisis, for which new immunity legislation would be needed.
- 22 'From the start of the effective implementation of the ceasefire, the members of the Palipehutu-FNL shall enjoy provisional immunity for acts committed during the armed struggle until the signing of the Ceasefire Agreement' (Comprehensive Ceasefire Agreement between the Government of the Republic of Burundi and Palipehutu-FNL. Annexure II, art. 3.1).
- 23 The government remains, at least rhetorically, willing to consider the establishment of a tribunal if that is one of the recommendations put forward by the TRC.

apply. In December 2014, Rwasa – FNL leader and, prior to the 2015 elections, self-declared opposition leader of Burundi – was summoned by the prosecutor in Bujumbura in connection with the massacre of Banyamulenge refugees in August 2004 in Gatumba, for which the FNL spokesperson had claimed responsibility.<sup>24</sup> In his reply to the prosecutor, Rwasa stated that the Burundian judiciary could not prosecute him because he continues to enjoy temporary immunity.<sup>25</sup>

In October 2011, a technical committee in charge of preparing the draft law on the establishment of the TRC proposed that the submission of the final TRC report would put an end to the temporary immunities granted by all peace agreements and all laws adopted on that basis.<sup>26</sup> After discussion in the Council of Ministers, this provision was removed from the draft law. Although the Office of the UN High Commissioner for Human Rights suggested that the provision be reinserted during the parliamentary debate,<sup>27</sup> the law on the TRC of 15 May 2014 does not deal with the end of temporary immunities.<sup>28</sup> More than a decade after the end of the transition period and contrary to the initial spirit that prevailed at the time of the Arusha peace negotiations, temporary immunity legislation remains applicable and the end of its application is not in sight.

#### TEMPORARY IMMUNITY DISCOURAGES TRUTH AND ACCOUNTABILITY FOR ACTS NOT COVERED BY THE IMMUNITY

Closely related to the first lacuna, temporary immunity had the perverse effect of discouraging Burundi's political leadership from launching a transitional justice process. As noted, the end of temporary immunity has become explicitly linked to the establishment of a nonjudicial truth-telling body (the TRC)<sup>29</sup> and a judicial criminal body – an international judicial commission of inquiry, to be followed by a special tribunal – to deal with the legacy of large-scale human rights abuses. This temporal relationship between the two transitional justice bodies and temporary immunity legislation constituted an important interest-based argument for Burundi's decision makers – also the main beneficiaries of temporary immunity – to delay the transitional justice process as much as possible. The passage of time and the gradual reduction of the UN footprint on transitional justice in Burundi also allowed the government to move away from a process focused on truth and finger-pointing of the most responsible perpetrators (as agreed upon in APRA) towards local-level reconciliation and forgiveness.

24 On this massacre, see Human Rights Watch, *Burundi: The Gatumba Massacre: War Crimes and Political Agendas* (September 2014).

25 Agathon Rwasa, *Lettre à Monsieur le Procureur Général près la Cour d'Appel du Bujumbura*, 15 December 2014. The same argument is put forward in the letter which Pasteur Habimana, former Palipehutu-FNL spokesperson, addressed to the prosecutor on 2 December 2014.

26 République du Burundi, *Rapport du Comité technique chargé de la préparation de la mise en place des mécanismes de justice transitionnelle* (Bujumbura, October 2011).

27 UN OHCHR, *Analyse du projet de loi portant création, mandat, composition, organisation et fonctionnement de la Commission Vérité et Réconciliation discuté à la session du Conseil des Ministres du 14 novembre 2002: 2*.

28 However, the TRC law of 15 May 2014 does refer to the 2003 and 2006 temporary immunity legislation in its preamble, implicitly confirming their continued application.

29 As of May 2016 and because of the political and security crisis that was occasioned by the 2015 elections, the TRC has not been able to hold any public hearings.

To conclude, linking the temporal scope of application of temporary immunity legislation to the completion of the transitional justice process inevitably creates a perverse incentive structure. This should be avoided at all costs in case renewed use is made of temporary immunity.

### TEMPORARY IMMUNITY BENEFITS BOTH INSURGENTS AND INCUMBENTS

Justified by the desire to allow them to return home and participate in a political dialogue, the scope of application of the immunity as suggested by Museveni is logically limited to opponents currently living in exile. The same reason explains why immunity appeared on the agenda of the peace talks over 15 years ago. Once more, however, it is important to take into consideration an evolution in the actual use of temporary immunities in order to counter the risk of a renewed derailment of immunity. Without explaining its rationale, the GCA of 16 November 2003 included a provision that the temporary immunity 'shall also apply to the security forces of the Government of Burundi.'<sup>30</sup> The presidential decree of 23 March 2004, which contains the modalities of implementation of the immunity granted by the GCA, defined this beneficiary group as

including, in particular, the members of the Burundian Armed Forces for the facts committed during the hostilities with the CNDD/FDD, police officers who supported the military operations as well as 'guardians of peace' members.<sup>31</sup>

Applying the same logic to the current crisis and assuming that the previous (ab)use of immunities also sheds light on the future, this earlier experience suggests that temporary immunity will not only be granted to opponents in exile, but also to government army soldiers, the national police force and allied nonofficial movements. Without suggesting that there is a perfect analogy with the *gardiens de la paix* vigilante groups, the *Imbonerakure* CNDD-FDD youth wing comes to mind.<sup>32</sup>

Granting temporary immunity to incumbents is obviously inspired by a motivation other than facilitating a political dialogue with opponents returning from exile, which is the argument put forward by Museveni. This then begs the question: What were the 'facts' – the term used in the decree of 23 March 2004 – covered by the immunity and what were the effects produced by the immunity?<sup>33</sup> The latter issue is closely related to the fourth perverse effect of temporary immunity.

30 GCA Protocol, art. 2.2.

31 Décret du 23 mars 2004 portant modalités d'application de l'immunité provisoire prévue par l'Accord Global de Cessez-le-feu du 16 novembre 2003, art. 3. According to Human Rights Watch, the *gardiens de la paix* were mostly rural, paramilitary self-defense groups established by the government army. Human Rights Watch, *To Protect the People: The Government-Sponsored 'Self-Defense' Program in Burundi* (December 2001).

32 In a resolution adopted at its special session on Burundi in December 2015, the Human Rights Council referred to the *Imbonerakure* as an armed group 'whose actions contribute to the persistence of violence and hinder the promotion of a peaceful solution to the crisis.' UN Doc. A/HRC/RES/S-24/1 (22 December 2015), para. 7.

33 In addition, including the *Imbonerakure*, the police, the intelligence service and the regular security forces among the beneficiaries of the provisional immunity may be a useful argument for Nkurunziza to 'sell' a possible negotiated settlement to his own support group.

### TEMPORARY IMMUNITY IS MORE THAN IMMUNITY

The concept of immunity refers to the legal status of a person or entity – e.g., a state, a head of state, a diplomat – that cannot be held liable for an act which, without that immunity, might lead to a judicial procedure concerning the criminal or civil responsibility of the beneficiary of the immunity. This was also the main interpretation of the notion of temporary immunity in the Burundian case. Indeed, Article 3 of the law of 21 November 2003 defines immunity as a safeguard against arrest, indictment and prosecution of its beneficiaries. Likewise, the law of 22 November 2006 defines temporary immunity as the suspension of criminal prosecution.

However, immunity also served additional purposes other than protecting suspected offenders against criminal prosecution. First, immunity was used as an instrument to release offenders who had already been convicted and who were serving their prison term. In this case, immunity was clearly not a matter of suspending criminal prosecution. Under both peace agreements of 2003 and 2006 and the legislation adopted on that basis, commissions were established in charge of identifying the beneficiaries referred to as ‘political prisoners,’ a poorly defined category of detainees.<sup>34</sup> Between January and March 2006, the minister of justice granted a collective ‘provisional release’ to approximately 3,300 prisoners on the basis of temporary immunity. Local human rights organizations unsuccessfully challenged the ministerial orders before the Constitutional Court.<sup>35</sup> Insofar as this unconventional interpretation of temporary immunity offers inspiration to the – perhaps forthcoming – political dialogue or peace talks, this may mean that opponents convicted for staging the coup d’état attempt in May 2015<sup>36</sup> – but, for the purpose of political balancing, also government soldiers, police officers, intelligence service officials or vigilante group members – are released on the basis of temporary immunity, without the truth about their alleged responsibility being established through a fair judicial procedure.

Secondly, immunity had an important effect on the eligibility and the political careers of its beneficiaries. Under the electoral legislation of April 2005, adopted in the run-up to the 2005 general elections that symbolically marked the end of the transition, candidates benefiting from temporary immunity were allowed to stand for the elections even if they had a criminal record. The application of this provision was explicitly limited to the first posttransition elections, pending the establishment of the ICJI and the TRC.<sup>37</sup> Because of this temporal limitation, President Nkurunziza – who, in absentia, was convicted to death by the Bujumbura Court of Appeal in 1998 – was no longer eligible after the 2005 elections. In September 2009, however, the electoral legislation was revised in order to extend the electoral effects of temporary

34 Ordonnance ministérielle du 23 mars 2004 portant nomination des membres de la commission chargée de mettre en œuvre l’immunité provisoire prévue par l’Accord global de cessez-le-feu du 16 novembre 2003, art. 2.

35 Constitutional Court, RCCB 174, 22 August 2006. In early 2009, nearly 250 FNL members were released on the basis of temporary immunity granted in accordance with the 2006 peace agreement. Some of them had been convicted for participation in an armed insurgency, illegal possession of weapons or endangering the security of the state, while others had been convicted for murder.

36 ‘Burundi Coup Plotters Get Life Imprisonment,’ *East African*, 15 January 2016.

37 Electoral code of 20 April 2005, art. 8.



immunity to after the first elections as well.<sup>38</sup> This enabled Nkurunziza to stand for the 2010 elections.<sup>39</sup>

### TEMPORARY IMMUNITY: A STEPPING STONE TOWARDS LONG-LASTING IMPUNITY

Finally, and most worryingly, Burundi's experience shows that even when *in law* temporary immunity is limited to certain political offences, *in reality* it guarantees full impunity to perpetrators of serious human rights crimes.

The Burundian case is a perfect illustration of rhetorical – but *de facto* rather meaningless – adherence to the global transitional justice paradigm, which includes a general principle that genocide, crimes against humanity and war crimes can never be amnestied.<sup>40</sup> This amnesty prohibition appears in Burundi's peace agreements and legislation.<sup>41</sup> Likewise, temporary immunity legislation offers a safeguard against prosecution for politically motivated offences but, at the same time, explicitly excludes genocide, crimes against humanity and war crimes from its material scope of application.<sup>42</sup> Legally speaking, this theoretically leaves room for criminal investigation and prosecution of those crimes.

In reality, however, temporary immunity should be seen as one element of the larger negotiated compromise which paved the way for a multidimensional political settlement between Burundi's opponents. The cornerstones of this settlement were a sophisticated political and military power-sharing arrangement, as well as institutional engineering of interethnic trust. This brought a decade of peace and stability to Burundi. Despite the elites' rhetorical appreciation of the South African model of transitional justice, Burundi's settlement was also fundamentally based on reconciliation without truth and without accountability.<sup>43</sup> The main truth about Burundi's legacy of atrocities, in fact, is that no one has ever been convicted for genocide, crimes against humanity and war crimes. Truth telling – and, *a fortiori*, criminal prosecution – would have been a major threat to the stability of the elitist political settlement. The seemingly temporary immunity component of the settlement allowed its beneficiaries to integrate Burundi's political and security institutions. In turn, participation in those institutions guaranteed a *de facto* protection against prosecution for

38 Electoral code of 18 September 2009, art. 8. This provision was endorsed by the new electoral code of 3 June 2014.

39 Furthermore, on 8 July 2011, his death sentence was annulled by the Supreme Court. The Supreme Court judgment is published as an annex to Stef Vandeginste, 'L'annulation de la condamnation à mort de Pierre Nkurunziza, Président de la République du Burundi: un commentaire de l'arrêt du 8 juillet 2011 de la Cour Suprême dans l'affaire RPSA 280,' IOB Working Paper 2012.08 (University of Antwerp, October 2012).

40 See, in more detail, Stef Vandeginste, 'Bypassing the Prohibition of Amnesty for Human Rights Crimes under International Law: Lessons Learned from the Burundi Peace Process,' *Netherlands Quarterly of Human Rights* 29(2) (2011): 189–211.

41 APRA, Protocol III, chap. III, arts. 26, 1; Code pénal, arts. 170, 171.

42 Loi du 21 novembre 2003, art. 2, para. 2 and art. 3; Loi du 22 novembre 2006, arts. 1 and art. 2, para. 2.

43 This is not to suggest that there was only one uniform and uncontested conceptualization of justice and reconciliation in Burundi. On the views of political actors, see, Sandra Rubli, '(Re)making the Social World: The Politics of Transitional Justice in Burundi,' *Africa Spectrum* 48(1) (2013): 3–24. On public opinion in general, see, Cyrus Samii, 'Who Wants to Forgive and Forget? Transitional Justice Preferences in Postwar Burundi,' *Journal of Peace Research* 50(2) (2013): 219–233.

those human rights crimes which, nicely reflecting the global justice norm, were formally not covered by the temporary immunity. This also enabled Burundi's international partners to welcome the overall compromise.<sup>44</sup>

## CONCLUSION

Presumably well-intended measures, needed for short-term stabilization and settlement purposes, produced perverse effects in the longer run. These are accurately summarized by Special Rapporteur Pablo de Greiff in his latest report on Burundi:

The undisciplined expansion of both the subjects and temporal scope of the immunities suggests that, de facto, they have become a permanent amnesty scheme; the benefits are hardly temporary and are contrary to the initial legislation's exclusion of atrocity crimes.<sup>45</sup>

Burundi was, for roughly one decade, considered a success story of conflict resolution and peacebuilding. The crisis and renewed political violence show that, despite Burundi's remarkable achievements in terms of ethnic pacification, its experiment of peace without truth and accountability has failed. It is, therefore, undesirable to further institutionalize a tradition of impunity that continues to erode the validity of norms that rather need to be protected. Although in practice its short-term justice cost may be negligible, this is the main risk of offering yet another bite at the immunity cherry to offenders, several of whom have a proven capacity for recidivism.

In a letter dated 3 July 2004 to UN Secretary-General Kofi Annan regarding the crisis in Ituri (Democratic Republic of the Congo), Museveni wrote that

whereas Uganda has been at the fore front of working to an end to impunity with respect to war crimes and genocide in this region, our experience in the Burundi peace process has convinced us of the need for provisional immunity in order to achieve peace first.<sup>46</sup>

In as much as Burundian history convincingly showed some merits of the use of temporary immunities for short-term conflict-settlement purposes, advocating its

44 On the role of Burundi's international development partners in its transitional justice process, see, David Taylor, "'We Have No Influence': International Discourse and the Instrumentalisation of Transitional Justice in Burundi,' *Stability: International Journal of Security and Development* 2(3) (2013): 1–10.

45 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Greiff. Addendum. Mission to Burundi (8–16 December 2014),' UN Doc. A/HRC/30/42/Add.1 (10 August 2015), para. 42.

46 The author also suggested suspending 'the activities of the international criminal court until the peace process in Ituri and DRC [Democratic Republic of the Congo] in general is irreversible' (Letter of President Museveni to UN Secretary-General Kofi Annan, 3 July 2004, p. 3 – on file with the author). Possible tensions between temporary immunities and International Criminal Court (ICC) investigations may also arise in the context of the Burundian crisis. On 25 April 2016, ICC Prosecutor Fatou Bensouda announced the opening of a preliminary investigation into the situation in Burundi since April 2015. International Criminal Court, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on Opening a Preliminary Examination into the Situation in Burundi,' 25 April 2016, <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-25-04-2016> (accessed 2 June 2016).

repeated use and internationally promoting it without taking into consideration the proven longer-term perverse effects would be unwise and irresponsible.

The international mediation involved with the crisis owes it to the countless and voiceless victims of atrocities committed in Burundi to learn lessons from the previous use of temporary immunity. Another round of impunity – disguised as temporary immunity – is likely to sow the seeds of the next cycle of political violence between elites who temporarily reconcile when their interests meet in a new political settlement but who resort to violence when their interests are under threat, knowing that they can do so without any risk of prosecution as long as they are not defeated.

Perverse effects are the consequences of intended solutions that, in reality, make problems worse. Not only human rights protection but also subregional peace and stability – presumably the main concern of the EAC mediator – are bound to fall victim to the longer-term consequences of another round of well-intended provisional immunity that spirals out of control. To avoid those effects, a careful wording of the limitations of the scope, effects and beneficiaries of the temporary immunity is but a first step. More attention must be paid to the monitoring and enforcement of those limitations by domestic and international actors in the months and years after the deal has been signed. Further comparative research may be helpful in identifying and designing commitment devices that tie the hands of the beneficiaries of the immunities during the implementation stage of the negotiated settlement.