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Burundi's crisis and the Arusha Peace and Reconciliation Agreement: which way forward?

In virtually all of the international diplomatic statements concerning the ongoing political and security crisis in Burundi, reference is made to the Arusha Peace and Reconciliation Agreement that was signed in August 2000. The current crisis is seen as potentially *"seriously undermining the significant gains achieved through the Arusha Agreement"*[1]. Repeated calls have been made for a *"genuine and inclusive dialogue, based on the respect of the Arusha Agreement"*[2]. At the domestic level as well, the Arusha Agreement stands at the heart of the political dispute. The missions of the National Commission for Inter-Burundian Dialogue, established in September 2015, include an evaluation of the Arusha Agreement.[3] A newly established opposition movement, CNARED, is named after its main objective which is the restoration of the respect for the Arusha Agreement.[4]

Most of the time, however, references to Arusha – and the need to respect its letter and/or its spirit – remain rather vague. This begs two important questions which this *Brief* addresses, and which are analysed in more detail in an accompanying *IOB Working Paper*.[5] First, why should the Arusha Agreement, a fifteen year old peace accord, be so central in the current political debate? What gains need to be preserved? Second, assuming that there is a political agreement around the need to preserve the '*Arusha acquis*', how can its respect be ensured and strengthened through Burundi's political and judicial institutions? These questions will hopefully feature prominently on the agenda of the – presumably - forthcoming dialogue and negotiations between Burundi's political actors and between Burundi and its international partners.

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1 United Nations Security Council, *Resolution 2248 (2015)*, 12 November 2015

2 Office of the Special Envoy of the Secretary-General for the Great Lakes in Africa, *The team of International Envoys Support the AU PSC Communique on Burundi*, Joint Press Release, 24 October 2015.

3 *Décret du 23 septembre 2015 portant création, mandat, composition, organisation et fonctionnement de la Commission nationale de dialogue interburundais*, article 9.

4 *Acte Constitutif du Conseil National pour le Respect de l'Accord d'Arusha pour la Paix et la Réconciliation au Burundi et la restauration de l'Etat de Droit, CNARED en sigle*, 31 juillet 2015, article 2.

5 Stef Vandeginste, *A la recherche d'un ange gardien perdu: pourquoi et comment assurer une meilleure protection de l'Accord d'Arusha pour la Paix et la Réconciliation au Burundi?*, Working Paper 2015.08, IOB, University of Antwerp, December 2015. An English version of this working paper will be available soon.

"Burundi cannot afford to do away with the *'Arusha acquis'*."

The Arusha Achievements

The Arusha Agreement was at the same time less and much more than a peace accord. On the one hand, it was no more than the first in a series of agreements that together put an end to a decade of civil war and instability. On the other, however, it contained the blueprint of a new institutional framework and of new state-society relations. The latter foundational principles of a post-conflict Burundi that together make up the *'Arusha acquis'* remain essential pillars of the return to stability and security in Burundi.

First of all, conflict resolution was based on institutional arrangements engineering **politico-ethnic reconciliation and pacification**. Rather than opting for ethnic amnesia like in neighbouring Rwanda[6], Burundi's segmental divisions were acknowledged and incorporated in a typically consociational but at the same time unique ethnic power-sharing model. Second, **minority protection** was organized through political and military representation of demographic minority groups. Given Burundi's demographic composition, this inevitably involved minority over-representation and 'corrected' proportionality. A third foundational principle was the need to **prevent military coups**, a fortiori mono-ethnic coups. Therefore, Arusha provided for civilian supremacy over military matters and for the gradual (rather than abrupt) correction of (ethnic and regional) imbalances in the composition of the defense and security forces. Fourth, **institutional legitimacy** was based on legality, rule of law and protection against interference by influential power-holders and on societal trust and representativeness. Finally, Arusha put forward a number of **democratic principles** (like separation of powers, multi-party elections, etc.).

Without neglecting some shortcomings and perverse effects of the Arusha Agreement and without suggesting that all of the foundational principles have been fully realized since the first post-conflict elections in 2005[7] nor that they offer a sufficient and comprehensive answer to the current crisis, Burundi cannot afford to do away with them.

The hybrid nature of the Arusha Agreement and its link with Burundi's Constitution

The text of the Arusha Agreement is characterized by its hybrid nature. Uncertainty around its (merely political?, legal?, supra-constitutional?) status has further obscured the debate around its future. Its status must therefore be clarified.

While the Arusha Agreement was, evidently, a political agreement signed by a number of domestic actors and international cosignatories, several provisions were adopted with a normative, law-making intention and objective. Contrary to other sections of the Agreement (for instance dealing with transitional justice[8] and with reconstruction and development[9]), the five Arusha achievements summarized above are laid down in Protocol II, Chapter I ('Constitutional principles of the post-transition Constitution'). In its judgment of 4 May 2015

6 Stef Vandeginste, "Governing ethnicity after genocide: ethnic amnesia in Rwanda versus ethnic power-sharing in Burundi", *Journal of Eastern African Studies*, Vol. 8, N° 2, 2014, 263-277

7 In reality, since the 2010 elections, a gradual erosion of the Arusha Agreement has taken place. See in more detail Stef Vandeginste, *Arusha at 15. Reflections on power-sharing, peace and transition in Burundi*, IOB Discussion Paper 2015.01, University of Antwerp, February 2015.

8 Those are included in Protocol I "Nature of the conflict, problems of genocide and exclusion and their solutions".

9 Those are included in Protocol V.

"The current crisis demonstrates the need for better protection mechanisms of the *'Arusha acquis'*."

and for the very first time, the Constitutional Court ruled that this section of the Arusha Agreement is a source of constitutional law and stated that "*he who violates the major constitutional principles of the Arusha Agreement cannot pretend he respects the Constitution*"[10]. The court ruling – which was strongly criticized for permitting President Nkurunziza's third term – thus lends support to the view that the Arusha Agreement is much more than a temporary and by now outdated political elite deal. Not only was the Agreement the main source of inspiration for Burundi's current Constitution of 18 March 2015, a core part of it has ongoing constitutional value in and of itself.

Some important uncertainty remains, however, regarding the precise legal status of the above-mentioned Protocol II, Chapter I. What is its rank in the hierarchy of norms? This question is particularly relevant when, as is the case in several instances, there is a discrepancy between the Arusha Agreement and the text of the current Constitution. Which text prevails over the other? In addition, while the Constitutional Court ruled that the Arusha Agreement has no supra-constitutional status, this runs against the intention of the constituent assembly as reflected in the explanatory memorandum[11] of the Constitution. As a result, it is currently not clear whether certain principles contained in the Arusha Agreement are intangible and cannot be affected by a constitutional amendment. Or might a constitutional reform remove ethnic quota? The Working Paper that accompanies this *Brief* suggests a number of options on how to clarify and reaffirm the constitutional (c.q. supra-constitutional) legal status of the Arusha Agreement.

An Agreement in need of institutional protection, not of mere political lip-service

The current crisis in Burundi convincingly demonstrates that in order to safeguard the Arusha achievements and ensure the respect for the provisions on which they are based, more is needed than a mere political commitment which, almost by definition, is conjunctural and contingent on elite interests. Institutional guarantees are needed to ensure the continued respect of Arusha's foundational principles. Rather than adding another institution to Burundi's already crowded institutional landscape, two existing institutional mechanisms – one political, the other judicial – can be reconfigured as Arusha's guardian angels. While more in-depth research on how to revise the mandate, the procedure and the functioning of the two protection mechanisms is needed, the Working Paper that accompanies this *Brief* offers some background as well as some preparatory guidance and some initial thoughts.

A political guardian angel

In its Protocol V, the Arusha Agreement itself provides for the establishment of an Implementation Monitoring Committee (IMC), composed of national members and international representatives. Established for the period of transition (initially 36 months), the IMC no longer exists today. Furthermore, the very final provision of the Arusha Agreement states that the regional heads of State will serve as its guarantors. The recent crisis has shown, however, that regional involvement with the Burundian situation is determined by a variety of other considerations than the Arusha Agreement.

Protocol II, Chapter I of the Arusha Agreement itself states that one of the

10 My translation. See original judgment in French: Constitutional Court, *RCCB 303*, 4 May 2015.
11 See the Exposé des motifs of the post-transition Constitution.

missions of the Senate, after the period of transition, is "*to monitor compliance with the present Protocol*"[12]. The Constitution did not integrate this provision, although it charges the Senate with verifying the application of the constitutional provisions regarding ethnic and gender representation in all state structures and institutions, a mission clearly inspired by the Arusha Agreement.[13] A future role of the Senate as guardian angel of the Arusha Agreement – monitoring and reporting on its implementation and promoting its respect - may reach beyond this particular provision and may be particularly relevant for those sections of the Agreement that do not easily lend themselves to judicial scrutiny.

A judicial guardian angel

The Constitutional Court is the judicial body in charge of ensuring the respect of Burundi's constitutional order and, therefore, a 'logical' guardian angel of the Arusha Agreement. However, in addition to a very serious legitimacy deficit currently affecting the Court, several limitations in terms of its constitutional powers limit the Court's ability to fully play that role. A significant range of legislative acts escape its control. Also, when verifying conformity with the Constitution, the Court is not explicitly mandated to also verify compatibility with the Arusha Agreement. Furthermore, the Court is not charged with interpreting the Arusha Agreement itself, it can only indirectly do so when interpreting a constitutional provision. Finally, when exercising its powers in electoral dispute settlement, the Court – like the Electoral Commission (CENI) - never made use of the Arusha Agreement. These 'enforcement gaps' must and can be remedied in order to ensure a better judicial protection of the Arusha achievements.

The Working Paper that accompanies this *Brief* suggests a number of reforms of the Court's missions to respond to these gaps. Additional research is needed on a number of procedural aspects and on how to increase the – real and perceived – independence and autonomy of the Court, in order for it to be able to play a widely respected role as judicial guardian angel of the Arusha Agreement.

"All parties agree 'Arusha' is a matter to be discussed: a promising observation."

Conclusion

Like previous power-sharing negotiations in the nineties[14], Arusha also included a deal about the sharing of positions and access to power among elites. These previous experiences have become part of the mindset of some of Burundi's political elites. However, it would be highly unfortunate to reduce the – presumably – forthcoming talks to a discussion, once again, about power, positions and immunity. The substance of sustainable peace and governance in Burundi must be addressed. Therefore, the future of the Arusha achievements and their institutional protection must be one of the issues high on the agenda. All parties involved have suggested that 'Arusha' is a matter to be looked into. This in itself is a promising observation which does not apply to other contentious issues.

12 Protocole II, Chapter I, article 6, paragraph 16.
13 In 2010, the Senate published a report on its own history and activities during the 2005-2010 legislature. See Sénat du Burundi, *Le Sénat au Burundi. De la période monarchique à la troisième législature*, Bujumbura, 2010.
14 See Stef Vandeginste, "Burundi's electoral crisis: back to power-sharing politics as usual?", *African Affairs*, N° 114, 2015, p.624-636 and Stef Vandeginste, "Power-sharing, conflict and transition in Burundi: twenty years of trial and error", *Africa Spectrum*, Vol. 44, N° 3, 2009, p.63-86