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In need of a guardian angel

Preserving the gains of the Arusha Peace and Reconciliation Agreement for Burundi

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Preserving the gains of the Arusha Peace and Reconciliation Agreement for Burundi

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January 2016

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Abstract

The Arusha Agreement of 28 August 2000 is an important stake of the ongoing crisis in Burundi. This paper analyses Burundi's Arusha Agreement based achievements and suggests how they may be better protected through existing but strengthened institutional mechanisms. A political agreement of a hybrid nature, the Arusha Agreement contains a set of constitutional principles that have strongly inspired the current Constitution of 18 March 2005. The legal status of Protocol II of the Arusha Agreement has been recognised by the Constitutional Court, but its precise constitutional or supra-constitutional status needs to be further clarified. Furthermore, its enforcement of this text should not merely depend on a conjunctural political support. Two protection mechanisms, one political the other judicial, can ensure its respect. The Senate as well the Constitutional Court should be studied in more detail in order to reinforce their role as guardian angels of the Arusha Agreement. This paper intends to offer inspiration for that study and suggests some amendments of the powers of the Constitutional Court.

Résumé

L'Accord d'Arusha du 28 août 2000 constitue un enjeu important de la crise actuelle au Burundi. Ce papier donne une analyse des acquis d'Arusha et suggère comment mieux les protéger à travers des mécanismes institutionnels existants mais à renforcer. Accord politique de nature hybride, l'Accord d'Arusha contient un ensemble de principes constitutionnels qui ont fortement inspiré la Constitution du 18 mars 2005 actuellement en vigueur. Son statut juridique ayant été reconnu par la Cour Constitutionnelle, il serait opportun de clarifier davantage le statut constitutionnel ou supra-constitutionnel du Protocole II de l'Accord d'Arusha. La mise en application de ce texte ne devrait pas dépendre d'un soutien politique purement conjoncturel. Deux organes de protection, l'un politique l'autre juridictionnel, peuvent en assurer le respect. Aussi bien le Sénat que la Cour Constitutionnelle devraient faire l'objet d'études approfondies pour renforcer leur rôle d'ange gardien de l'Accord d'Arusha. Ce papier lance le débat en formulant quelques suggestions de réformes des compétences de la Cour Constitutionnelle.

This Working Paper explains in more detail the analysis contained in the IOB Analysis and Policy Brief "*Burundi's crisis and the Arusha Peace and Reconciliation Agreement: which way forward?*" published in December 2015.

An earlier version of the Working Paper was published in French («*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?*», IOB Working Paper 2015.08).

My sincere thanks go to Drs. Micha Wiebusch for his translation of the paper.

1. Introduction

Many international and Burundian actors and observers agree that preserving the gains of the Arusha Peace and Reconciliation Agreement, signed in Arusha 28 August 2000, is one of the core issues of the current political and security crisis in Burundi.[1] In its resolution of 12 November 2015, the United Nations Security Council underlined that the before mentioned crisis "*has the potential to seriously undermine the significant gains achieved through the Arusha Agreement*" and stressed "*the utmost importance of respecting the letter and the spirit*" of the Agreement "*which has helped to sustain a decade of peace in Burundi*"[2].

It would go beyond the scope of this paper to present a detailed and exhaustive overview of the gains obtained and the difficulties met as a result of the Arusha Agreement. Neither does this paper describe the historical context in which the Agreement was negotiated. The internal and international dynamics that, seven years after the crisis of 1993, led to the signing of the Agreement have been discussed elsewhere.[3] More recently, a state of the art was presented, fifteen years after the signing of the Arusha Agreement.[4]

What are the Arusha achievements and how can their respect be better ensured? These are the key questions that will be dealt with in this *working paper.* First, the objectives – achieved entirely or in part – and the principles on which the Agreement is based, will be discussed. Then, a typology will be presented of the provisions of the Agreement according to their purpose and nature. Particular attention will be paid to the constitutional status of the provisions that lay the foundation of the achievements of Arusha. Thereafter, the different mechanisms in charge of ensuring the enforcement and protection of the Arusha Agreement will be discussed. Two institutions are the subject of a (preliminary) commentary in this paper. These are, the Senate, a protection mechanism of a political nature, and the Constitutional Court, a judicial protection mechanism. Further in-depth research is needed of these two institutions as guardian angels of the Arusha Agreement. This paper presents a number of hypotheses as well as different avenues that need to be studied in more detail.

The paper is part of a larger process of reflection and consultation. A previous version has been the subject of written comments by some ten resource persons and remarks by participants in a seminar which was held at the University of Antwerp on 28 October 2015. Our sincere gratitude goes out to all those who have contributed their observations and suggestions. The paper intends to stimulate the debate about the future of the Arusha Agreement. Therefore, the paper is addressed, i.a., to the National Commission for the Inter-Burundian Dialogue ("Commission nationale pour le dialogue inter-burundais (CNDI)") established in September 2015[5], as well as to national political actors and international partners of Burundi.

The analysis presented in this paper is based, on the one hand, on scientific literature, and, on the other, on a personal analysis of the political situation of Burundi. As explained

[1] On the occasion of the fifteenth anniversary of the signing of the Arusha Agreement, the Secretary General of the United Nations said "*[n]ever has the spirit of Arusha been as sorely tested as in the past five months.*" (UN, *Statement attributable to the Spokesman for the Secretary-General on Burundi*, New York, 28 August 2015).

[2] United Nations, Security Council, *Resolution 2248*, 12 November 2015.

[3] S. Vandeginste, "Power-Sharing, Conflict and Transition in Burundi: Twenty Years of Trial and Error", *Africa Spectrum*, Vol. 44, N° 3, 2009, p.63-86.

[4] S. Vandeginste, *Arusha at 15: reflections on power-sharing, peace and transition in Burundi*, IOB Discussion Paper, 2015.01, University of Antwerp, February 2015

[5] The missions of the CNDI include an evaluation of the Arusha Agreement and the Constitution (Article 9 of the Decree of 23 September 2015 dealing with the establishment, mandate, composition, organisation and functioning of the National Commission for the inter-Burundian dialogue).

below, at the heart of the Arusha Agreement lies a cohabitation between different politico-ethnic societal segments. In the literature, the stabilisation of political and security institutions in a post-conflict state through the representation of different segments of a divided society – and the issue of appropriate mechanisms in this regard – has been the subject of several publications. While expert opinions differ on the preferred modalities, the merits of an inter-segmental power-sharing are largely acknowledged in the scientific literature. In our view, Burundi cannot (or not yet) afford to archive the Arusha Agreement without risking to forfeit its achievements. As the current crisis shows, the earlier ethno-political divisions can easily re-emerge and it would be premature to conclude that Burundi no longer needs an Arusha-style approach in the governance of its public affairs. However, this is far from suggesting that the Arusha Agreement constitutes a "*definitive panacea*" or a "*sacred text*"[6] that should never be amenable to revision until the end of times.

2. The Arusha Achievements

In this first section, an attempt is made to summarise the gains of Arusha. These are the main principles which were agreed upon in Arusha. Without suggesting that these principles have been entirely realised, they nevertheless constitute a set of foundational principles worth safeguarding.

Before trying to summarise the Arusha achievements in five points, it is useful to recall article 4 of Protocol I of the Agreement: "*With regard to the nature of the Burundi conflict, the Parties recognize that: (a) The conflict is fundamentally political, with extremely important ethnic dimensions;(b) It stems from a struggle by the political class to accede to and/or remain in power.*" The main solution put forward by the Agreement for this twofold problem has been power-sharing. On the one hand, it entailed an inter-ethnic power-sharing (in response to point a), on the other hand, it entailed a sharing of the 'cake' between political elites (in response to point b). While the first constitutes one of the gains of Arusha, the second has caused some perverse effects which will be discussed briefly below.

1. The first pillar and achievement of the Arusha Agreement is without any doubt Burundi's **politico-ethnic reconciliation and pacification** through typically consociational mechanisms. Rather than opting for 'ethnic amnesia', the Arusha Agreement acknowledged and institutionalised ethnic divisions.[7] At the same time, in order to progressively overcome the ethnic division, the Agreement set out to safeguard and promote national unity. The Arusha Agreement has reconfigured the Burundian state on the basis of this double principle of unity and diversity. Despite the extremely difficult context – where the generally favourable conditions for the introduction and maintenance of consociational power-sharing identified by the literature were not met – Burundi succeeded in implementing its own model of politico-ethnic reconciliation and pacification. Burundi has become a reference in the scientific literature and its success has been acknowledged by most authors - including those who are generally sceptical about the use of power-sharing as a conflict resolution mechanism.[8]

[6] M. Mbonimpa, Opinion – L'Accord d'Arusha : une panacée définitive?, *IWACU*, 1 novembre 2015

[7] For more details see S. Vandeginste, *Théorie consociative et partage du pouvoir au Burundi*, IOB Discussion Paper, 2006.04, Université d'Anvers, février 2006.

[8] I. Spears, "Africa's Informal Power-Sharing and the Prospects for Peace", *Civil Wars*, Vol. 15, N° 1, 2013, p.37-53.

2. A second achievement, closely connected to the first, is **minority protection**. Given the demographic composition of Burundi, with an overwhelming Hutu majority, this necessarily implies an over-representation of the ethnic minority in the political, administrative and security institutions of the state. Therefore, quotas were agreed upon and a sophisticated and tailored electoral system was designed in Arusha. Inevitably, the precise terms of this compromise did not entirely satisfy all concerned parties.[9]

3. Institutional stability in Burundi has been repeatedly jeopardised since the country's independence through military coups (and failed coup attempts). The Arusha Agreement put forward the **prevention of *coups d'état*** among its solutions to the conflict.[10] *A fortiori*, the mono-ethnic *coup d'état* needed to be prevented. To achieve this goal, the Agreement provided for (i) civilian supremacy over military affairs, and (ii) the gradual correction of (mainly ethnic and regional) imbalances in the composition of the defence and security forces.[11]

4. A fourth Arusha achievement relates to the **institutional legitimacy** of the State. This is based, on the one hand, on the respect for the legal framework that determines the composition, powers and functioning of institutions. Legitimacy also requires the protection of institutions against interference by influential actors (principles of legality and of the rule of law). On the other hand, the legitimacy of institutions is based on their capacity to integrate - and generate trust among - all segments of Burundian society (principle of representation).[12]

5. Finally, a fifth achievement of Arusha consists of the respect of a certain number of **democratic and rule of law principles:** separation of powers, respect for fundamental rights, multi-party elections, etcetera.

In what follows, the paper will address the question of how these five achievements can be preserved. More precisely, it looks into **how the text (*the letter*) of the Arusha Agreement which enshrines the five achievements, can be protected**. Another Arusha achievement – which is not covered by this paper – does not concern the letter but ***the spirit*** of Arusha, i.e. the commitment of Burundi's political elites to resolve their disputes through non-violent dialogue. The spirit of Arusha does not need to be part of our analysis, it is an underlying assumption. Indeed, insofar the spirit were not or no longer accepted by certain stakeholders, the five main principles summarised above would inevitably be disrespected.

Finally, it is important to mention three perverse effects of the Arusha Agreement. Although they will not be the subject of analysis of the paper, it is relevant to mention them so as to demystify a dimension of the Arusha Agreement. The Agreement not only contained a blueprint of the post-conflict Burundian state, but also a *deal* between political elites. The first perverse effect of this deal is related to the impunity for human rights violations, which the

[9] On Tutsi side, some parties demanded parity at all levels (See Appendix I to the Arusha Agreement, *Explanatory Commentary on Protocol II*, Section B.2.) and an alternating presidency between politico-ethnic families (see the Draft Constitution proposed by some political parties of mainly Tutsi origin in 2004, article 84). On Hutu side, some parties considered this a violation of the principle, 'one man, one vote' and of majoritarian democracy (see also A.A. Nyamitwe, *Démocratie et ethnicité au Burundi*, Paris, Lethielleux, 2009).

[10] Protocol I, Chapter II, article 5, paragraph 7.

[11] Protocol II, Chapter I, article 11 (which refers, in its first paragraph, to articles 10 and 11 of Protocol III regarding the principles of organisation of the defence and security forces).

[12] Protocol I, Chapter II, article 5, paragraph 2.

text of the Arusha Agreement rhetorically rejected but which in practice, with the tacit consent of Burundi's international partners, was never addressed.[13] This sends the perverse signal to political elites that the control of political and military power provides protection against any demand for accountability. A second perverse effect is tied to the elites' learning curve. Arusha has taught them that power-sharing negotiations constitute an alternative option to accede to power if a democratic electoral victory is not feasible.[14] Finally, Arusha did not offer a solution to all governance problems. In fact, while Arusha was to a large part respected, other governance deficiencies (corruption, neo-patrimonialism, authoritarianism, etc.) subsisted.

3. The Hybrid Nature of the Arusha Agreement and its Relationship with the Constitution

The five achievements identified above are laid down in several provisions of the Arusha Agreement. This begs, first, the question what is the nature of the text of the Arusha Agreement. The analysis of this issue will be preceded by a brief overview of the structure of the Agreement. Next, the current constitutional status of the Arusha Agreement will be discussed.

3.1. Overview of the structure of the Arusha Agreement

The Arusha Peace and Reconciliation Agreement for Burundi consists of five articles, five protocols and five annexes. The protocols are:

- Protocol I. Nature of the Burundi conflict, problems of genocide and exclusion and their solutions
- Protocol II. Democracy and good governance
- Protocol III. Peace and security for all
- Protocol IV. Reconstruction and development
- Protocol V. Guarantees on implementation of the agreement

The annexes deal with the pledge by participating parties (Annex I), the structure of the national police force (Annex II), the ceasefire agreement (Annex III, a blank page at the time of signing the Agreement[15]), the report of Committee IV. Reconstruction and Development (Annex IV) and the implementation timetable (Annex V).

[13] See, for example, S. 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*, Vol. 29, N° 2, 2011, p.189-211.

[14] See, for example, S. Vandeginste, "Burundi's electoral crisis: back to power-sharing politics as usual?", *African Affairs*, N° 114, 2015, p.624-636.

[15] This is where article 2 of the Global Ceasefire Agreement of 16 November 2003 between the Transition Government and CNDD-FDD should be situated, which states that the Global Agreement *"is an integral part of the Arusha Peace and Reconciliation Agreement for Burundi. It revokes all earlier conflicting provisions of the Arusha Agreement vis-à-vis the CNDD-FDD Movement"*.

3.2. Typology of the provisions of the Arusha Agreement

The text of the Arusha Agreement is characterised by its hybrid nature.[16] It constitutes, in the first place, a political agreement between an amalgam of signatories. These are the government, the national assembly, seventeen representatives of political parties (other political parties were added afterwards) and a number of international co-signatories[17], among others the mediator Nelson Mandela. It is worth noting that the group of signatories of course did not have any legal authority or normative power of itself, neither under Burundian law nor for signing an international treaty. Nevertheless, given the objectives put forward by the text of the Agreement[18], the wording of several provisions[19] and considering the pledge made by the signatories (including the government and the national assembly that declared *"to be bound"* by the Agreement) who resolved to ensure its effective implementation, it is clear that the Arusha Agreement had the intention, among other things, to create legal rules that go beyond the mere 'contract' between signatories.[20]

The threefold typology of the provisions of the Arusha Agreement is illustrated with examples, in function of their non-legal or legal (and, if so, constitutional) nature.

1. First, certain provisions of the Arusha Agreement have a normative purpose whereas other provisions do not. As an example of the latter, reference is made to the two first articles of the first Chapter of Protocol I which offers an analysis of the historical causes of the Burundian conflict during the pre-colonial and colonial conflict. These two articles, sub-divided in ten provisions, obviously **do not have any normative purpose.**
2. Other provisions *do* have a **normative purpose** insofar as they contain rules (concerning rights, obligations, powers, missions, procedures, etcetera) that the signatories wished to see incorporated in the law of Burundi or in agreements between Burundi and its international partners. For example, article 27 of Protocol III, Chapter III (Permanent ceasefire and cessation of hostilities) can be mentioned, which arranges the establishment and functioning of the Ceasefire Commission (its composition, its missions, way of operating, etcetera). These provisions clearly have a normative purpose, but the signatories clearly did not intend to give them a constitutional status.
3. Certain provisions of the Agreement have a **very particular normative purpose.** They lay the foundations of two constitutional frameworks, one for the transition, the other for the post-transition period.

[16] The confusion around the legal status of a peace agreement is not at all unique to the Burundian case. For an excellent analysis, see C. Bell, *On the law of peace. Peace agreements and the Lex Pacificatoria*, Oxford University Press, 2008. Concerning the 'cohabitation' between a constitution and political agreements during periods of transition, see also P. Mambo, "Les rapports entre la Constitution et les accords politiques dans les Etats africains: réflexion sur la légalité constitutionnelle en période de crise", *Revue de droit McGill*, Vol. 57, n° 4, 2012, p.921-952.

[17] Article 4 stipulates that the co-signatories also affix their signatures *"as witnesses and as an expression of their moral support for the peace process"*.

[18] See the presentation of the achievements in the first section of this paper.

[19] See, *inter alia*, the first article of the Agreement (*"The Parties accept as binding […]"*).

[20] See, in this regard, the first Annex of the Agreement (*"Pledge by participating parties"*).

(i) The constitutional principles of the transition period can be found in **Protocol II, Chapter II** ('Transitional Arrangements').[21] As specified in article 12, it deals with a set of exceptional and special arrangements pending the entry into force of a Constitution that is in conformity with the constitutional principles put forward for the post-transition period. Chapter II contains provisions relating to the functioning of political parties during the transition period, the transition parliament, judicial reform, reform of the administration, etcetera. On this basis, the Transition Constitution of 28 October 2001 was adopted. The Transition Constitution repeatedly refers to the Arusha Agreement[22]. Taken together, these different references indicate a willingness of the constitutional assembly to grant to the Agreement a constitutional status equal – or even superior – to that of the Transition Constitution itself. Indeed, the latter does not allow its own amendment if that is in contradiction with the Arusha Agreement.[23]

(ii) The constitutional principles of the post-transition period are laid down in **Protocol II, Chapter I,** ('Constitutional Principles of the Post-Transition Constitution'). The signatories of the Arusha Agreement committed themselves to ensuring that a constitutional text was drafted in conformity with the principles set forth in this chapter. The chapter consists of 11 articles (fundamental values, general principles, charter of fundamental rights, political parties, elections, the legislature, the executive, local government, the judiciary, the administration, defence and security forces). Taken together, these articles constitute – at least – the bedrock and primary source of the Constitution. Both in the Arusha Agreement[24] and in the Transition Constitution of 28 October 2001[25] it was foreseen that the Constitutional Court would verify whether the draft post-transition constitution adopted by parliament was in conformity with the Arusha Agreement, before the text would be submitted to a referendum. This clearly shows (i) the intention to conform the post-transition constitution to the Arusha Agreement, and (ii) that the signatories of the Agreement as well as the constitutional assembly in October 2001 saw in the Constitutional Court a guardian angel of the Arusha Agreement. We will further address this below.[26]

This third type of provisions of the Arusha Agreement clearly entailed the exercise of **original constituent power.** This power does not rely on any pre-existing legal text. It draws its validity and its legitimacy from itself, as if there was a legal void that needed to be filled.[27] The signatories of the Agreement thus granted themselves the power to build a new constitutional order and to draft a new constitution, while committing themselves to submitting the text of the

[21] The provisions for transitional justice mechanisms contained in Protocol I – rather than in Protocol II, Chapter II – have also been incorporated in the Transition Constitution of 28 October 2001 (articles 228 – 233), but are no longer included in the Constitution of 18 March 2005.

[22] For example, regarding the composition of the government, the oath of the President of the Republic and the crime of high treason. These explicit references to Arusha no longer appear in the current Constitution.

[23] Article 256 of the Transition Constitution of 28 October 2001.

[24] Protocol II, Chapter II, article 15, paragraph 5.

[25] Article 183, 6°

[26] The Court has never ruled on the conformity of the Post-Transition Constitution with the Arusha Agreement. See the decisions of the Constitutional Court in the cases RCCB 103, 104, 105 and 108, Decision of 27 October 2004.

[27] In the case of Burundi, this gap was the result of the *coup d'état* on 25 July 1996. To temporarily bridge the gap, two interim texts were adopted. (Decree of 13 September 1996 on the organisation of the institutional system of the transition and the Constitutional Act of the transition of 6 June 1998).

constitution for approval by way of referendum. The Constitution of 18 March 2005 – currently in force – which is based on the Arusha Agreement has indeed been adopted by a referendum on 28 February 2005.

The original constituent power that was exercised in Arusha is not to be confused with the **derived constituent power** provided for in Title XIV ('Of the Revision of the Constitution') of the Constitution of 18 March 2005. Derived constituent power is exercised in accordance with the procedure established by the constitution that is subjected to revision. Limitations may be imposed upon the derived constituent power, namely when the constitution itself lists a number of entrenched (or 'intangible') provisions. We will return to this issue below.

3.3. Consequences for the constitutional status of the Arusha achievements

What is the relevance of the above for the analysis of the Arusha achievements and their safeguarding?

First, the provisions which spell out the five Arusha achievements are part of Protocol II, Chapter I. In other words, they are the result of the exercise of original constituent power. This grants to these provisions a very particular status that goes far beyond that of a mere political agreement. Also, because of their particular purpose, their nature is different than the nature of the provisions contained in other peace agreements that were signed at a later date, such as the General Cease-Fire Agreement between the transition government and the CNDD-FDD of November 2003.

Next, in order to further clarify the current constitutional status of the Protocol II provisions upon which the Arusha achievements are based, two questions must be addressed. The answer to those questions depends, in part, on the conformity between the text of the Arusha Agreement and the Constitution of 18 March 2005, and on the consequences of possible discrepancies between the two texts.

(i) Let us assume, for a moment, that there is such conformity. In that case, given that the two texts are identical, one may argue, at first sight, that the text of the Arusha Agreement is now redundant, because its provisions with a constitutional purpose were transposed and incorporated in the current Constitution. The case could be made that, as a result, when respecting the Constitution, one also respects, a priori, the Arusha Agreement. In that case, why still refer to the Arusha Agreement? At first sight, the Agreement seems to be a redundant document. However, in this scenario, the question remains whether the articles of the Constitution that correspond to the Protocol II provisions upon which the Arusha achievements are based, can be revised? In other words, **might the exercise of derived constituent power run against constitutional principles laid down in the Arusha Agreement? Or are the principles laid down in Protocol II, Chapter I of the Arusha Agreement entrenched and intangible?** In concrete terms, to illustrate this question, is it permitted – through a procedure that is in accordance with Title XIV - to amend article 164 of the Constitution which deals with the ethnic composition of the National Assembly and to remove the quotas that guarantee a representation of Hutu (60%), Tutsi (40%), women (30%) and Twa (3 MPs)?

(ii) This first question arises, *a fortiori*, also in case of a discrepancy between certain provisions of the Arusha Agreement and their corresponding articles in the Constitution of 18 March 2005. In this scenario, an additional major question arises. It concerns the hierarchy of norms. **When there is a discrepancy between the Arusha Agreement and the Constitution, which text prevails over the other?**

Given the current political crisis, the relevance of these two questions stands beyond doubt and needs no further attention here. Below, we first address the question of conformity between the two texts. Next, the problem of hierarchy of norms will be briefly analysed, including the possible intangibility of the constitutional provisions that relate to the Arusha achievements.

3.3.1. Conformity between the Arusha Agreement and the Constitution: intended but not realised

Both the signatories of the Arusha Agreement as well as the constitutional assemblies of October 2001 and March 2005[28] wished that there was a conformity between the two texts. Therefore, when interpreting constitutional provisions, it is of course very reasonable to use the Arusha Agreement in order to reconstruct the intention of the constitution drafters. This is also how – be it with a surprising result – the Constitutional Court proceeded in its decision of 4 May 2015 in the case RCCB 303 (discussed further below).

Despite the intention of the signatories of Arusha and of the constitutional assemblies, are there any differences between the Arusha Agreement and the Constitution, specifically concerning the provisions related to the Arusha achievements? More research is needed to study this question in greater detail. But a first reading clearly shows that there indeed are some notable differences between the Arusha Agreement and the Constitution. Some examples are (no exhaustively) mentioned here. The differences listed may, at first sight, give the impression that these are only a matter of details, but the first example has convincingly demonstrated the importance of what may at first glance seem like a detail.

> A well-known example is found in the difference between the Constitution and Protocol II, Chapter I, article 7 ('The Executive'), paragraph 3 of the Agreement that stipulates, explicitly, that *"No one may serve more than two presidential terms"*. This phrase was not included explicitly in article 96 of the Constitution. The ambiguity that followed, especially given the transitional provision contained in article 302 (which provides for the indirect election of the first president after the transition), resulted in a legal uncertainty that would not have existed if the constitution drafters had copied the Arusha Agreement literally.
>
> Protocol II, Chapter I, article 6 ('The Legislature'), paragraph 17, provides that the Senate approves *"solely"* the appointments listed exhaustively in that provision. This includes the governors, the state prosecutors, etcetera. However, Article 185, paragraph 9, of the Constitution adds ambassadors and members of the Independent National Electoral Commission (CENI) to the 'restricted' list. Can the President of the Republic appoint the members of the CENI without approval of the Senate, in accordance with the Arusha Agreement? Or does he have to comply with the Constitution, even though it contradicts the Arusha Agreement?
>
> Protocol II, Chapter I, article 6 ('The Legislature'), paragraph 11, states that *"[t]he National Assembly's Bureau shall have a multiparty character, while the Senate's Bureau shall be of a multi-ethnic character"*. Such a provision is not included in the Constitution. If, concerning the composition of its bureau, the Senate's Internal Regulations do not respect multi-ethnicity, can the Arusha Agreement be invoked to challenge them?
>
> Protocol II, Chapter I, article 7 ('The Executive'), paragraph 6 of the Agreement provides for the right of political parties and party coalitions that have received more than one-twentieth of the votes

[28] See Explanatory Statement, paragraph 3, *"The provisions of this Draft Constitution are the emanation of the Agreement […]. As such, they are, all, in conformity with it"*. (Original: *"Les dispositions du présent projet de Constitution sont l'émanation dudit Accord […]. A ce titre, elles lui sont, toutes, conformes"*.)

to submit a list of persons to serve as ministers. If the President dismisses a minister, she/he must choose a replacement from a list submitted by the party or coalition of that minister. Article 129 of the Constitution only requires a consultation with the party when a minister is revoked. There is no mention of a list of candidates from which the President must choose the minister. Nor is there any reference to party coalitions.[29]

Protocol II, Chapter I, article 9 ('The Judiciary') paragraph 22 sets out the jurisdiction of the Constitutional Court. On several points, this paragraph differs from article 228 of the Constitution (which deals with the same subject). (See in more detail below.)

Protocol II, Chapter II, article 20 ('Elections') paragraph 4f grants the competence to the CENI to *"ensure through appropriate rules that parties do not operate in a manner that incites ethnic violence"*[30]. Article 91 of the Constitution limits this competence to the period of electoral campaigns.

Protocol, Chapter I, article 9 ('The Judiciary') paragraph 15 stipulates that the proceedings are public *"except where the interests of justice or a compelling public interest require otherwise"*. Article 206 of the Constitution provides for hearings in closed session *"when the publicity is dangerous to the public order or to morality"*.[31]

A final example relates to a divergence between the Arusha Agreement and a law. Protocol II, Chapter I, article 9 ('The Judiciary') paragraph 8 provides that the *Ubushingantahe* Council *"shall sit at the level of the colline. It shall administer justice in a conciliatory spirit"*. The *Ubushingantahe* Council does not appear in the Constitution. However, it is mentioned in article 78 of the Code on Judicial Organisation and Competence of 17 March 2005. If the legislature decides to remove the *Ubushingantahe* Council from this Code, would it be possible to invoke a violation of the Agreement? Who would be allowed to do so and before which body?

These examples illustrate how important it is to clarify the current constitutional status of the Arusha Agreement. In particular, they illustrate the relevance of the question of the hierarchy of norms mentioned above. Furthermore, they raise the question which mechanism may verify the conformity of a law, a decree or other act with the Arusha Agreement, an issue discussed further below.

3.3.2. Supra-constitutional and intangible provisions?

On 4 May 2015, the constitutional legal status of the Arusha Agreement – or, more precisely, of the constitutional corpus it contains – was the subject of a judgment of the Constitutional Court, *"the jurisdiction of the State in constitutional matters"*.[32] In its decision on the interpretation of articles 96 and 302 of the constitution, the Constitutional Court for the first time shed some light on the current constitutional status of the Arusha Agreement. It justifies[33] its reading of the Arusha Agreement as follows: *"In order to understand the spirit of the Constitution, it is useful to first understand the document which mostly inspired the drafters of the 2005 Constitution. To establish the intention of the drafters, one may examine the documents which inspired the Burundian Constitution drafters and therefore, special attention will be given to the Arusha Peace*

[29] Concerning the interpretation of the words 'political parties' in article 129, see Constitutional Court, case RCCB 312, Judgment, 17 August 2015.

[30] This article of Chapter II ('Transitional Arrangements') was also incorporated in the constitutional principles of the post-transition period through a reference in article 5, paragraph 5.

[31] Unlike the other examples, this one does not concern the Arusha achievements.

[32] Article 225 of the Constitution.

[33] In doing so, it contradicts the petition by the senators in this case. The applicants had suggested *"that the Arusha Peace and Reconciliation Agreement for Burundi is not in itself the constitution and escapes the jurisdiction of the Court"*. (Original: *"que l'Accord d'Arusha pour la Paix et la Réconciliation du Burundi n'est pas en soi la constitution et échappe de droit à la compétence de la Cour de céans"*.)

and Reconciliation Agreement for Burundi, a genuine, unavoidable and indispensable document from which inspiration was drawn by the Burundian Constitution drafters"[34]. The court thus confirms that the Arusha Agreement constitutes an important source of constitutional law. According to the Court, the Agreement constitutes the "*bedrock*" of the Constitution, "*particularly the sections relating to constitutional principles*".[35] It ruled that both the letter and the spirit of the Agreement need to be respected[36] and added that "*whosoever violates the main constitutional principles of the Arusha Agreement cannot claim to respect the Constitution*"[37].

The main matter of concern here is to know where the Arusha Agreement and the Constitution can be ranked in the hierarchy of norms. In its decision in the case RCCB 303, the Court referred to texts that "*inspired the Burundian drafters but never became supra-constitutional*"[38], including the Arusha Agreement and the Charter of National Unity. It reiterated that though the Arusha Agreement "*is not supra-constitutional, it is nonetheless the Constitution's bedrock*"[39]. This position of the Court is remarkable since no reference is made to the explanatory statement (*exposé des motifs*) of the draft Constitution. However, the explanatory statement states the following about the sources of inspiration for the draft post-transition constitution: "*The contribution of the Arusha Peace and Reconciliation Agreement for Burundi was predominant. The provisions of this draft Constitution are the emanation of the Agreement which is itself a sort of supra-constitutional reference*"[40]. Given the divergence between the explanatory statement and the decision of the Court, we must conclude that the Agreement's status in constitutional law – supra-constitutional or equivalent? – remains uncertain. Below, we include some suggestions on how to clarify the Arusha Agreement's constitutional status.

As indicated above, another relevant issue here is that of the revision of the Constitution and certain entrenched, intangible provisions. While the Transition Constitution of 28 October 2001 did not allow for a revision if it was contrary to the Arusha Agreement[41], the current Constitution in Titre XIV ('Of the revision of the Constitution') does not make the same explicit reference to the Arusha Agreement. Article 299 stipulates that "*No procedure of revision may be retained if it infringes the national unity, the cohesion of the Burundian People, the secularity of the State, the reconciliation, the democracy or the integrity of the territory of the Republic*". Assuming that the Arusha Agreement does not have a supra-constitutional status (which is not clear, see above) nothing seems to rule out a revision of the Constitution which would run counter to the Arusha Agreement. On closer reading, however, one could possibly read an implicit reference to the Arusha Agreement in article 299. This provision does not enumerate unamendable *articles*, but rather identifies intangible *principles*. Two of these intangible principles (national unity[42] and

[34] Constitutional Court, Case RCCB 303, Judgment, 4 May 2015, third page. Quotes in this working paper are based on a translation commissioned by the Pan African Lawyers Union. The original, French version of the judgment is available here with a personal commentary.

[35] *Ibidem*, fourth page. The reference to the main constitutional principles clearly constitute a reference to Protocol II, Chapter I.

[36] *Ibidem*, sixth page.

[37] *Ibidem*, fourth page.

[38] *Ibidem*, third page.

[39] *Ibidem*, fourth page.

[40] Para. 3. The explanatory statement was published in *Le Renouveau* on 10 November 2004.

[41] Article 256

[42] The notion of unity is clearly also to be understood in light of the Charter of National Unity (original: *Charte de l'Unité nationale*) (see, *inter alia*, article 64 of the Constitution). This Charter, quite remarkably, granted itself the status of "*an irrevocable pact. No regime, no institution, no law, no provision of any kind whatsoever is authorized to repeal or to subtract from it.*" (Original: "*un pacte irrévocable. Aucun régime, aucune institution, aucune loi, aucune disposition de quelque nature que ce soit n'est habilité à l'abroger ni à s'y soustraire*").

reconciliation) are 'defined' in a preambular paragraph of the Constitution on the basis of the Arusha Agreement: "*Reaffirming our faith in the ideal of peace, of reconciliation and of national unity in accordance with the Agreement of Arusha for Peace and Reconciliation in Burundi of August the 28th, 2000 and with the Agreements of Cease-Fire*".[43] Article 299 could therefore be viewed as referring to the provisions of the Arusha Agreement that relate to national unity and reconciliation. These largely coincide with the provisions that correspond with the Arusha achievements. This reading of article 299 is most probably contested and therefor does not solve the issue of (possible) entrenchment of certain Arusha provisions.

3.4. How to clarify and uphold the constitutional status of the Arusha Agreement?

The current constitutional status of the Arusha Agreement is contested and – at least partly – uncertain. How can it be clarified? Four options are mentioned below, without any ambition to be exhaustive.

First, provided there is a political agreement on this point, the supra-constitutional and intangible status of Protocol II, Chapter I of the Arusha Agreement could be asserted on the occasion of a next constitutional revision. This could be done by adding in the preamble a paragraph identical to the one which is currently in the explanatory statement. Concretely, this could mean, for example, that the following paragraph is added: "*Reaffirming that the Constitution is the emanation of the Arusha Peace and Reconciliation Agreement for Burundi of which Protocol II, Chapter I constitutes a supra-constitutional reference".* In addition, an explicit reference to the Arusha Agreement could be reinserted – in accordance with Article 256 of the Transition Constitution of 28 October 2001 – in Article 299 which imposes certain limitations on the derived constituent power.

A second option, also in the case of a revision of the Constitution, would be to insert a new article which would find inspiration in the current article 19 of the Constitution. Under this article, all the fundamental rights and duties proclaimed and guaranteed by international human rights treaties ratified by Burundi are "*an integral part of the Constitution*". Protocol II, Chapter I could be explicitly added to this 'constitutional bloc' (the whole of constitutional legal standards applied by the Constitutional Court). Accordingly, the Constitutional Court would be able to make direct application of this Chapter in the same way as it does with international human right treaties.[44]

As a supplement to these two options, the following paragraph could be added to article 228 which sets out the powers of the Constitutional Court: "*verify whether the draft revision of the Constitution is consistent with the constitutional principles proclaimed by the Arusha Peace and Reconciliation Agreement for Burundi*".

Finally, outside the scenario of a constitutional revision, the Constitutional Court could clarify or uphold the constitutional status of the Arusha Agreement. (In its decision RCCB 303, the Constitutional Court has already confirmed its competence to rule on the status of the Agreement in constitutional law.) The Court cannot do so *proprio motu*, on its own initiative, but it could be invited through a request addressed to the Court (see below). Specifically, the Court could for instance be asked to interpret article 299 referred to above, in particular the concepts of national unity and reconciliation and their relationship with the Arusha Agreement. In the

[43] Emphasis added.

[44] For a recent case, see the decision of the Constitutional Court in the case RCCB 294, 20 October 2014, in which the Court directly applied the Convention on the Rights of the Child.

petition, the attention of the Court could be drawn to the explanatory statement which favours a supra-constitutional status of the Arusha Agreement. In this scenario, it remains to be seen what the Court would decide. If the Court confirms its case law in line with decision RCCB 303, then the Arusha Agreement would not have a supra-constitutional status.

4. Institutional protection for the Arusha achievements

In light of these observations, this paper aims to encourage a debate around the reinforcement of a double mechanism to ensure better compliance with the Arusha Agreement. Instead of proposing the establishment of a new institution – Burundi has no shortage of institutions – the reconfiguration of two existing institutional mechanisms (one political, the other judicial) is suggested as guardian angels of the Arusha Agreement.

Before analysing the role the Senate and the Constitutional Court currently play and could play in the future, it is important to say something about the desirability and the necessity of such protection mechanism(s). Might a simple reiterated commitment of the political actors not suffice? The Arusha Agreement, like any peace agreement, is primarily a political agreement. In two extreme scenarios it would indeed not be opportune to conduct a study on the (re)establishment or reinforcement of the institutional protection mechanisms. If the political will to ensure enforcement of the Arusha Agreement is entirely absent, then no legal rule or protection mechanism (parliamentary or judicial) would be able to save the Agreement. The other extreme would be if there is a total and unconditional willingness of all political parties to respect the spirit and letter of the Agreement all times and in all circumstances (even if their own interests are contrary to it). In this scenario there would be no need for a protection mechanism. However, reality does not correspond to either of these two scenarios. The political crisis in Burundi shows, convincingly, that in case of a disagreement about the interpretation and status of the Agreement or one of its politically sensitive provisions (and there are many), it is risky to rely merely on dialogue and political consensus to uphold the Agreement. Support for the Agreement on the part of political actors may be too conjunctural and contingent.[45] As the crisis shows, the respect for the social contract which the Arusha Agreement contains should not depend on short term political imperatives. A similar finding applies to the role played by an international political guarantor who could, in theory, replace or supplement to domestic political actors. The positioning by the international partners - including their commitment to uphold the Arusha Agreement - depends, among other things, on parameters and considerations that have nothing to do with respecting the Agreement. In conclusion, it is relevant to study the protection mechanisms (their powers, composition, functioning, etcetera) of the Agreement and how to reinforce them. This paper only initiates such a reflection and encourages further analysis.

As demonstrated above, some provisions of the Arusha Agreement have a particular legal purpose. Their enforcement can be taken up by a judicial mechanism. This particularly applies to Protocol II, Chapter I. However, other provisions of the Agreement are of a different, non-justiciable nature. It would be difficult for a judicial mechanism to monitor the implementation of these provisions. Here lies a role for a protection mechanism of a political nature. This

[45] Some scenarios, all of which have materialized in Burundi's recent political history, illustrate this risk. A political actor in favour of the Agreement can enter into a coalition with a political ally hostile to the Agreement, and depending on the relative strength of the two partners, reconsider his support to respecting the Agreement. In another example, a political actor in favour of the Agreement may run the risk of being sanctioned by other members of his own party opposing the Agreement. Faced with this risk, he has the choice to leave or stay in the party ranks. Or, a political actor can be in favour of the Agreement when it is in his interest and change his mind when his interests are better served elsewhere.

mechanism could monitor the implementation of the Agreement beyond what has been defined as the Arusha achievements. This could include, for instance, Protocol IV. Reconstruction and development.

4.1. The Senate, a political protection mechanism

There is a clear gap when it comes to the monitoring and enforcement of the implementation and respect of the Arusha Agreement. There is no political mechanism, neither national nor international, in charge of monitoring the overall implementation of the Agreement. Under Protocol V, the establishment of an Implementation Monitoring Committee of the Agreement was provided for. This Committee was composed of representatives of the signatories: Burundians *"designated for their moral integrity"* and representatives of the UN (Chair of the Commission), the OAU, and the Regional Peace Initiative on Burundi.[46] The Transition Constitution of 28 October 2001 endorsed the creation of the Commission, while adding that *"the mandate of Implementation Monitoring Committee of the Agreement expires at the end of the transition period"* (in principle a period of 36 months that in reality was extended by a couple of months).[47] Logically, the Implementation Monitoring Committee no longer appears in the current Constitution.

The final provision of the Agreement provides that *"The heads of State of the region shall also constitute guarantors of the Agreement"*. This provision has become topical again on 6 July 2015 when, in full electoral crisis, Ugandan President Museveni was appointed as mediator by the East African Community. Co-signatory to the Agreement, the Ugandan president has been welcomed by some political actors as guarantor of the Arusha Agreement, while to our knowledge he has not defined his mission in these terms himself.

The most promising political 'guardian angel' is the Senate. Under the Transition Constitution, the Transition Senate was in fact responsible to *"ensure the respect for the implementation of the Arusha Agreement"*[48]. Under the terms of the Arusha Agreement, the Senate was also supposed to play this role in the post-transition period. Indeed, Protocol II, Chapter I, Article 6 paragraph 16 provides that *"The Senate shall have the following functions: […] To monitor compliance with the present Protocol"* (paragraph f). This role is however not included in article 187 of the Constitution of 18 March 2005 which determines the competences of the Senate. This example can therefore be added to the above-mentioned list of discrepancies between the Arusha Agreement and the Constitution. Nevertheless, the Constitution gives the Senate the competence of *"controlling the application of the constitutional provisions which require ethnic and gender representativeness and balances in all the State structures and institutions"*[49], a task clearly inspired by the Arusha Agreement.

It would go beyond the scope of this paper to study in detail the role the Senate has played so far - since 2005 - in monitoring compliance with the Arusha Agreement. Nevertheless, a report can be mentioned, published by the Senate on its activities during the legislature 2005-2010. It refers to three senatorial inquiry commissions on the respect of balances within the national defence force, the public administration and the national police, respectively in 2007, 2008 and 2009.[50]

[46] Protocol V, article 3 of the Arusha Agreement.

[47] Article 245

[48] Article 147, 6°

[49] Article 187, 5°

[50] Senate of Burundi, *Le Sénat au Burundi. De la période monarchique à la troisième législature*, Bujumbura, 2010, p.56-57.

Follow-up research is needed to study reforms (of the competences, the rules of procedure, functioning, etcetera) that may help to rehabilitate and strengthen the role of the Senate as a guardian angel of the implementation of the Arusha Agreement.

4.2. The Constitutional Court, a judicial protection mechanism

The Constitutional Court is the judicial mechanism in charge of ensuring the respect for the constitutional order, which finds most of its inspiration in the Arusha Agreement. Under the Agreement, the Court was conceived as a strong and independent judicial mechanism that can act as a guarantor of the Constitution, *"even against the Executive and the Legislature"*[51]. Therefore, the Court is an 'obvious' protection mechanism of the Agreement. However, for the Constitutional Court to fully play this role, some reforms are needed, both in terms of the jurisdiction of the Court as well as its legitimacy and its functioning. The current paper is limited to the jurisdiction of the Court as defined by article 228 of the Constitution. For each of its powers, we indicate the extent to which a reference is made to the Arusha Agreement and/or to which extent the Agreement has been referred to by the Court. Possible reforms are suggested to remedy the shortcomings identified. Follow-up research is needed to study the appropriate reforms of its composition, the independence of the Court and its members, its procedure and its much needed autonomy (budgetary and otherwise).

(i) Decide on the constitutionality of the laws and the regulatory acts taken in the matters other than those belonging to the domain of the law (art 228, para. 1, first bullet point)

By 'law' must be understood a legislative act passed by parliament in matters defined by article 159 as the domain of the law. The matters outside the domain of the law have a regulatory character (art. 160) and are subjected to regulatory power exercised by the President of the Republic by decree (art. 107). In addition to this first bullet point, the second paragraph of article 228 requires that organic laws (before their promulgation) as well as internal regulations of the National Assembly and the Senate (before their implementation) are subjected to a compulsory constitutional review.

As a result, a number of texts currently are not covered by the constitutionality review done by the Court. These are: questions submitted to referendum (art.198, 295 and 298), a draft amendment of the Constitution (art. 297-300), a presidential decree adopted to implement a law (art. 107), an order taken by the Vice-President to implement a presidential decree (art. 126) and a ministerial order (art. 134). The scope of acts covered by the first bullet point of Article 228, para. 1, is more limited than what was provided for in the Arusha Agreement. The Agreement granted to the Court the jurisdiction to rule on the constitutionality of all decisions taken by the executive branch[52].

By 'constitutionality' should be understood the conformity of the act in question with the Constitution of 18 March 2005. To our knowledge, when exercising its jurisdiction on the basis of article 228, para. 1, first bullet point, the Court has never verified compliance with the Arusha Agreement. This causes no problem in the case of total conformity between the letter and spirit of the constitutional provision and the provision in the Agreement. However, in case of a discrepancy between the two texts, respect for the Agreement may be problematic.

[51] Arusha Agreement, *Appendix I. Explanatory commentary on Protocol II*, p.5

[52] Protocol II, Chapter I, article 9, para. 22 b) as contained in the Corrigendum to the Agreement.

Possible reforms to be considered:

- Add – partly or wholly – the acts currently not subjected to constitutional review by the Court;
- Add conformity with the Arusha Agreement to the constitutional review process performed by the Court. Several options are possible:
  a) Clarify the constitutional or supra-constitutional status of the Arusha Agreement (see the suggestions above in Section II.4.); and/or
  b) Add an explicit reference to the Arusha Agreement – either as a whole or only to Protocol II 'Democracy and good governance', Chapter I 'Constitutional principles of the post-transition Constitution' – in article 228, paragraph 1, first bullet point and paragraph 2.[1]

(ii) Ensure the respect for this Constitution, including the Charter of Fundamental Rights, by the organs of the state, [and] the other institutions (art. 228, para. 1, second bullet point)

This is the most enigmatic provision of article 228. It does not appear in either the Constitution of 13 March 1992 (article 151), nor in the Arusha Agreement (protocol II, Chapter I, article 9, para. 22 that determines the powers of the Constitutional Court). Two things in particular are not clear from reading this provision. Firstly, how can the Court *"ensure the respect"* other than by the exercise of its other powers (as defined by the other bullet points of the same paragraph)? Secondly, what are *"the organs of the State, [and] the other institutions"* which this provision refers to?[53]

To our knowledge, the Constitutional Court has used this provision only once to establish its competence. This happened in the case RCCB 213, judgment of 13 June 2008[54], which was highly controversial for allowing CNDD-FDD dissident members of parliament to be replaced.

The Court has never made use of this provision to assure respect for the Arusha Agreement. In theory, it could do so in the future, given that in its decision RCCB 303 of 4 May 2015, it has declared that *"the spirit and the letter of Arusha Peace and Reconciliation Agreement must be respected"* and that *"whosoever violates the main constitutional principles of the Arusha Agreement cannot claim to respect the Constitution"*. Since the second bullet point tasks the Court to assure the respect for the Constitution, it follows that the Court, according to its own reasoning, can

[53] What was the intention of the constitutional assembly? Given the explicit reference to the Charter of Fundamental Rights, did the assembly want to create a court of human rights in the broadest sense, namely a judicial institution mandated to establish human rights violations committed by all organs and institutions of the State (e.g. police, prison wardens, etc.)? It is beyond the scope of this paper to analyse this provision in more detail. Nevertheless it is worth mentioning that such an idea would be far removed from the initial idea of the designers of the first Burundian Constitutional Court. The Constitutional Commission, the author of the draft constitution in 1991, provided that: *"The constitutional court would not have to deal with practical cases of human rights violations, which belong to the jurisdiction of the ordinary courts, but simply with the constitutionality of laws and regulations intended to violate human rights"*. (Original: *"La cour constitutionnelle n'aurait pas à connaître de cas pratiques de violations de droits de l'homme, qui sont de la compétence des tribunaux ordinaires, mais simplement de la constitutionnalité de lois et règlements censés violer les droits de l'homme."*) (Rapport sur la démocratisation des institutions et de la vie politique au Burundi, Bujumbura, August 1991, p.100)

[54] The decision is available here, with a personal commentary.

also assure the respect for the main constitutional principles of the Arusha Agreement (contained in Protocol II, Chapter I).

No reform to propose. However, a clarification of the nature and scope of article 228, para. 1, second bullet point, would be helpful.

(iii) Interpret the Constitution, at the request of the President of the Republic, of the President of the National Assembly, of the President of the Senate, of one quarter of the Deputies or of one quarter of the Senators (art. 228, para. 1, third bullet point)

This provision grants to the Court the competence to interpret the Constitution, while limiting the number of petitioners that can submit a motion to the Court for this purpose. This provision is applied quite often and has led to important case law.

In the case RCCB 303 (judgment of 4 May 2015, cited above), the Court based its competence on this provision. For the first time in the history of the Court, it draws on the Arusha Agreement as one of its primary sources to interpret the Constitution. However, in its most recent case law based on this third bullet point, the Court does not rely systematically on the Arusha Agreement. In its decision of 17 August 2015 in the case RCCB 312 concerning the interpretation of article 129 of the Constitution, the Court made no any explicit reference to the Arusha Agreement even though the Agreement deals explicitly with this article. Moreover, the Arusha Agreement provides arguments in support of the Court's interpretation of article 129. However, the Court chose not to invoke the Agreement.

Finally, while constituting the "*bedrock*"[55] of the Constitution, the Arusha Agreement does not form part of it. Therefore, the Court is not competent to interpret the Arusha Agreement in itself. In the present circumstances, the Court can rely on a reading of the Agreement to interpret the Constitution. However, no one can submit a motion to the Court asking it to interpret the Arusha Agreement or any of its provisions.

Possible reforms to be considered:

Three options are possible.

- The case could be made that a reform is not necessary, since the case law of the Court in its judgment RCCB 303 allows the Court to consider the Arusha Agreement *whenever it seems appropriate to do so*.
- However, a reform may be seen as necessary in order to compel the Court to seek inspiration in the Arusha Agreement, thus avoiding that judgment RCCB 303 remains an exception (which the more recent judgment in case RCCB 312 seems to suggest). In this case, it would be useful to add, in the third bullet point, an explicit reference to the Arusha Agreement (especially Protocol II, Chapter I) as a source to be considered when interpreting the Constitution.
- A more ambitious reform would be to allow the Court to interpret not only the Constitution (in accordance with the Arusha Agreement, cf. aforementioned option), but also any provision of the Arusha Agreement (not limited to those in Protocol II, Chapter I). In this scenario, a request for interpretation on the basis of the (amended) third bullet point could directly involve a provision of the Arusha Agreement.

[55] *Ibidem*, fourth page.

(iv) Decide on the regularity of the presidential and legislative elections and of the referenda and proclaim their final results (art. 228, al. 1, fourth bullet point)[56]

A large part of the case law of the Constitutional Court deals with electoral disputes. The competence of the Court in this area is specified further in the Law of 19 December 2002 governing the Court and the Electoral Code of 3 June 2014. These concern particularly matters of a technical nature (verification of provisional results, rectification of material errors, announcement of final results, annulment in case of irregularities concerning the ballots, etc.). Article 81 of the Electoral Code – which does not define the nature of the irregularities mentioned – stipulates that "*If the Constitutional Court notes irregularities that may have influenced in a decisive way the election results, it will annul the election completely or in part*".[57] To our knowledge, the Court has never used this article to sanction – through the annulment of an election – a lack of respect for the Arusha Agreement, for example regarding eligibility requirements of candidates.

The Independent National Electoral Commission (CENI) also conducts a control of a purely 'administrative' nature when assessing the eligibility of a candidate without applying the Arusha Agreement.[58]

Possible reforms to be considered:

- Redefine the control on "regularity" to include compliance of all aspects of the elections (list of candidates, eligibility, etcetera) with the Arusha Agreement;
- Clarify the respective competences of the Court and the CENI in this regard. Here, it would be appropriate to allow the CENI to petition the Court for an interpretation of the Constitution and/or the Arusha Agreement.

[56] The fifth ("*receive the oath of the President of the Republic, of the Vice-Presidents of the Republic and of the members of the Government before their entry into [their] functions*") and sixth ("*declare the vacancy of the position of President of the Republic*") bullet point of Article 228, paragraph 1, do not appear relevant for this analysis and are therefore not discussed here.

[57] Original: "*Si la Cour Constitutionnelle relève des irrégularités susceptibles d'avoir pu influencer d'une façon déterminante le résultat du scrutin, elle annule l'élection en tout ou en partie.*"

[58] See, *inter alia*, the Communiqué of the CENI of 12 June 2015 and S. Vandeginste, *La limitation constitutionnelle du nombre de mandats présidentiels: une coquille vide? Une analyse du cas du Burundi*, IOB Working Paper, 2014.04, juin 2014, p.8-11.

Conclusion

The Arusha Agreement enabled Burundi to make some remarkable progress.[59] Politico-ethnic reconciliation and pacification, protection of minorities as well as stability and legitimacy of institutions – all tailored to the particular case of Burundi – constitute the achievements of Arusha that the country cannot (yet) afford to lose. These gains are incorporated in a set of provisions of the Arusha Agreement. The Agreement as a whole is of a hybrid nature. Some of its provisions that have a constitutional purpose give a special but uncertain status to a part of the Agreement. The Constitutional Court of Burundi upheld that Protocol II of the Agreement is a source of constitutional law. The Court did not, however, endorse the intention of the constitution drafters to grant a supra-constitutional status to the Arusha Agreement. To answer the double question of the hierarchy of norms in case of a discrepancy between the Constitution and the Arusha Agreement, and a possible intangibility of the Arusha achievements, it is necessary to clarify the status of the Arusha Agreement under constitutional law. This can be done in the context of a constitutional revision or outside such a revision. Some options have been presented above.

The current crisis shows that a guardian angel of the Arusha Agreement is missing at a time when there is no political consensus on the Agreement (or some of its provisions). The Senate could (again, as initially intended) become its political protection mechanism, particularly with regard to the provisions of the Agreement that are not amenable to judicial enforcement. The Constitutional Court already provides for a judicial protection mechanism of the Agreement, but we have identified several shortcomings in terms of its jurisdiction. Some reforms have been put forward above. More in-depth research is needed to examine how the Senate can be restored as the guardian angel as intended by the signatories of the Agreement as well as on how to promote the much needed autonomy, legitimacy and independence of the Constitutional Court and of its members. Strengthening the role of the Court as a guardian angel of the Agreement would also have a beneficial effect on the other missions of this pillar of the rule of law.

This analysis intends to encourage a debate on the future of the Arusha Agreement, hoping that it will come out reinforced. On the other hand, if the Arusha Agreement and its protection mechanisms are shelved, Burundi may have to reinvent them one day (preferably without reproducing the perverse effects and shortcomings referred to above).

[59] Sylvestre Ntibantunganya has suggested organising a Round Table to assess the impact of the Agreement on the political, economic and social life of Burundi (*L'Accord d'Arusha pour la paix et la réconciliation au Burundi. Survivra-t-il dans un paysage politique burundais désormais dominé par les anciens mouvements politiques armés?*, Focode, Bujumbura, 2014, p.20).

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