BYPASSING THE PROHIBITION OF AMNESTY FOR HUMAN RIGHTS CRIMES UNDER INTERNATIONAL LAW: LESSONS LEARNED FROM THE BURUNDI PEACE PROCESS

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Abstract

Focusing on the case of Burundi, this article analyses the effectiveness of the international prohibition of amnesty for serious human rights crimes at the national level, in the context of complex war-to-peace transitions based on power-sharing deals between former opponents. On the one hand, the amnesty prohibition has clearly affected Burundi's peace process and its proposed transitional justice process. The prohibition found its way into national legislation and no amnesty was granted for genocide, crimes against humanity and war crimes. Throughout its involvement with the Burundian peace process, the United Nations has systematically opposed the use of amnesty legislation that does not respect the constraints imposed by international law. On the other hand, imperatives of political expediency and the desire to safeguard short term political stability have given rise to the establishment and creative use of a sophisticated bypassing mechanism. Through the combination of limitations imposed on the jurisdiction of the national criminal justice system, the use of temporary immunities and the delayed establishment of proposed transitional justice mechanisms, the amnesty prohibition has – so far – been most effectively circumvented. The case of Burundi offers interesting insights into the limits of the global 'justice cascade'.

1. INTRODUCTION

In his address to the Review Conference on the International Criminal Court in Kampala, Uganda in May 2010, United Nations (UN) Secretary-General Ban Ki-moon stated that the world is witnessing the birth of an age of accountability which is

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gradually replacing the old era of impunity. 'In this new age of accountability, those who commit the worst of human crimes will be held responsible',[1] whatever their rank or position. As part of that new international context, it has for more than a decade now been standard practice for the UN to no longer endorse peace agreements that promise amnesties for genocide, war crimes, crimes against humanity or other gross violations of human rights.[2] Such amnesties are generally considered to be contrary to States' obligations under various sources of international (human rights, humanitarian and criminal) law and a lack of endorsement by the UN can be seen as an indication for the existence of a prohibition of such amnesties under international law.

Among international legal scholars, however, opinions differ about the exact scope of the amnesty prohibition.[3] Also, little is known about the impact of this trend on the public interests the amnesty prohibition is supposed to serve, namely the actual reduction of impunity for human rights crimes or its deterrent effect.[4] However, it is clear that the amnesty prohibition has, at the very least, affected the strategies of

1 United Nations, Secretary-General, *'An Age of Accountability'. Address to the Review Conference on the International Criminal Court*, Kampala, 31 May 2010, p. 2.

2 See, *inter alia*, United Nations, Security Council, *Report of the Secretary-General on enhancing mediation and its support activities*, UN Doc. S/2009/189, 8 April 2009, para. 36; United Nations, Security Council, *The rule of law and transitional justice in conflict and post-conflict situations. Report of the Secretary-General*, UN Doc. S/2004/616, 23 August 2004, para. 10; United Nations, *Guidance Note of the Secretary-General. United Nations Approach to Transitional Justice*, March 2010, p. 4; Office of the United Nations High Commissioner for Human Rights, *Rule-of-law tools for post-conflict States. Amnesties*, Geneva, 2009, p. 27. It is generally assumed that this policy was inaugurated around mid-1999, at the time of the UN involvement in the negotiations leading up to the Lomé peace accord for Sierra Leone, through an internal cable of the UN Secretary-General addressed to all UN representatives (*Guidelines for UN Representatives on Certain Aspects of Negotiations for Conflict Resolution*).

3 For some recent analysis of the scope of States' duty to prosecute (and of the amnesty prohibition) and views on what might possibly be considered as permissible amnesties (*de lege lata* or *de lege ferenda*), see, *inter alia*, Seibert-Fohr, A., *Prosecuting Serious Human Rights Violations*, Oxford University Press, Oxford, 2009; Freeman, M., *Necessary Evils. Amnesties and the Search for Justice*, Cambridge University Press, Cambridge, 2009; Ambos, K., 'The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC', in: Ambos, K. *et al.* (eds), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development*, Springer, Berlin, 2009, pp. 19–104; Mallinder, L., *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide*, Hart, Oxford, 2008; and Orentlicher, D., '"Settling accounts" Revisited: Reconciling Global Norms with Local Agency', *International Journal of Transitional Justice*, Vol. 1, No. 1, 2007, pp. 10–22. For an analysis of the lead role of the Inter-American human rights system in the development of the global amnesty prohibition, see *inter alia Victims Unsilenced. The Inter-American Human Rights System and Transitional Justice in Latin America*, Due Process of Law Foundation, Washington DC, 2007.

4 While some authors contend that human rights prosecutions after transition surely have a deterrent effect (Kim, H. and Sikkink, K., 'Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries', *International Studies Quarterly*, Vol. 54, No. 4, 2010, pp. 939–963), others argue that 'reliable empirical knowledge on the state-level impact of transitional justice is still limited' (Thoms, O., Ron, J. and Paris, R., 'State-Level Effects of Transitional Justice: What Do We Know?', *International Journal of Transitional Justice*, Vol. 4, No. 3, 2010, pp. 329–354, at p. 331).

mediators and parties negotiating a termination of armed conflict, something that is sometimes referred to as 'negative peace'.[5] Indeed, when participating in peace negotiations, the political and military leadership of parties to an armed conflict – be it on the side of the incumbent regime or of the insurgent movement(s) – is likely to make a cost-benefit analysis. What are the (perceived) risks and opportunities of a continuation of the war? What are the (potential) costs and advantages of signing a peace deal? Among the costs associated with the latter option, the risk of criminal prosecution for crimes, including those related to human rights violations committed by their forces, stands out as a major factor to take into consideration. Impunity for such crimes therefore constitutes an important bargaining chip for peace negotiators seeking to influence the cost-benefit analysis and trying to converge the interests of the parties. An amnesty provision in the peace agreement, and the subsequent enactment of domestic amnesty legislation, was the classical instrument through which such impunity was traditionally offered. As a result of remarkable international normative developments during the past 20 years, certain types of amnesties have now been removed from the toolbox of peace negotiators. There is an undeniable trend in international peace negotiating practice that fewer, or in any case, increasingly restrictive, amnesty clauses are inserted in peace agreements.[6] As part of the broader process of globalisation of justice and the fight against impunity, the use of certain types of amnesties is no longer left to the sole discretion of States.[7]

The intention of this article is to take a closer look at the implementation and enforcement of the amnesty prohibition at the national level, in particular in those complex situations in which armed conflict is ended through negotiations rather than through military victory.[8] Taking the case of Burundi as an example, this article reveals how the amnesty prohibition was rhetorically upheld, including with regard to its incorporation in domestic law. However, this article will also address how the prohibition has had little or no practical effect so far on curbing a long standing tradition of impunity for gross and systematic human rights violations that were committed during 25 years of oppressive single party rule and 15 years of civil war. The main explanatory factor is of a political nature. Power-sharing was

5 The term was coined by Johan Galtung (see, *inter alia*, Galtung, J., *Peace by Peaceful Means. Peace and Conflict, Development and Civilization*, Sage, London, 1996). Negative peace refers to the absence of direct hostilities and acute violence, whereas positive peace refers to the longer term process of reducing structural violence and of removing the root causes of conflict.

6 Vinjamuri, L. and Boesenecker, A., *Accountability and peace agreements: mapping trends from 1980–2006*, Centre for Humanitarian Dialogue, Geneva, 2007.

7 Parallel to the UN policy referred to above, a variety of actors (in particular non-governmental organisations) have contributed to the emergence of this global trend. See, *e.g.*, Hayner, P., *Negotiating Justice: Guidance for mediators*, Centre for Humanitarian Dialogue, International Centre for Transitional Justice, Geneva/New York, 2009.

8 On a global level, and with some notable exceptions, negotiated settlements have become the dominant way to end wars. See, *inter alia*, Hartzell, C. and Hoddie, M., *Crafting Peace. Power-sharing institutions and the negotiated settlement of civil wars*, Pennsylvania State University Press, Pennsylvania, 2007.

the dominant modality of Burundi's transition from war to peace. And in order for parties to accept such negotiated settlement to the armed conflict, law was shaped in accordance with the desired political end. As dealt with in more detail below, the creative use of temporary immunities, in combination with the proposed, but delayed, establishment of transitional justice mechanisms and limitations imposed on the criminal jurisdiction of the domestic justice system effectively replaced the 'classical' blanket amnesty 'carrot' and bypassed the 'modern' amnesty prohibition. While reaffirming, time and again, its principled position during on-going negotiations with the Burundian Government, the UN has at the same time been remarkably lenient in condoning this sophisticated bypass.

2. BURUNDI'S LEGACY OF ATROCITIES AND THE PEACE PROCESS

Burundi is a tiny, landlocked, densely populated and poor country in the central African Great Lakes region. Its post-colonial history has been importantly shaped by repeated outbursts of ethno-political violence.[9] Four years after its accession to independence in 1962, Burundi's monarchy was overthrown by the army and a single party (UPRONA) regime established.[10] For some 25 years, political, military and economic power was largely concentrated in the hands of an elite group of Tutsi of the Hima clan from southern Bururi province. The Tutsi group is, demographically speaking, an ethnic minority group which probably[11] represents around 14 percent of the population. Palace revolutions occurred in 1976, when President Bagaza ousted his predecessor Micombero, and in 1987, when President Buyoya oustied Bagaza. However, this hardly affected the authoritarian nature of the successive regimes. In a context of on-going repressive rule, cyclical outbursts of violence led to mass victimisation. For example, violence caused tens of thousands of casualties as well

9 Colonised by Germany at the end of the 19th century, Burundi was, together with neighbouring Rwanda, administered by Belgium as a mandate (League of Nations) and trust (United Nations) territory until its independence on 1 July 1962.

10 *Unité et Progrès National* [Unity and National Progress, UPRONA].

11 The results of the latest (2008) population census were released in April 2010. As of 2008, the total population stood at around 8 million inhabitants. The census collected information per province and municipality (*commune*), but did not record ethnic affiliation. Contrary to the situation that prevailed in Rwanda before the 1994 genocide, Burundian identity cards do not mention ethnic affiliation either. However, that does not prevent people from identifying themselves (and their fellow citizens) as Hutu (around 85 percent), Tutsi (around 14 percent), Twa (around 1 percent) or Ganwa (a small number of descendants of the first king of Burundi). Although these societal groups cannot easily be distinguished on the basis of the 'classical' objective indicators (territory, culture, language, religion), the self-identification by Burundian citizens definitely includes ethnic affiliation. See also United Nations, Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Burundi*, UN Doc. CERD/C/304/Add.42, 18 September 1997, para. 10.

as refugees, most notably those of the Hutu ethnicity living in exile in neighbouring Tanzania after the 1972 massacres by the government army.[12] This large-scale violence was primarily political in nature, that is inspired by the desire to obtain or maintain political power and the access to resources that comes with it, and based on a combination of shifting ethnic, regional and clan alliances and cleavages. For some four months in 1993, Burundi appeared to be a remarkable success story of instant democratisation in which African countries were encouraged to embark upon in the early 1990s after the end of the Cold War. In June 1993, the predominantly Hutu party Front for Democracy in Burundi (FRODEBU)[13] and its presidential candidate Melchior Ndadaye defeated incumbent President Pierre Buyoya and his predominantly Tutsi UPRONA party. In October 1993, however, during one of the most successful failed military coup attempts in history,[14] Ndadaye and several other dignitaries were assassinated by Tutsi military. This event left the country in turmoil, with initial large-scale killings of Tutsi, but soon also Hutu, civilians. From June 1994 onwards, with the creation of the predominantly Hutu National Council for the Defence of Democracy – Forces for the Defence of Democracy (CNDD-FDD)[15] rebel movement at the initiative of a dissident wing within FRODEBU, the country erupted into a civil war.

A peace process started in 1998, with former Tanzanian President Nyerere and, after his death, former South African President Mandela as lead mediators. It did not come to an end until April 2009, when the last rebel movement laid down arms and was registered as a political party. Several peace agreements were signed, most importantly the Arusha Peace and Reconciliation Agreement (APRA – August 2000), the Global Cease-Fire Agreement with the CNDD-FDD (GCA – November 2003) and the Comprehensive Cease-Fire Agreement with the Party for the liberation of Hutu people – National Liberation Forces (PALIPEHUTU-FNL) (CCA – September 2006). The APRA was signed by the government, the national assembly, an alliance of predominantly Tutsi parties (the so-called G10, including UPRONA) and an alliance of predominantly Hutu parties (the so-called G7, including FRODEBU). Through a complex system of proportionality with minority over-representation, qualified majority requirements, ethnic quota (including as far as the composition of parliament, government and the army is concerned) and grand coalition arrangements, it laid the foundations of a typically consociational power-sharing regime. This remains

12 It was among those refugees that, in 1980, the Party for the liberation of Hutu people – National Liberation Forces (PALIPEHUTU-FNL) rebel movement was created (*Parti pour la libération du peuple hutu – Forces nationales de libération*).

13 *Front pour la Démocratie au Burundi*.

14 Reyntjens (in his report for Minority Rights Group International, *Burundi: Prospects for Peace*, MRG, London, 2000, p. 14) provides more detail about how, though formally collapsed as a result of the immediate and univocal rejection by Burundi's international partners, the failed coup attempt effectively annulled the outcome of the electoral process and turned out to be a 'creeping coup' which was formalised in July 1996 when former President Buyoya returned to power.

15 *Conseil national pour la Défense de la Démocratie – Forces de Défense de la Démocratie*.

the backbone of the current Constitution of 18 March 2005.[16] Given the absence of the two main rebel movements and the major reservations appended by most of the predominantly Tutsi parties, the APRA was welcomed with major scepticism as far as its potential to effectively end the conflict in Burundi was concerned. However, it turned out to be the first and fundamental step on the road to peace. Three years later, a peace agreement was signed between the transitional government (established as a result of the APRA) and the CNDD-FDD. Again, the November 2003 GCA was strongly based on a power-sharing deal, with CNDD-FDD agreeing to lay down arms and, in return, joining the government and the armed forces (all of which was put into practice remarkably smoothly). Elections were held in 2005 and won by the CNDD-FDD, its leader Pierre Nkurunziza becoming the new president. Finally, negotiations between the newly elected government and the last remaining rebel movement PALIPEHUTU-FNL were successfully completed in September 2006. After repeated delays – *inter alia* as a result of renewed violent clashes – the CCA was fully implemented in early 2009, with the rebel movement registering as a political party (FNL) and announcing its participation in the 2010 general elections.[17]

Like most contemporary peace agreements,[18] Burundi's peace accords also address the question of how to deal with the legacy of human rights atrocities, in this case committed by a wide range of State and non-State actors. Before looking in somewhat more detail at the transitional justice arrangements laid down in Burundi's peace agreements, it is worth noting that although the truth about the past remains to be told, reports by intergovernmental,[19] international and local non-governmental

16 For an analysis of the different modalities of power-sharing that shaped Burundi's transition after one-party rule and from conflict to peace, see Vandeginste, S., 'Power-Sharing, Conflict and Transition: Twenty Years of Trial and Error', *Africa Spectrum*, Vol. 44, No. 3, 2009, pp. 63–86. For more details about the consociational nature of Burundi's Constitution, see Vandeginste, S., *Théorie consociative et partage du pouvoir au Burundi* [Consociational theory and power-sharing in Burundi], Discussion Paper, University of Antwerp, Institute of Development Policy and Management, 2006/6, February 2006.

17 Between May and August 2010, local, presidential and legislative elections were held, with the dominant party CNDD-FDD and President Nkurunziza consolidating their rule. Opposition parties, including FNL and FRODEBU, withdrew from the electoral process, accusing the government and the electoral commission of massive fraud.

18 More generally, 'a central feature of many recent peace agreements is their extensive references to human rights' (International Council on Human Rights Policy, *Negotiating Justice? Human Rights and Peace Agreements*, ICHRP, Geneva, 2006, p. 1). See also United Nations, Human Rights Council, *Analytical Study on Human Rights and Transitional Justice*, UN Doc. A/HRC/12/18, 6 August 2009 and its addendum (*Inventory of human rights and transitional justice aspects of recent peace agreements*, UN Doc. A/HRC/12/18/Add.1, 21 August 2009).

19 A Special Rapporteur on the situation of human rights in Burundi was appointed by the UN Economic and Social Council in July 1995 (Decision 1995/291). The Special Rapporteur was replaced by an Independent Expert on the situation of human rights in Burundi in 2004. In 2008, the UN Human Rights Council decided to extend the mandate of the Independent Expert 'until an independent national human rights commission has been established' (UN Doc. A/HRC/RES/9/19, para. 8). Legislation on the establishment of a national human rights commission was adopted in December 2010.

human rights observers, though extremely rare before 1990, provide overwhelming prima facie evidence that war crimes, crimes against humanity and probably also acts of genocide[20] have been committed.[21] In fact, although Burundian sources provide us with sometimes radically different accounts of past events and who was responsible for them, the APRA reflects a general consensus where it states, be it without further specification, that 'the Parties recognize that acts of genocide, war crimes and other crimes against humanity have been perpetrated since independence against Tutsi and Hutu ethnic communities in Burundi'.[22]

3. BURUNDI'S PEACE AGREEMENTS AND TRANSITIONAL JUSTICE

Before focusing on the incorporation and bypassing of the amnesty prohibition, I will provide a general overview of how the issue of transitional justice is addressed in Burundi's peace agreements and their follow-up. After a brief chapter on the nature and the causes of the conflict, the APRA puts forward a number of policy responses, relating to genocide, war crimes and crimes against humanity,[23] exclusion,[24] and national reconciliation.[25] More specifically, it is agreed that the transitional government will request the UN Security Council to establish an International Judicial Commission of Inquiry. In case the Commission's findings 'point to the existence of acts of genocide, war crimes and other crimes against humanity', the Government of Burundi shall request the UN Security Council to establish an international criminal tribunal to try and punish those responsible.[26] The APRA also provides for the establishment of a national truth and reconciliation commission (TRC) in order to help establish the truth about the legacy of violence that was committed since independence, to propose measures that are likely to promote reconciliation, and to write a shared

20 More particularly, the term genocide is used for the massacres of Hutu civilians in 1972 (United Nations, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Revised and updated report on the question of the prevention and punishment of the crime of genocide. Prepared by Mr. B. Whitacker*, UN Doc. E/CN.4/Sub.2/1985/6, 2 July 1985, paras. 24 and 36) and of Tutsi civilians in 1993 (Report of the International Commission of Inquiry for Burundi, established in accordance with UN Security Council Resolution 1012 of 28 August 1995, attached to United Nations, Security Council, *Letter dated 25 July 1996 from the Secretary-General addressed to the President of the Security Council*, 22 August 1996, UN Doc. S/1996/682, paras. 483 and 496).

21 For a more detailed analysis of the international legal framework – including an evaluation of the Burundian situation as an armed conflict under the Geneva Conventions of 12 August 1949 – and of Burundi's obligations under international law, see Vandeginste, S., *Stones Left Unturned. Law and Transitional Justice in Burundi*, Antwerp, Intersentia, 2010.

22 Protocol I, Chapter 1, Article 3(f).

23 Article 6.

24 Article 7.

25 Article 8.

26 Article 6(11).

understanding of Burundi's history.[27] Furthermore, the APRA puts forward a number of individual and collective reparation measures, including the restitution of land to returnees as well as a national monument and day of remembrance for all victims.[28] The GCA and the CCA endorsed the proposed establishment of both transitional justice mechanisms, which in the meantime had also been included in the Transitional Constitution of 28 October 2001.[29] Ten years later, neither the international criminal tribunal nor the TRC have been put in place, despite an important number of preparatory steps that were taken on the long and winding road supposedly leading to their establishment.[30]

In July 2002, as agreed upon in the APRA, interim President Buyoya formally requested the establishment of an international judicial commission of inquiry by the UN. The report of a mission of UN Security Council delegates, visiting Burundi nearly one year later, recommended that urgent attention be paid to the problem of impunity in Burundi and that the Security Council 'consider carefully' the government's request.[31] In January 2004, which was, not surprisingly,[32] shortly after the signature of the GCA, the Security Council approved the terms of reference of an assessment mission 'to consider the advisability and feasibility of establishing an international judicial commission of inquiry for Burundi, as requested by the President of Burundi'.[33] The UN assessment mission on the establishment of an international judicial commission of inquiry for Burundi, also known as the 'Kalomoh mission', named after the Assistant Secretary-General for Political Affairs leading the mission, visited Burundi in May 2004. Its report was submitted to the UN Security Council in March 2005.[34] In the meantime, in December 2004, the Burundian parliament

27 Article 8(1).

28 Protocol IV, Chapter 1, Articles 2–8.

29 Articles 228–233.

30 For a more detailed overview of the many hurdles on the road to transitional justice, see Vandeginste, S., 'Transitional Justice for Burundi: A Long and Winding Road', in: Ambos, K. *et al.* (eds), *op.cit.* (note 3), pp. 393–422.

31 United Nations, Security Council, *Report of the Security Council mission to Central Africa, 7 to 16 June 2003*, UN Doc. S/2003/653, 17 June 2003, para. 44.

32 In December 2003, one month after the signature of the GCA, South-African Vice-President Jacob Zuma, the main facilitator of the Regional Peace Initiative for Burundi, stated before the UN Security Council that '[w]e can now say without fear of contradiction that the Burundi peace process has entered a decisive and irreversible stage' (United Nations, Security Council, *Report of the meeting of 4 December 2003*, UN Doc. S/PV.4876, p. 3). The Council's remarkable delay in dealing with Burundi's request was clearly no coincidence. It was fully in line with the earlier UN policy on Burundi of prioritising (at least in terms of sequencing) peace, security and stability over the transitional justice process (see below).

33 United Nations, Security Council, *Letter dated 26 January 2004 from the President of the Security Council addressed to the Secretary-General*, UN Doc. S/2004/72, 26 January 2004, para. 1.

34 United Nations, Security Council, *Letter dated 11 March 2005 from the Secretary-General addressed to the President of the Security Council*, UN Doc. S/2005/158, 11 March 2005.

had enacted legislation on the establishment of a national TRC.[35] Though formally promulgated and, as explained below, important in light of the incorporation of the amnesty prohibition, this law was never implemented. The Kalomoh mission report contained recommendations that would inevitably necessitate important amendments of the TRC legislation. Firstly, the mission report carefully assessed the proposed establishment of transitional justice mechanisms as agreed upon in the APRA, and took into consideration the new international trends in terms of transitional justice, for instance, finding inspiration in the functioning of hybrid international criminal bodies established in Sierra Leone, Timor Leste and Bosnia and Herzegovina. Secondly, the UN Kalomoh mission report recommended the establishment of twin mechanisms. It proposed a TRC of mixed (national – international) composition. In addition, it recommended the establishment of a Special Chamber within the Burundian court system with jurisdiction to prosecute those bearing the greatest responsibility for genocide, crimes against humanity and war crimes.

On 20 June 2005, the UN Security Council unanimously adopted Resolution 1606, in which it requested the Secretary-General to initiate negotiations with the government on the implementation of the proposals contained in the Kalomoh mission report.[36] Negotiations between the UN and the Government of Burundi, which was newly elected and henceforth largely dominated by the CNDD-FDD, started in early 2006. During the negotiations process, the proposed Special Chamber, which was tailored along the lines of the Bosnian War Crimes Chamber, was gradually replaced by a Special Tribunal similar to the one put in place for Sierra Leone. However, two major issues of disagreement emerged, which, at the time of writing, continue to oppose the UN and the Burundi Government. These are the issue of amnesty (see below) and the investigative autonomy of the Prosecutor of the Special Tribunal. In short, whereas the government wants to limit prosecution to cases in which the procedure before the TRC did not bear fruit,[37] the UN logically wants the Prosecutor of the Special

35 *Loi No. 1/021 du 27 décembre 2004 portant missions, composition, organisation et fonctionnement de la Commission Nationale pour la Vérité et la Réconciliation*.

36 United Nations, Security Council, *The situation in Burundi*, UN Doc. S/RES/1606, 20 June 2005.

37 The memorandum of the Burundian delegation to the negotiations lists four scenarios in which cases could be deferred by the TRC to the Special Tribunal: when a suspect refuses to appear before the TRC, when a suspect does not acknowledge his responsibility for acts confirmed by the TRC, when a suspect refuses to participate in the reconciliation procedure or when the suspect refuses to implement the reconciliation measures decreed by the TRC (*Mémorandum de la délégation burundaise chargée de négocier avec les Nations Unies la mise en place d'une Commission de la Vérité et de la Réconciliation et d'un Tribunal Spécial au Burundi* [Memorandum of the Burundian delegation charged with negotiating with the United Nations on the establishment of a truth and reconciliation commission and a special tribunal in Burundi], Bujumbura, 26 March 2006, para. 71). When read in combination with the memorandum of the CNDD-FDD party (*Mémorandum du parti CNDD-FDD sur la Commission Vérité et Réconciliation et le Tribunal Spécial pour le Burundi* [Memorandum of the CNDD-FDD on the truth and reconciliation commission and the special tribunal in Burundi], Bujumbura, 5 May 2007), published on the eve of a visit to Burundi by UN High Commissioner for Human Rights, Louise Arbour, these four scenarios – some of which are

Tribunal to exercise his powers in full independence, also *vis-à-vis* the TRC, and to decide autonomously whom and when to prosecute.

In 2007, negotiations were suspended and it was agreed to organise national consultations with the objective of collecting the views of the population on the mandate and the functioning of the proposed transitional justice mechanisms. Under the coordination of a tripartite steering committee with representatives from the government, the UN and civil society, national consultations were held. These were held in the second half of 2009, after another considerable delay. A report was submitted to President Nkurunziza in April 2010 and released in December 2010.[38] It is expected that negotiations between the UN and the government on the establishment of the TRC and the Special Tribunal, taking into account the recommendations drawn from the national consultations, will resume 2011.[39]

4. TRANSITIONAL JUSTICE FOR BURUNDI AND THE AMNESTY PROHIBITION

Did the amnesty prohibition affect the peace process and the proposed transitional justice process for Burundi? On the one hand (section 4.1.), it surely did. The peace agreements do not grant or condone amnesty for genocide, crimes against humanity or war crimes, not even in a disguised manner.[40] Furthermore, legislation adopted to

quite ambiguously worded – are clearly meant to restrict the autonomy of the prosecutor to pursue a case.

38 Comité de pilotage, *Les consultations nationales sur la mise en place des mécanismes de justice de transition au Burundi. Rapport* [National consultations on the establishment of the transitional justice mechanisms in Burundi], Bujumbura, 20 avril 2010.

39 UN Security Council Resolution 1902 of 10 December 2009 (UN Doc. S/RES/1902), which extends the mandate of the UN Integrated Office in Burundi (BINUB) until 31 December 2010, encourages the Government of Burundi, with the support of BINUB and other partners, 'to ensure that the results of these consultations form the basis for the establishment of transitional justice mechanisms' (para. 17). Resolution 1959 of 16 December 2010, which replaced BINUB by a scaled-down BNUB (UN Office in Burundi), 'welcomes the completion of the national consultations on the establishment of transitional justice mechanisms (…) and encourages the Government of Burundi, with the support of international partners and BNUB as appropriate, to establish the proposed mechanisms' (para. 13).

40 In some cases, amnesty has been rhetorically repackaged. Without using the term, the 1999 Lomé Peace Agreement for Sierra Leone, for instance, ensures that 'no official or judicial action is taken' in respect of anything done by members of the signatory parties in pursuit of their objectives (*Peace agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone*, 18 May 1999, Article IX, annex to United Nations, Security Council, *Letter dated 12 July 1999 from the Chargé d'affaires ad interim of the Permanent Mission of Togo to the United Nations addressed to the President of the Security Council* [Letter dated 12 July 1999 of the Chargé d'affaires ad interim of the Permanent Mission of Togo to the United Nations addressed to the President of the Security Council], UN Doc. S/1999/777, 12 July 1999).

implement the peace agreements rules out this type of amnesty.[41] And, finally, also in practice, no amnesty has been granted for these most serious crimes of international concern. On the other hand (section 4.2.), a sophisticated bypassing mechanism has been put in place, benefiting a wide range of former opponents who agreed to share power and whose interests converge through continued impunity for atrocities committed in the past.

The term amnesty is very often used without defining it. And in practice, there is a wide variety of amnesties in terms of their scope, modalities, context in which they are adopted, stated policy objectives, and so forth. Before studying the amnesty prohibition at work in Burundi, I will therefore first briefly clarify the concept of amnesty and compare it with pardons and with (temporary) immunity, a notion of which creative use has been made in the Burundian context. Amnesty will be used here to refer to a formal undertaking, mostly a legislative act, purporting to retroactively nullify the criminal but sometimes also civil liability of persons in respect of a conduct, which otherwise could have been subject to judicial investigation, prosecution and punishment.[42] An amnesty extinguishes the public action (*action publique*) and wipes out past convictions.[43] A blanket amnesty exempts a large group of beneficiaries from liability and prosecution without them having to fulfil certain conditions, for instance related to disclosure of facts or acknowledgement of responsibility on an individual basis when applying for amnesty. A pardon exempts a convict from serving a criminal sentence but does not nullify the conviction or liability associated with the particular conduct.[44] Immunity, which, in some literature, is used interchangeably with the term amnesty, refers to a procedural safeguard. It is usually linked to the official capacity or function of the individual beneficiary, which offers protection against prosecution and indictment before certain courts, but does not exonerate a person from criminal liability.[45]

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41 Compare with the situation in Côte d'Ivoire, where the Ouagadougou Political Agreement (*Accord politique de Ouagadougou du 4 mars 2007*, annex to United Nations, Security Council, *Letter dated 13 March 2007 from the Secretary-General addressed to the President of the Security Council*, UN Doc. S/2007/144, 13 March 2007) announced the adoption of a new amnesty law, explicitly excluding economic crimes, war crimes and crimes against humanity (Article VI, para. 6.3.), but where the Ordinance of 12 April 2007 (*Ordonnance No. 2007 457 du 12 avril 2007 portant amnistie*) does not impose identical restrictions on the material scope of the amnesty.

42 Sources: Office of the UN High Commissioner for Human Rights, *op.cit.* (note 2), p. 5; International Council on Human Rights Policy, *op.cit.* (note 18), p. 80; Freeman, M., *op.cit.* (note 4), p. 13; Chigara, B., *Amnesties in International Law: The Legality under International Law of National Amnesty Laws*, Longman, London, 2002, 205p., at pp. 1–2.

43 See also Articles 171 and 176 of the Criminal Code of Burundi.

44 See Articles 161–170 of the Criminal Code, which also includes provisions on what is called *grâce amnistiante* (Articles 177–179), a combination of an amnesty enacted by the legislator and individually awarded presidential pardons with the legal effect of an amnesty.

45 Under Burundian law, immunity is defined as the suspension of criminal prosecution (*la suspension des poursuites pénales*, Article 1 of the Law of 22 November 2006) See also International Court of Justice, *Case concerning the arrest warrant of 11 April 2000 (Democratic Republic of the Congo versus Belgium)*, Judgment of 14 February 2002, para. 60.

4.1. THE AMNESTY PROHIBITION AT WORK

The APRA stipulates that '[a]mnesty shall be granted to all combatants of the political parties and movements for crimes committed as a result of their involvement in the conflict, but not for acts of genocide, crimes against humanity or war crimes, or for their participation in coups d'Etat'.[46] Furthermore, the APRA states that the TRC can, upon completion of its investigations, adopt or propose measures that are likely to promote reconciliation and forgiveness. And, in this context, 'the transitional National Assembly may pass a law or laws providing a framework for granting an amnesty consistent with international law for such political crimes as it or the National Truth and Reconciliation Commission may find appropriate'.[47] These APRA provisions, reaffirmed by the GCA and the CCA, clearly remain within the limits international law imposes on the use of amnesties.

The abovementioned law of 27 December 2004 on the establishment of a national TRC confirms that the TRC may determine the political crimes for which amnesty legislation might be enacted by parliament but explicitly excludes genocide, crimes against humanity and war crimes from its permissible scope.[48] This law was enacted as part of the implementation of the APRA and was in fact never implemented as far as the actual creation of a TRC is concerned. Furthermore, the Criminal Code of 22 April 2009, which incorporates the crimes of genocide, crimes against humanity, war crimes and torture in the domestic *Code pénal*,[49] reaffirms that neither amnesty[50] nor pardons[51] can be given for genocide, crimes against humanity, or war crimes. However, the Code remains silent on amnesty for torture.

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46 See Prot. III, Chapter III, Article 26(l)). This provision is in line with the international amnesty prohibition as well as with the provision on amnesties in Additional Protocol II of the Geneva Conventions of 12 August 1949 ('At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained', Article 6(5)). This provision is generally interpreted as encouraging amnesties for offenders who, because of their taking part in hostilities, have committed a criminal offence under domestic law, but as excluding amnesties for the most serious crimes of international concern. See, *e.g.*, Henckaerts, J.M. and Doswald-Beck, L., *Customary International Humanitarian Law. Volume I. Rules*, Cambridge University Press, Cambridge, 2005, pp. 611–614.

47 See Prot. I, Chapter II, Article 1(c).

48 'Les crimes de génocide, les crimes contre l'humanité et les crimes de guerre ne sont pas amnistiables' (Article 4(2)).

49 See Articles 195–209. In May 2003, a separate law had already been adopted, defining genocide, crimes against humanity and war crimes as criminal offences under national Burundian law (see below).

50 'Le génocide, le crime contre l'humanité et le crime de guerre ne peuvent faire l'objet d'aucune loi d'amnistie' [Genocide, crimes against humanity and war crimes cannot be amnistied] (Article 171(2)).

51 'La grâce n'éteint pas les peines prononcées contre le génocide, les crimes contre l'humanité et les crimes de guerre' [A pardon does not extinguish the criminal sentences for genocide, crimes against humanity and war crimes] (Article 170).

Furthermore, the amnesty prohibition also affected the scope of temporary immunity legislation adopted in accordance with the three peace agreements. As explained in more detail below, in order to enable the return from exile of the political leaders and combatants of the insurgent movements, a temporary safeguard against prosecution was agreed upon in the APRA, the GCA and the CCA. Legislation enacted to provide temporary or provisional immunity to CNDD-FDD and PALIPEHUTU-FNL members explicitly excluded acts of genocide, crimes against humanity and war crimes from its material scope.[52]

Also, throughout the negotiations process between the UN and the Government of Burundi on the implementation of the Kalomoh mission report, the international amnesty prohibition has been referred to as a normative boundary both by the UN as well as by domestic and international civil society organisations. This normative boundary is seen as one which any outcome of the negotiations needs to abide by. The Government of Burundi prefers to leave it to the discretion of the TRC to determine for which crimes an amnesty law may be enacted, without ruling out *a priori* that an amnesty might be awarded in case of genocide, crimes against humanity and war crimes.[53] This sticking point turned out to be one of the two so far insurmountable obstacles in the negotiations process between the UN and the government.

Finally, the amnesty prohibition also affected the national consultations on transitional justice. Specifying the terms of reference of these consultations, the Framework Agreement of 2 November 2007 between the Government of Burundi and the UN rules out the possibility that questions are posed to civil society and the general population during the national consultations that are not worded in accordance with international law standards.[54] Throughout the consultations, the amnesty option to

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52 The two terms have been used interchangeably, although in the French language version the term *immunité provisoire* is used more frequently. See *Loi No. 1/022 du 21 novembre 2003 portant immunité provisoire de poursuites judiciaires en faveur de leaders politiques rentrant de l'exil*, Article 2 and *Loi No. 1/32 du 22 novembre 2006 portant immunité provisoire de poursuites judiciaires en faveur de membres du mouvement signataire de l'Accord de cessez-le-feu du 7 septembre 2006*, Article 2(2), *in fine*.

53 Sources include a Letter by Minister of Foreign Affairs, Antoinette Batumubwira, to Nicolas Michel, UN Under-Secretary-General for Legal Affairs, Bujumbura, 15 June 2006 and the CNDD-FDD Memorandum of 5 May 2007 on Transitional Justice (documents on file with the author).

54 Defining the mandate of the tripartite steering committee, in charge of organising the national consultations, the Framework Agreement specifies that 'le Comité ne soulèvera pas […] des questions qui pourraient être en porte-à-faux avec le droit international' [The Committee will not ask questions that may not be in accordance with international law]. (*Accord cadre entre le Gouvernement de la République du Burundi et l'Organisation des Nations Unies portant création et définition du mandate du Comité de pilotage tripartite en charge des Consultations nationales sur la Justice de transition au Burundi*, [Framework Agreement between the Government of Burundi and the United Nations on the creation and mandate of the tripartite Steering Committee in charge of national consultations on transitional justice in Burundi], Bujumbura, 2 November 2007, Article 10). See, more generally, Office of the United Nations High Commissioner for Human Rights, *Rule-of-law tools for post-conflict States. National consultations on transitional justice*, UN Doc. HR/PUB/09/2, Geneva, 2009 ('The questions need to be carefully formulated so that they acknowledge the constraints of international law. For instance, instead of asking whether participants wish to see

promote reconciliation was submitted to the opinion of the Burundian people (though the wording of the option explicitly excluded amnesty for genocide, crimes against humanity and war crimes). It was seen that 65 percent of the Burundian people favoured the use of amnesties. The report of the national consultations recommends that the TRC has the power to propose measures which it considers likely to promote national reconciliation insofar as they are in accordance with international norms and principles regarding impunity of perpetrators of human rights atrocities and amnesties generally.[55]

In summary, at first sight, the Burundi situation seems to offer a textbook example of the impact of the international amnesty prohibition on developments at the national level.

4.2. THE AMNESTY PROHIBITION CIRCUMVENTED

Roughly ten years after the amnesty prohibition found its way into the Burundian peace process, what has been its actual impact on the long-standing culture of impunity for human rights violations in Burundi? When studying the impact of the amnesty prohibition, an analysis of its implementation, that is its incorporation in peace agreements and domestic law, is insufficient. Thus, this section addresses the issue of compliance, that is the conformity between the rule and the actual behaviour of actors and, more particularly, the State to whom the norm is addressed.[56] I concluded that the prohibition has been circumvented, through a combination of two factors. The first factor is that restrictions have been imposed on the criminal jurisdiction of the domestic justice system, and in turn linked to the proposed establishment of transitional justice mechanisms. The second factor is the creative use of temporary immunity legislation. The rationale behind this bypassing mechanism is clear. Behind a façade of lip-service paid to the international paradigm outlined above, other public interest considerations such as the prevention of State collapse, the promotion of short term stability and, therefore, the desire to promote power-sharing, both between belligerents as well as between societal segments, as well as private interests and imperatives of political expediency prevailed.

4.2.1. Restrictions on Domestic Prosecution Combined with Delayed Establishment of Transitional Justice Mechanisms

The APRA announces the enactment of legislation to counter genocide, war crimes and other crimes against humanity, as well as other human rights violations.[57] This

an amnesty for acts of genocide, a question might elicit their views on the importance of prosecution for serious crimes', p. 6).

55 Comité de pilotage, *op. cit.* (note 38), p. 71.

56 See the distinction made in Shelton, D., *Commitment and Compliance. The Role of Non-Binding Norms in the International Legal System*, Oxford University Press, Oxford, 2000, p. 5.

57 Prot. I, Chapter II, Article 6(9).

provision was implemented through the law of 8 May 2003, which refers to the Statute of the International Criminal Court[58] and other international human rights conventions, and which incorporates the above mentioned crimes as criminal offences in Burundi's domestic criminal law.[59] It is also specified that statutory limitations are not applicable to acts of genocide, crimes against humanity and war crimes. However, the law of 8 May 2003 only permits prosecution of crimes committed after its promulgation.[60] For crimes committed before, Article 33 stipulates that these will be handled by the proposed International Judicial Commission of Inquiry and, depending on its conclusions, the international criminal tribunal. As noted above, the establishment of these bodies by the UN Security Council, at the request of the Burundian Government, was put forward in the APRA.

In other words, while the law of 8 May 2003 creates a domestic legal basis for the prosecution of those believed to be responsible for genocide, crimes against humanity and war crimes committed after its promulgation, it logically bars prosecution of those responsible for the same crimes committed before that date.[61] To prosecute the latter crimes, two theoretical options remain, both of which are to a large extent under the control of the incumbent government and, as a result, have so far not been put into practice. Either past atrocities are prosecuted before the international transitional justice mechanism agreed upon in the peace accords, or they are domestically prosecuted under a different legal qualification, for example as 'ordinary' homicide. The latter possibility is barred by the temporary immunity legislation discussed below. The former option has been the subject of a lengthy negotiations process (referred to above) the end of which, five years after the adoption of UN Security Council Resolution 1606, is not at all in sight.

This seemingly endless delay is due to the positions adopted by both parties around the negotiations table, the Government of Burundi as well as the UN. As explained above, the Government of Burundi, though politically dominated by the former CNDD-FDD rebel movement, is based on a power-sharing agreement that affects both the political, economic as well as military spheres. The current army is based on the peaceful cohabitation, at all levels of command, of former government soldiers and former rebel combatants. Given their human rights record, (leading) members of all of the former opponents could potentially face prosecution for past atrocities. None of them has openly rejected the establishment of an international or hybrid

58 The Rome Statute was ratified by Burundi on 21 September 2004.

59 As noted above, these criminal offences were later incorporated in the *Code pénal* of 22 April 2009.

60 'L'enquête et la qualification des actes de génocide, des crimes de guerre et des autres crimes contre l'humanité commis au Burundi depuis le 1 juillet 1962 jusqu'à la promulgation de la présente loi, seront confiés à la Commission d'enquête judiciaire internationale' (*Loi No. 1/004 du 8 mai 2003 portant répression du crime de génocide, des crimes contre l'humanité et des crimes de guerre*, Article 33(1)). After the incorporation of the said crimes in the Criminal Code of 22 April 2009, this provision remains applicable.

61 It would go beyond the scope of this contribution to assess whether, otherwise, the law might possibly violate the principle of non-retroactivity of criminal law.

criminal body. Therefore, their interests converging on this point, they join efforts in postponing as much as possible the establishment of transitional justice mechanisms that might constitute a threat to their current positions. Keeping up appearances as if they are genuinely interested in transitional justice has so far proved to be a successful strategy. Openly rejecting the establishment of accountability mechanisms might force the UN to change its position, possibly to the detriment of its Burundian counterparts.

The UN's position has partly been determined by the local context, as well as by international trends in the field of transitional justice. As far as the former is concerned, the UN has, ever since the start of its involvement in conflict mediation in Burundi shortly after the 1993 *coup d'Etat* attempt, given priority to the cessation of hostilities, the return of (at least short term) stability and the restoration of minimal security and order.[62] Rather than scaring off potential spoilers of the peace process with the prospect of criminal prosecution, preference was given to a most inclusive political negotiations process.[63] As of 2010, peace remains fragile in Burundi and the policy of the country's international partners remains determined, first of all, by stability concerns. As far as the international trends in transitional justice are concerned, hybrid mechanisms and the principle of complementarity as embodied in the Rome Statute have gradually replaced the initial 'purely' international approach that gave rise to the establishment of the international criminal tribunals for the former Yugoslavia and

62 Most telling are the 'Burundi *mémoires*' of the former UN Secretary-General Special Representative for Burundi. See Ould Abdallah, A., *Burundi on the Brink. 1993–1995. A UN Special Envoy Reflects on Preventive Diplomacy*, United States Institute of Peace, Washington, 2000; and Ould Abdallah, A., *La diplomatie pyromane*, Calmann-Levy, Paris, 1996.

63 As an illustration, reference can be made to the UN reaction to the Gatumba massacre of August 2004, in which over 150 refugees were killed and for which the PALIPEHUTU-FNL movement of Agathon Rwasa claimed responsibility. In the immediate aftermath of the massacres, peace negotiations with the rebel movement were suspended. A joint investigation by the UN High Commissioner for Human Rights and the UN peace keeping operation missions in Burundi (ONUB) and the Democratic Republic of Congo (MONUC) confirmed the responsibility of PALIPEHUTU-FNL for the massacre. In its Resolution 1577 of 1 December 2004, the UN Security Council, 'deeply troubled by the fact that Mr. Agathon Rwasa's Forces nationales de libération (Palipehutu-FNL) have claimed responsibility for the Gatumba massacre, expresses its intention to consider appropriate measures that might be taken against those individuals who threaten the peace and national reconciliation process in Burundi' and called upon the governments of the DRC, Rwanda and Burundi 'to ensure that the investigation into the Gatumba massacre is completed and that those responsible are brought to justice'. Not more than three months later, the UN Secretary-General reported that the government and FNL were ready to resume peace talks, noting that 'the inclusion of FNL (Rwasa) in the peace process should be carefully assessed in order to achieve sustainable peace and stability throughout Burundi' (United Nations, Security Council, *Third report of the Secretary-General on the United Nations Operation in Burundi,* UN Doc. S/2005/149, 8 March 2005, para. 75). In April 2005, ONUB welcomed a breakthrough in the talks with the FNL, without any reference whatsoever to the Gatumba massacre (*Press Release*, 14 April 2005). As of December 2010, no one has been held responsible for the Gatumba massacre. As a result of the power-sharing deal struck in September 2006 (CCA), Agathon Rwasa was appointed as head of the National Social Security Institute (INSS). In June 2010, he left the country alleging massive electoral fraud during Burundi's local elections of May 2010.

for Rwanda, which at that time provided inspiration to the drafters of the APRA.[64] This international trend is reflected in the Kalomoh mission report and the ensuing negotiations process. As a result, and given the very limited geo-political importance of Burundi, there is virtually no chance that the UN would decide to unilaterally, that is without the acceptance of the government, impose transitional justice upon Burundi. This is an insight the Burundian negotiators have so far skilfully made to serve their interests.

4.2.2. Temporary Immunity

In theory, the law of 8 May 2003 did not prevent the Burundian public prosecutor from prosecuting past human rights atrocities before domestic courts, legally qualified as homicide or other criminal offences *de droit commun*. This is assuming the prosecution department might act independently and decide to initiate investigations notwithstanding the political consensus in favour of impunity. However, this option was barred as well, as a result of temporary immunity legislation enacted in accordance with the agreements laid down in the three peace accords. Initially, the rationale and the scope of temporary immunities were quite limited. However, as time went by, the interpretation and the use of temporary immunities gradually expanded.

Immunity was initially conceived as a temporary arrangement that was needed to enable the return of rebel leaders and combatants from exile, the bush, or other zones under their control on Burundian territory. This was necessary in order for them to take up positions in the various institutions, be it the transitional government, parliament, the army, the police, State owned companies, *etc*., as specified in the peace accords, without fear for prosecution. Thus, it was an essential component for the successful completion and implementation of the power-sharing provisions in the various peace accords and a matter of great concern for the negotiating parties.[65] In line with this specific rationale, the scope of the immunity arrangement was limited in several ways: *ratione temporis* to the period of transition, *ratione personae* to persons who feared

64 On the rationale behind this shift and the wide range of hybrid modalities, see Office of the UN High Commissioner for Human Rights, *Rule-of-law tools for post-conflict States. Maximizing the legacy of hybrid courts*, UN Doc. HR/PUB/08/2, Geneva, 2008.

65 On the very day of the signature of the GCA, 21 November 2003, the transitional National Assembly enacted temporary immunity legislation (*Loi No. 1/22 du 21 novembre 2003 portant immunité provisoire de poursuites judiciaires en faveur de leaders politiques rentrant de l'exil*). For the CNDD-FDD, signatory party to the GCA, this legal recognition of the safeguard initially laid down in the APRA and (politically) reaffirmed in the GCA, was an important precondition to its signature of the GCA. Three years later, insufficient reassurances in terms of their immunity were put forward as a reason for the delayed implementation of the CCA by the PALIPEHUTU-FNL leadership (see, in more detail, Vandeginste, S., 'Immunité provisoire et blocage des négociations entre le gouvernement du Burundi et le Palipehutu-FNL: une analyse juridique' [Provisional immunity and obstacles to the negotiations between the Government of Burundi and Palipehutu-FNL: a legal analysis], in: Marysse, S. *et al.* (eds), *L'Afrique des Grands Lacs. Annuaire 2007–2008*, L'Harmattan, Paris, 2008, pp. 77–91).

prosecution upon return and *ratione materiae* to what were vaguely referred to as 'political crimes' or 'politically motivated crimes' or 'acts committed as part of the armed struggle' but in any case, as noted above and fully in line with the international amnesty prohibition, excluding acts of genocide, crimes against humanity and war crimes. All of these limitations gradually disappeared, with the exception, quite remarkably, of the explicit exclusion of genocide, crimes against humanity and war crimes. This limitation continues to apply today but has become rather meaningless, in light of the constraint laid down in the law of 8 May 2003[66] and the seemingly endless delays in establishing transitional justice mechanisms for Burundi.

Ratione temporis, the use of temporary immunities was seen as a 'Transitional Arrangement'[67] limited to the period of transition. This was defined as the period starting with the establishment of a transitional government, not later than six months after the signature of the APRA, and ending with the election of the new president, not later than 30 months after the start of the period of transition.[68] In other words, the period of transition and the safeguards offered through temporary immunities were meant to come to an end not later than three years after 28 August 2000. Constitutionally, the transition was defined as the period of 36 months following the promulgation of the Transitional Constitution of 28 October 2001 and ending with the adoption by referendum of a new post-transition Constitution, which, in reality, happened on 18 March 2005. The GCA and the law of 21 November 2003 on temporary immunities confirmed the definition of the period of transition as ending with the adoption of a post-transition Constitution. In the electoral code of 20 April 2005, in line with the APRA but not fully in accordance with the spirit of the Transitional Constitution reference was made to the first elections as marking the end of the period of transition and the effect of the temporary immunity.[69] However, after the local, legislative and presidential 2005 elections, the temporal scope of the immunity arrangement expanded considerably when another approach was used to define the 'temporal' nature of the immunity legislation. Indeed, in the context of ongoing negotiations with the PALIPEHUTU-FNL, it was felt that the immunity arrangement should be reconceived so as to also offer a safeguard to the leadership of the last remaining rebel movement. Therefore, immunity was provided for in the CCA and legally endorsed through the law of 22 November 2006. Limiting the temporal scope of the immunity to the period of transition would not have made sense because, constitutionally speaking, the period of transition had come to an end in 2005.

66 Article 33.

67 See the title of Protocol II, Chapter II of the APRA.

68 Article 13.

69 'Aux fins des premières élections et en attendant les conclusions de la commission d'enquête judiciaire internationale sur le génocide, les crimes de guerre et les crimes contre l'humanité et de la Commission Nationale pour la Vérité et la Réconciliation, les personnes ayant bénéficié de l'immunité provisoire continuent à jouir de leurs droits civils et politiques nonobstant les condamnations éventuelles prononcées' (Article 8).

Instead, the law stipulates that the temporary immunity will have effect until the establishment of the TRC and the Special Tribunal.[70] The effect of this new definition of the temporal scope of application of the immunity is presumably quite deliberately extremely perverse. In fact, by prolonging the above mentioned negotiations with the UN on the establishment of the transitional justice mechanisms proposed by the Kalomoh mission report, if need be indefinitely, the government hits two birds with one stone. Not only does it manage to put off prosecution and truth telling before those bodies, it also extends the benefits of 'temporary' immunity, possibly for many years to come.

Furthermore, *ratione personae*, the range of beneficiaries has gradually also expanded. Initially, immunity was intended to enable the return to Burundi of the political leaders of rebel movements living in exile.[71] Very soon, however, additional categories of people were added. Firstly, in addition to the political leadership of the CNDD-FDD, also 'ordinary' combatants were added. Secondly, it was agreed that the immunity arrangement should also benefit members of the governmental security forces. On the basis of a decree of 23 March 2004, a commission was established and charged with identifying the individual beneficiaries.[72] Thirdly, and quite remarkably, it was agreed in the GCA to establish a joint commission 'which shall study individual cases of civilians currently serving sentence to determine that they should be granted temporary immunity'.[73] As a result, while immunity was initially meant to offer a safeguard against future prosecution, it was henceforth applied to detainees who had already been convicted and were serving sentence. This clearly goes way beyond the conventional application of the concept of immunity.

In November 2005, a commission was established and charged with identifying those who were considered to be 'political prisoners' and should therefore be released under a regime of temporary immunity.[74] The report of the commission was never published and it remains unknown how it defined the notion of 'political prisoner'. Between January and March 2006, three ministerial orders adopted by the new

70 'Elle est valable pour la période d'avant la mise sur pied de la Commission Vérité Réconciliation et du Tribunal Spécial au Burundi' (Article 2(2)). Similarly, in September 2009, Article 8 of the Electoral Code was revised in order to extend the benefit of the provisional immunity beyond the first elections, until the two transitional justice mechanisms are established (*Loi du 18 septembre 2009 portant révision de la loi no. 1/015 du 20 avril 2005 portant Code électoral*).

71 See, *inter alia*, Article 1(2), of the law of 21 November 2003.

72 *Décret No 100/023 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* [Decree No 100/023 of 23 March 2004 on the application of the provisional immunities provided for by the Global Cease-fire Agreement of 16 November 2003].

73 See Article 2(4) of the GCA Protocol on Outstanding Political, Defense and Security Power Sharing Issues in Burundi.

74 *Décret No. 100/92 du 7 novembre 2005 portant création, organisation et fonctionnement d'une Commission chargée d'identifier les prisonniers politiques* [Decree No. 100/92 of 7 November 2005 on the establishment, organisation and functioning of a Commission charged with identifying political prisoners].

CNDD-FDD Minister of Justice collectively granted 'provisional release' to around 3,300 prisoners on the basis of temporary immunity.[75] Minister of Justice Niragira explained that this was a major step towards national reconciliation and added that, in any case, all of the beneficiaries would need to appear before the TRC.[76] Local human rights organisations unsuccessfully challenged the ministerial orders before the Constitutional Court. A similar, creative use was made of temporary immunity when negotiating and implementing the peace agreement with the PALIPEHUTU-FNL rebellion. As a result, in September 2008, a commission was established to identify political prisoners and FNL 'prisoners of war', a notion which, again, was not defined, who were to benefit from the provisional immunity legislation enacted in accordance with the CCA. In early 2009, nearly 250 FNL members were released,[77] which lifted one of the major stumbling blocks for the FNL to implement the CCA and, thus, complete the peace process.

Ratione materiae, the various temporary immunity arrangements have systematically excluded the crime of genocide, crimes against humanity and war crimes from their scope. In line with our findings about proposed amnesty legislation, immunity legislation enacted on the basis of Burundi's peace accords limits the material scope of the immunity in a way which is clearly inspired by the international amnesty prohibition.[78] In practice, none of the 'political prisoners' to whom 'provisional release' was granted on the basis of temporary immunity legislation had been, nor could possibly have been for reasons explained above,[79] convicted of genocide, crimes against humanity and war crimes.

In summary, despite initially important limitations of temporary immunity legislation and notwithstanding its apparent conformity with the amnesty prohibition, the above mentioned combination of measures essentially amounts to a reality of

75 *Décret No. 100/02 du 3 janvier 2006 portant immunité provisoire des prisonniers politiques détenus dans les maisons de détention de la République du Burundi.* [Decree No. 100/02 of 3 January 2006 on provisional immunity for political prisoners detained in detention centres in the Republic of Burundi].

76 The measure benefitted pre-trial detainees as well as convicted prisoners, the overwhelming majority of whom were Hutu, whom the (at that time) predominantly Tutsi justice system considered responsible for their involvement in the 1993 massacres against Tutsi civilians and for their support to the CNDD-FDD.

77 *Décret No. 100/210 du 31 décembre 2008 portant immunité provisoire des prisonniers politiques et de guerre du mouvement Palipehutu-FNL détenus dans les établissements pénitentiaires de la République du Burundi.*

78 Article 2 of the law of 21 November 2003 (enacted as a result of the APRA and the GCA) and Article 2(2) *in fine* of the law of 22 November 2006 (enacted as a result of the CCA).

79 Before the entry into force of the law of 8 May 2003, there was no legal basis, under Burundian domestic law, to formally prosecute suspected perpetrators on the basis of charges of genocide, crimes against humanity or war crimes. After its entry into force, crimes committed in the past were left to the jurisdiction of the transitional justice mechanisms. In theory, this left the possibility that persons convicted for genocide, crimes against humanity and war crimes which they committed after 8 May 2003 were provisionally released on the basis of temporary immunity through the ministerial orders of early 2006, but that was not the case in reality.

continued, be it seemingly temporary, impunity, including for the most serious crimes of international concern. This inevitably raises the question how the UN reacted to the increasingly broad use of temporary immunities. Generally speaking, the APRA, the GCA and the CCA were repeatedly welcomed, including by the UN Security Council, the Commission on Human Rights, the Peacebuilding Commission and the Committee against Torture. Calls were made for their early implementation without any publicly critical reservations about the immunity clauses. To my knowledge, the UN expressed concern at the potential legal effects of the temporary immunities on two occasions. On both occasions, it mainly reaffirmed its position as a matter of principle, without specifically opposing the implementation of the temporary immunity arrangement itself. Its expressions of concern were, moreover, hardly 'visible' to the general public. In August 2006, around the time of completion of the negotiations with the FNL on the CCA, the UN Assistant Secretary-General for Legal Affairs, in a letter to the Minister of Foreign Affairs, expressed the concern that, because of the broad wording of the provision, the proposed use of temporary immunities may also cover acts of genocide, crimes against humanity and war crimes.[80] Secondly, during the negotiations process between the Government of Burundi and the UN on the implementation of the Kalomoh mission report, a joint letter by the UN Under-Secretary-General for Legal Affairs and the UN Deputy High Commissioner for Human Rights expressed the concern that the kind of immunity that had been granted in Burundi apparently had legal effects similar to an amnesty, which would inevitably raise the question of its validity before an international tribunal.[81] In summary, the UN, a most important actor involved in the Burundi peace process and in the negotiations on the establishment of the proposed transitional justice mechanisms, has been remarkably reluctant to publicly condemn and, therefore, lenient in condoning, the bypassing mechanism gradually put in place by the Burundian Government. At no point did the UN explicitly take the position that, as a result of the combination of measures adopted, Burundi possibly violated its obligations under international law.

80 'Du fait que l'Accord ne définit ni le sens exact à donner à cette 'immunité provisoire', ni sa durée, ni son champ d'application, il laisse craindre une amnistie sans restriction qui pourrait, en principe, couvrir le crime de génocide, les crimes contre l'humanité, les crimes de guerre ainsi que d'autres violations graves du droit international humanitaire' (Letter of the UN Assistant Secretary-General Larry Johnson to the Minister of Foreign Affairs, Antoinette Batumubwira, 24 August 2006 (on file with the author)). As noted above, this concern was addressed in the law of 22 November 2006 which – contrary to the wording of the CCA itself – explicitly excludes those crimes from the material scope of the temporary immunity.

81 'L'ONU estime toutefois qu'une 'immunité provisoire' qui pourrait avoir le même effet qu'une amnistie, a été accordée à tous les groupes armés dans une série d'accords, ce qui pose la question de leur validité devant une juridiction internationale en tant que protection contre les poursuites' (Letter of the UN Under-Secretary-General for Legal Affairs, Nicholas Michel, and Deputy High Commissioner for Human Rights, Kyung-wha Kang, to Minister of Foreign Affairs, Antoinette Batumubwira, 1 May 2007 (on file with the author)).

5. CONCLUDING OBSERVATIONS

There are different perspectives from which to assess the impact of the international amnesty prohibition (or, at the very least, the trend towards the recognition of such prohibition) in the case of Burundi. Advocates as well as sceptics of the so-called 'justice cascade'[82] and, more generally, the global human rights norms cascade, may find inspiration in the Burundi case. While some developments were clearly norm-affirming, they were systematically countered by norm-circumventing bypasses. On a constructivist account,[83] one may argue that Burundi's peace process has clearly been shaped by the international normative environment. Offering amnesty for the most serious crimes of international concern in return for a cessation of hostilities was no longer an option. The proposed transitional justice process and the on-going negotiations between the UN and the Government of Burundi are clearly impacted upon by the international amnesty prohibition. Seen from this same angle, the case of Burundi has even been referred to as evidence for the general thesis that the granting of amnesty in connection with truth seeking processes is possible only when the amnesty excludes crimes under international law.[84] On a realist account, the sophisticated bypassing of the amnesty prohibition reveals the limits of what international law can achieve.[85] While Burundi's peace agreements and domestic law rhetorically incorporated the amnesty prohibition, the international norm has as of yet not made any difference when it comes to curbing a long standing tradition of impunity for the most serious human rights crimes. Imperatives of political expediency, such as the negotiated modality of Burundi's transition based on a power-sharing deal, as well as international priority for negative peace and short term stability, have clearly outweighed the desire to hold accountable those responsible for past injustices. Holding those responsible is obviously one of the underlying goals of the amnesty prohibition.

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82 Lutz, E. and Sikkink, K., 'The Justice Cascade: the Evolution and Impact of Foreign Human Rights Trials in Latin America', *Chicago Journal of International Law*, Vol. 2, No. 1, 2001, pp. 1–34; and Sikkink, K. and Walling, C.B., 'The Impact of Human Rights Trials in Latin America', *Journal of Peace Research*, Vol. 44, No. 4, 2007, pp. 427–445.

83 See, *inter alia*, Finnemore, M. and Sikkink, K., 'International Norms Dynamics and Political Change', *International Organization*, Vol. 52, No. 4, 1998, pp. 891–917.

84 Amnesty International, *Commissioning Justice. Truth Commissions and Criminal Justice*, AI, London, 2010, pp. 14–15. Amnesty also cites Burundi as an example of its finding that the practice of truth commissions strongly supports the prosecution of crimes under international law (*ibidem*, p. 19). These two conclusions are absolutely correct if one limits its analysis of Burundi's peace process and proposed transitional justice policy to the black letter of the law.

85 More generally, sceptics have argued that it is erroneous to assume that international human rights law exercises a normative pull towards compliance (Goldsmith, J.L. and Posner, E., *The Limits of International Law*, Oxford University Press, Oxford, 2005, p. 15). States' leaders may do no more than paying mere lip-service to international law, which may suffice to reach their objective of gaining international legitimacy and appeasing international coercion (see also Subotic, J., *Hijacked Justice. Dealing with the past in the Balkans*, Cornell University Press, Ithaca, 2009).

Whereas international consensus appears to be growing that peace and justice are not mutually exclusive but mutually reinforcing,[86] the case of Burundi seems to suggest that, although this may well be true over the longer term, when it comes to promoting 'sustainable peace', dirty deals between political and military elites with blood stained hands are only cosmetically affected by the international normative environment. Negotiating and implementing peace agreements is, first and foremost, a matter of making interests meet and seen from that angle, normative constraints are a nuisance that can be creatively circumvented. Of course, Burundi is but one situation and much more, comparative research is needed into the domestic legal and political reality of the international amnesty prohibition in order to be able to draw more generally applicable conclusions.[87]

A fundamental normative question remains unanswered. Are Burundi-like situations undesirable because they undermine the global trend towards improved human rights protection? Or should they be seen as acceptable bypasses, instances of emergency surgery needed to avoid the sudden death of a long and complex process of transition towards peace and, therefore, to avoid more human suffering? It is stating the obvious that it is preferable for law to produce its intended effects, rather than to be systematically ineffective, violated or circumvented. Furthermore, it is also preferable for political transitions to result in situations in which the exercise of political power is constrained by the rule of law, including international human rights obligations of the State concerned, rather than in situations in which there is essentially continuity in the arbitrary exercise of political authority. However, one may imagine situations in which an immediate and full implementation of the amnesty prohibition is likely, though admittedly hardly ever surely, to result in continued instability and a delayed end to armed conflict. A strict and immediate application of transitional justice law is not only much more challenging, it might also be counterproductive. Transitional justice law was primarily designed in the early 1990s to deal with situations of completed political transitions after authoritarian rule and are now being applied to much more complex situations and transition processes that have clearly not yet reached their final destination. A compromise may then lie in the careful formulation of the international norm so as to leave a certain margin of appreciation. For such a development *de lege ferenda*, international human rights law may offer more inspiration than international criminal law.

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86 See, *e.g.*, United Nations, Human Rights Council, *Analytical Study on Human Rights and Transitional Justice*, UN Doc. A/HRC/12/18, 6 August 2009, para. 51 ('The assumed tension between peace and justice has gradually dissolved').

87 On a methodological note, the author of this contribution shares the view that more in-depth country analysis (rather than large n-studies) on transitional justice and more 'thick' legal research that goes beyond the black letter of the law is needed (see Mc Evoy, K., 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice', *Journal of Law and Society*, Vol. 34, No. 4, December 2007, pp. 411–440).