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AFRICAN YEARBOOK ON INTERNATIONAL HUMANITARIAN LAW

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Contents

Resolving presidential term limits in transitional justice processes: Revisiting the 2015 Burundi Crisis

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Abstract

The efforts to resolve the conflict in Burundi through the implementation of transitional justice have been fraught with many challenges. The crisis in Burundi took a new twist in June 2020 with the sudden passing of one of the major role-players, President Pierre Nkurunziza. However, this has not resolved the crisis in any significant way so far, and it is imperative to revisit and examine some of the underlying legal issues and draw some lessons for the future. In this article, I argue that the Burundi crisis, arising from the third-term bid of then President Nkurunziza, presented a conflict of two legal orders—the domestic constitutional order of Burundi and the African Union legal order as embodied in a number of regional treaties, principally, the African Union Constitutive Act and the Charter on Democracy and Governance. This clash made it difficult, if not impossible, to achieve a different outcome when expectations came in direct conflict with decisions of the highest court in the Burundian legal order. External actors should be more circumspect and approach election-related legal processes more cautiously, because, ultimately, it is the domestic courts that will decide such cases.

Keywords: Burundi, Arusha Peace Accord, transitional justice, presidential term limits, African Union, democracy, peace agreements.

PART I

INTRODUCTION

Burundi experienced an ethnic conflict between 1993 and 2005 where an estimated 300 000 people were killed and another 1.2 million displaced.[1] This brutal conflict was brought to an end by the successful negotiation of the Arusha Peace and Reconciliation Agreement for

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1 The number of casualties in the conflict have varied by different accounts. See *The Burundi Genocide's Death Toll*, University of South Florida Libraries, available at <http://exhibits.lib.usf.edu/items/show/479> (accessed on 23 July 2023).

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Burundi.[2] This agreement, imperfect as it may be, created the basis and enabling environment for democratic elections, disarmament, demobilisation and reintegration processes in Burundi. The negotiated settlement brought the former rebel group, Conseil National pour la Défense de la Démocratie et Forces de Défense de la Démocratie (CNDD-FDD), into power, and its leader, Jean Pierre Nkurunziza, became President in 2005 under a Presidential Constitution that provides for a presidential term limit of two terms.[3] Before his death in 2019, Jean Pierre Nkurunziza served two five-year terms as President, from 2005 to 2015, but he decided to stand for re-election again in 2015.[4] Opposition political parties argued that he was ineligible to contest the 2015 elections having already served two terms as prescribed by the Burundian Constitution. Nkurunziza and his ruling party, CNDD-FDD, argued that since he was elected by the National Assembly in his first term in 2005 rather than by 'universal adult suffrage', as stipulated in the Arusha Agreement, his first term in office should not count towards the two five-year terms.

This decision was met with stiff resistance from opposition political parties and many Burundians, and civil society groups and human rights activists organised street protests to register their displeasure.[5] For several months, there were mass protests across the country, and as the protests intensified, the government responded with increasing crackdown and repression.[6] The government's response was characterised by widespread human rights abuses—brutality by security forces, arbitrary arrests and detention, torture, disappearances and murder.[7] In particular, the International Crisis Group, Human

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2 'Arusha Peace and Reconciliation Agreement for Burundi', available at <https://peacemaker.un.org/sites/peacemaker.un.org/files/BI_000828_Arusha%20Peace%20and%20Reconciliation%20Agreement%20for%20Burundi.pdf> (accessed on 26 October 2023).

3 See Willy Nindorera 'The CNDD:FDD in Burundi: The Path from Armed to Political Struggle' (2012) *Berghof Transitions Series No 10, Resistance/Liberation Movements and Transition to Politics* 27; International Crisis Group 'End of Transition in Burundi: The Home Stretch' (5 May 2004) ICG Africa Report No 81 at 1.

4 BBC News 'Burundi's President, Pierre Nkurunziza confirms third-term bid' (2015), available at <https://www.bbc.co.uk/news/world-africa-32464054> (accessed on 27 November 2023).

5 Stef Vandeginste 'Briefing: Burundi's Electoral Crisis-Back to Power-Sharing Politics as Usual?' (2015) 115:457 *African Affairs* 624–636; International Crisis Group 'Burundi: A Dangerous Third Term' (20 May 2016) Africa Report No 235

6 Vandeginste (2015) op cit note 5.

7 Office of the UN Human Rights Council, Report of the Commission of Inquiry on Burundi, Human Rights Council, 36th session, 11–29 September 2017, A/HRC/36/54, 8–13. See also Human Rights Watch 'Burundi: Deadly Police Response to Protests', available at <https://www.hrw.org/news/2015/05/29/

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Rights Watch and the Office of the UN Human Rights Council have extensively documented widespread cases of human rights abuses and violations in Burundi, some of which may constitute crimes against humanity.[8]

As the crisis unfolded, two significant events occurred—one political and the other legal, but both had far-reaching implications for the crisis in Burundi and beyond. The first of these events was the judgment by the Constitutional Court of Burundi, handed down on 4 May 2015.[9] The second was the resolution adopted by the Peace and Security Council of the African Union (AUPSC) on 17 December 2015, invoking Article 4*(h)* of the African Union Constitutive Act and recommending to the Assembly of Heads of State and Government of the African Union to deploy an intervention force in Burundi.[10] Although the African Union (AU) did not eventually deploy the troops, the proprietary and wisdom of the initial AUPSC decision and the overall impact of the use of 'credible threats' as an instrument of coercive mediation to force the parties to the negotiation table have been the subject of criticism and commentary.[11] What has received less

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burundi-deadly-police-response-protests> (accessed on 27 November 2023); Amnesty International, 'Amnesty International Report 2014/15 – Burundi', available at <https://www.refworld.org/docid/54f07e0ee.html> (accessed on 28 November 2019); Human Rights Council, 33rd session, Annual report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General Report of the United Nations Independent Investigation on Burundi (UNIIB) established pursuant to Human Rights Council Resolution S-24/1, particularly paras 18–ff.

8 For an eye-witness account, see Lidewyde H Berckmoes & Anonymous 'Young Protesters' Ambivalence about Violence in the 2015 Crisis in Burundi: Local Legacies of Conflict and Generational Change' (2023) 11:3 *Peacebuilding* 302–316.

9 Johnson, Constance '*Burundi: Court Permits Third Bid for Presidency'* (2015), retrieved from the Library of Congress, available at <www.loc.gov/item/global-legal-monitor/2015-05-07/burundi-court-permits-third-bid-for-presidency/>(accessed on 27 November 2023).

10 Communique PSC/PR/COMM.(DLXV) of the African Union Peace and Security Council adopted at its 565th Meeting, Addis Ababa, 17 December 2015.

11 See for example, Nina Wilen and Paul D Williams 'The African Union and Coercive Diplomacy: The Case of Burundi' (2018) 56:4 *Journal of Modern African Studies* 673-696; International Crisis Group 'The African Union and the Burundi Crisis: Ambition versus Reality' (2016) Briefing No 122; Paul D Williams 'The African Union's Coercive Diplomacy in Burundi' (2015) *IPI Global Observatory*. Also see Solomon Dersso 'To Intervene or not Intervene? An Inside View of the AU's Decision-making on Article 4*(h)* and Burundi' (2016) *World Peace Foundation, Occasional Papers*, available at <https://sites.tufts.edu/reinventingpeace/2016/03/01/to-intervene-or-not-to-intervene-an-inside-view-of-the-aus-decision-making-on-article-4h-and-burundi/> (accessed on 28 October 2023), where Dersso also discusses the AUPSC resolution.

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attention, however, is the legal issues raised by the first event, its legal significance and practical impact on the crisis in Burundi on the one hand, and its legal and normative impact on the AU and its efforts to intervene in intra-state conflicts arising from election-related matters and the resulting domestic legal processes in Burundi and elsewhere on the continent, on the other hand.

The existing literature has largely focused on whether or not Nkurunziza was legally permitted to stand for re-election for a third term under the Burundian Constitution.[12] Some commentators have engaged this question from the perspective of the nature of the legal relationship between the Burundi Constitution and the Arusha Peace Agreement,[13] while others have focused on the efforts of the AU to resolve the crisis and the proprietary or otherwise of the botched AU intervention.[14] While some authors have defended the AU's efforts,[15] others have criticised the AU's response as ill-advised, premature and ineffective.[16] Broadly, the approach to the Burundi crisis has been located either within the presidential term-limits discourse and the Peace Agreement literature or what may be called the 'transitional justice discourse'.[17]

In this paper, I do not dwell on the botched AUPSC deployment, but only draw on the decision insofar as it has implications for the second event—the Constitutional Court judgment and the combined effect of the interaction of both developments on the conflict as it unravelled and as it affects the subsequent actions of major stakeholders. I adopt

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12 See Micha Wiebusch 'Presidential Term Limits and the African Union' (2019) 63:1 *Journal of African Law* 131–160 at 141; Stef Vandeginste 'Legal loopholes and the politics of executive term limits: Insights from Burundi' (2016) 16:2 *Africa Spectrum* 39–63; Vandeginste op cit note 5 at 624–636; Patricia Daley and Rowan Popplewell 'The appeal of third termism and militarism in Burundi '(2016) 43:150, *Review of African Political Economy* 648–657.

13 Vandeginste (2016) op cit note 12 at 39–63.

14 See 'Has the AU Played Its Last Card in Burundi? Deploying AU Troops to Halt Human Rights Abuses Raises More Questions Than Answers' (2016) *Institute for Security Studies*, available at <https://issafrica.org/pscreport/psc-insights/the-aus-challenged-responsibility-to-protect-in-burundi> (accessed on 23 November 2023).

15 See Dersso op cit note 11.

16 Wilen and Williams (2018) op cit note 11; Ty McCormick 'The Burundi Intervention that Wasn't' (2016) *Foreign Policy 2*, available at <https://foreignpolicy.com/2016/02/02/the-burundi-intervention-that-wasnt/> (accessed on 25 June 2022).

17 Stef Vandeginste *In Need of a Guardian Angel: Preserving the Gains of the Arusha Peace and Reconciliation Agreement for Burundi* (2016) Working Paper 1, Institute of Development Policy and Management, University of Antwerp; Yolande Bouka 'Missing the Target: The African Union's Mediating Efforts in Burundi' (2016) Africa Policy Brief No 15.

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a positivist analytic framework to argue that the legal quandary presented by the AU's rejection of Nkurunziza's third-term bid and the AUPSC's decision to deploy troops to Burundi—though rejected by the Assembly of Heads of State and Government—and the judgment of the Constitutional Court that upheld Nkurunziza's eligibility for re-election, presented a conflict of two legal orders—the domestic constitutional order of Burundi and the constitutional order of the AU (represented by a combination of several regional treaties, principally, its Constitutive Act, the APSA and the Charter on Democracy and Governance).[18] I argue that whereas Burundi has international law obligations under the AU treaties that it ratified with respect to the eligibility of Nkurunziza to stand for re-election, however odious that might seem to the AU, regional players and the international community, once the Constitutional Court of Burundi decided that the candidate (be it Nkurunziza or whosoever) was eligible for re-election, there was little room for legal manoeuvres by external actors to legally reverse the outcome. It became imperative to defer to the judicial pronouncement of the Burundi Constitutional Court (regardless of how that judgment might have been procured). In fact, fidelity to the rule of law imposes a duty on all actors in such circumstances to respect the decision of the Court as the highest adjudicating authority and norm-setting legal authority on the subject within the Burundian legal order (though doubts may exist about the independence and impartiality of the relevant adjudicating authority). This is vital, because imperfect as it may be, the judiciary is still one of the major pillars on which the transitional justice and peace and stability in Burundi will rest. This lesson is important for AU's future response to election-related intra-state conflicts on the continent, because as the AU seeks to deepen democratic values within its normative framework and continental legal order, we will likely see future instances where the AU and the highest judicial authority in a member state take conflicting views or stand at opposite poles in an election-related conflict.

This paper is divided into four parts, including this introduction, which sets the context, provides a background to the crisis in Burundi and presents a brief summary of the current literature on the subject and the main argument and outline of the paper. In Part II, I examine the relationship and tensions between the Constitution of Burundi and the Arusha Peace Agreement and its implications for the constitutional provisions on presidential term limits. To do this, I employ a legal positivist methodology. In Part III, I then juxtapose the Burundi Constitutional Court's judgment with the AU legal order to underscore

[18] See African Union Charter on Democracy, Elections and Governance, adopted at Addis Ababa on 30 January 2007.

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the collision of two legal regimes; thereby exposing the tensions in the conflicting normative hierarchies. In Part IV, I offer some concluding remarks.

PART II

THE ARUSHA PEACE AND RECONCILIATION AGREEMENT AND PRESIDENTIAL TERM LIMITS UNDER BURUNDI'S CONSTITUTION

The Arusha Peace and Reconciliation Agreement for Burundi (Arusha Agreement) was signed on 28 August 2000, after lengthy negotiations fraught with many challenges, change in mediators/facilitators, and a perpetual threat of derailment.[19] Faltering in many aspects, the implementation of the Arusha Agreement was not smooth, but it managed to hold Burundi together and enabled local actors and stakeholders, regional and international partners to begin to lay the legal and constitutional foundation for transition, political reforms, democratisation, and reconciliation necessary to underpin sustainable peace and security in Burundi. This groundwork ran into several obstacles and sometimes came to near collapse because of many factors, including the alleged role of 'double-agent' regional actors accused of undermining the political stability of Burundi among others.[20] Besides the intransigence of former president Jean Pierre Nkurunziza, a number of other latent political, ethnic, regional and international factors also contributed to these challenges.[21] The actions of some well-meaning external actors and how those actions were received and interpreted by state and non-state actors within Burundi sometimes produced the

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19 For a detailed discussion of the historical context and processes in which the Arusha Agreement was negotiated and signed, see generally, Stef Vandeginste *Stones Left Unturned: Law and Transitional Justice in Burundi* (2010); Stef Vandeginste 'Sharing, Conflict and Transition in Burundi: Twenty Years of Trial and Error' (2009) 44:3 *Africa Spectrum* 63–86; International Crisis Group 'The Mandela Effect: Prospects for Peace in Burundi' (18 April 2000) Central Africa Report No. 13.

20 International Crisis Group 'The Mandela Effect: Prospects for Peace in Burundi' (18 April 2000) Central Africa Report No. 13; 'Burundi after Six Months of Transition: Continuing the War or Winning Peace?' (24 May 2002) Africa Report No 46.

21 See comment by the Spokesman of the UN Secretary General on Burundi on the occasion of the 15th Anniversary of the signing of the Arusha Agreement: 'never has the spirit of Arusha been as sorely tested as in the past five months' (New York, 28 August 2015), cited in Stef Vandeginste *In Need of a Guardian Angel* op cit note 17.

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unintended consequences of driving Burundi to the precipice and reopening sporadic ethno-political and election-related violence.[22]

Contest for elective office and the transfer of political power vis-à-vis inter-ethnic relations in Burundi had always been at the centre of its long history of conflict, particularly with respect to the presidency. Taking cognisance of this historical reality, Article 4 of Protocol I of the Arusha Agreement provides that '[w]ith 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.'[23] In response to these two problems and in the hope that it would address the ethnic and political divisions at the root of the conflict, the Arusha Agreement provided for a double-layered power-sharing agreement along ethnic lines on the one hand, and along political divides on the other.[24]

Consequently, Article 7 of the Arusha Peace Agreement mandated that the proposed new Constitution of Burundi must provide for a president to be elected by universal suffrage to a presidential term limit of two terms. Against this backdrop, one of the fundamental provisions of the 2005 Burundi Constitution resulting from the Arusha Agreement was a presidential term limit. Article 96 of that Constitution provides that '[t]he President of the Republic is elected by universal direct suffrage for a mandate of five years renewable one time'. The then incumbent President, Jean Pierre Nkurunziza, who served as the first post-conflict President and whose second term in office came to an end in 2015, decided to stand for re-election, the clear provisions of Article 96 of the 2005 Constitution notwithstanding. The argument of Pierre Nkurunziza and his supporters was that since Pierre Nkurunziza was not 'elected by universal direct suffrage' in his first term, but by the

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22 Daley and Popplewell op cit note 12 at 648. Here, I am referring to the approach by some external actors apparently seeking to persuade the parties to come to the negotiation table and reach a compromise for a peaceful resolution of the conflict, sometimes resort to 'messaging diplomacy' to exert pressure on the government and opposition. In some cases, such messages have been misinterpreted either by the government to signal weakness, or by the opposition and other sub-state actors to mean external support for the actualisation of their demands, all of which produced unrealistic expectations, hardened positions, exacerbated and protracted the conflict. As Vandeginste notes: 'The positioning by the international partners [in the Burundi conflict]—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.' (See Stef Vandeginste *In Need of a Guardian Angel* op cit note 17 at 17).

23 See Article 4*(a)* Arusha Peace and Reconciliation Agreement for Burundi (2000).

24 See Vandeginste *In Need of a Guardian Angel* op cit note 17 at 7.

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National Assembly, the first term should be disregarded for purposes of counting the number of terms Nkurunziza had already served.[25] To be sure, Article 302 of the 2005 Burundian Constitution provides:

> [e]xceptionally, the first President of the Republic of the post-transition period is elected by the [elected] National Assembly and the elected Senate meeting in Congress, with a majority of two-thirds of the members.... The President elected for the first post-transition period may not dissolve the Parliament.[26]

We will return to the nebulous legal situation created by Articles 302 and 96, and the impact on the interpretation of Article 7 of the Arusha Agreement; the implementation and impact on the transition in Burundi; and peace and security in Burundi in the run-up to the 2015 elections. It suffices to emphasise for now that in the ensuing crisis, violent repression of protesters, a failed military coup, and an attempt by the AU to mobilise for an Article-4*(h)* intervention, Burundi was once again on the cusp of another round of civil war.[27] A number of commentators have blamed inelegant drafting in the process of transposing the provisions of the Arusha Agreement into the 2005 Constitution for the difficulty thus created by the impugned constitutional provisions.[28] It is argued that whereas Article 7 of the Arusha Agreement was unambiguous in its wording, the corresponding provisions in the 2005 Constitution were so poorly drafted that it was amenable to multiple interpretations.[29] In ordinary times, this should not be a major issue; after all, as a legal document, the 2005 Constitution is expected to be interpreted not only by the current parties but by succeeding generations—that is why the Constitution provides for a Constitutional Court in the first place. But these were not ordinary times in Burundi. Ultimately, it was the Constitutional Court that stepped in to resolve the tensions and contested meaning

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25 See Vandeginste op cit note 5 at 626; Voice Of America, 'Nkurunziza Nominated for Third Term as Burundi's President', available at <https://www.voanews.com/a/nkurunziza-nominated-third-term-burundi-president/2734823.html> (accessed on 30 October 2023).

26 Article 302 Burundi's Constitution of 2005, available at <https://adsdatabase.ohchr.org/IssueLibrary/BURUNDI_Constitution.pdf> (accessed on 30 October 2023).

27 See para 13*(a)*(i) Communique PSC/PR/COMM.(DLXV) of the African Union Peace and Security Council adopted at its 565th Meeting, Addis Ababa, 17 December 2015.

28 See Vandeginste op cit note 5 at 625–626.

29 See Vandeginste *In Need of a Guardian Angel* op cit note 17 at 14–15.

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of Articles 96 and 302 and the corresponding provisions in the Arusha Agreement.[30]

The impugned provisions of the Arusha Agreement at the heart of the presidential term-limit dispute are to be found in Article 7 of Chapter 1 of Protocol II of the Arusha Peace and Reconciliation Agreement for Burundi.[31] Article 7 states:

> 1. *(a)* The Constitution shall provide that, save for the very first election of a President, the President of the Republic shall be elected by direct universal suffrage in which each elector may vote for only one candidate. …
>
> *(b)* …
>
> *(c)* For the first election, to be held during the transition period, the President shall be indirectly elected as specified in article 20, paragraph 10 below.
>
> 2. …
>
> 3. She/he shall be elected for a term of five years, *renewable only once. No one may serve more than two presidential terms*.[32]

Article 20, dealing with elections, is located in Chapter II ('Transitional Arrangements') of the Arusha Peace Agreement. Paragraph 10 thereof provides that '[t]he first post-transition President shall be elected by the National Assembly and Senate sitting together by a majority of two-thirds of the votes'. Clearly, Article 96 of the 2005 Constitution, already quoted above, was drafted to reflect the agreement as contained in Article 7(3) of the Arusha Peace Agreement, which allows a maximum of two terms for the office of the president. Article 302 of the Constitution was drafted to capture the agreement as contained in Article 7(1)*(a)* and *(c),* read together with para 10 of Article 20 of the Arusha Agreement, already quoted above. However, the following significant question emerged: since President Pierre Nkurunziza was not 'elected by universal direct suffrage' for his first mandate of

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30 Oluwatoyin Badejogbin 'The Constitutional Court of Burundi Re RCCB 303 the Interpretation of the Constitution: President Nkurunziza's Politics and the Suppression of Judicial Independence in Burundi' (2016) *African Legal Information Institute,* available at <https://africanlii.org/articles/2016-05-30/africanlii/the-constitutional-court-of-burundi-re-rccb-303-the-interpretation-of-the-constitution-president-nkurunzizas-politics-and-the-suppression-of-judicial-independence-in-burundi> (accessed on 7 April 2024).

31 Protocol II deals with Democracy and Good Governance, and Chapter 1 under this Protocol is devoted to Constitutional Principles of the Post-Transition Constitution. Article 7 of the Protocol deals with 'The Executive'.

32 Protocol II of the Arusha Peace Agreement deals with Democracy and Good Governance, and Chapter 1 under this Protocol is devoted to Constitutional Principles of the Post-Transition Constitution. Article 7 of this Protocol deals with 'The Executive' (Emphasis added).

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five years, did that mean his first term in office should not count as a 'first term' of office in terms of Article 96 of the Constitution?

The arguments on both sides were compelling. The pro-government camp argued that the indirect election by the National Assembly for Nkurunziza's first post-conflict presidential term in 2005 meant that Nkurunziza had only been directly elected by universal suffrage once — in 2010.[33] By this interpretation, technically, the President was eligible for re-election in the 2015 election because the 2015 election would then be his second term of office, if elected. The opposition parties argued that the provisions in Article 302 of the Constitution reflect (even if imprecisely) the transitional arrangements in Article 7(1)*(a)* and *(c),* read in conjunction with para 10 of Article 20 of the Arusha Peace Agreement. The opposition pointed out that the ambiguity created by the relationship between Articles 96 and 302 of the Constitution was at best due to poor drafting and should not prejudice or derogate from the spirit of the Arusha Agreement, which sought to limit the presidential term of office to two terms, notwithstanding that the first election was by indirect universal suffrage through the National Assembly.[34] In the opposition's interpretations, heavy reliance was placed on the purpose and spirit of the Arusha Agreement generally, which seemed quite unambiguous in this respect. Though helpful, this approach raised another legal question which, if answered in the negative, would take the wind out of the sails of proponents of this view in terms of the hierarchy of legal norms within a legal order. And that question is: what is the relationship between the Arusha Agreement and the 2005 Burundian Constitution it gave birth to? Is the Arusha Agreement a supra-constitutional document or is the Burundian Constitution superior to the Arusha Agreement? The pro-Nkurunziza group argued that the 2005 Burundian Constitution was the supreme legal document in Burundi and thus superior to the Arusha Agreement; the opposition argued otherwise. In the end, it fell to the Constitutional Court of Burundi to answer this question. It is pertinent to recall that President Jean Pierre Nkurunziza, who was at the centre of the 2015 controversy, was the leader of the CNDD-FDD rebel group during the negotiation of the Arusha Peace Agreement, and he later became the transitional president of Burundi. Therefore, to trace the legal and political nuances in the Constitutional Court's judgment in the next section, it is important to briefly sketch the legal nature of peace agreements and constitutions within a transitional-justice process and what this relationship tells us about the scope for legal intervention by a regional body like the AU.

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33 Daley and Popplewell op cit note 12 at 649.

34 Vandeginste op cit note 5 at 626.

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There is no universally accepted definition of 'peace agreement', but it is widely regarded as a term referring to the documented outcome of a process of negotiation by parties engaged in a conflict in order to bring about an end to such conflict and usher in a process of peace and stability.[35] The process of negotiating peace agreements would normally involve major internal and external factors and actors besides the parties to the conflict, and some of those actors would be both state and non-state actors—some of whose legal status and capacity to enter into a treaty under international law may be doubtful.[36] As a result, with few exceptions, peace agreements manifest characteristics which locate them in grey areas where their legal nature under the law of treaties remain unclear and sometimes casting a shadow over their interpretation and the bindingness of their provisions in domestic courts.[37] A detailed analysis of the legal nature of peace agreements is outside the scope of this article, but it suffices to say that the interpretation, implementation and effective enforcement of peace agreements usually require the centralised and coercive authority characteristic of positive law in a domestic legal system and generally lacking in international law. It is for this reason that most peace agreements often provide for the adoption of a new constitution to embody and give effect to the agreement reached by the parties in the peace-negotiation process.[38] Unfortunately, the relationship between the peace agreement and the new constitution it gives birth to is seldom clearly stated in the peace agreement, and this was indeed the case in the Arusha Peace Accord. In essence, where does the Arusha Agreement end, and where does the new Burundi Constitution of 2005 begin, and which of the two documents command superior normative hierarchy in the Burundian legal order? The next section examines Burundi's Constitutional Court's answer to these questions.

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35 Christine Bell and Catherine O'Rourke 'Peace Agreements or Pieces of Paper? The Impact of UNSC Resolution 1325 on Peace Processes and their Agreements' (2010) 59(4) *The International and Comparative Law Quarterly* 941–980 at 950.

36 Christine Bell 'Peace Agreements: Their Nature and Legal Status' (2006) 100:2 *American Journal of International Law* 373–412 at 378.

37 Although all the parties to the Arusha Peace Accord regard it as binding on all the state parties and non-state actors, it is not clear how this is legally achieved.

38 Bell op cit note 36 at 379.

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PART III

THE CONSTITUTIONAL COURT'S JUDGMENT AND THE HORIZONTAL RELATIONSHIP BETWEEN THE ARUSHA PEACE AGREEMENT AND THE 2005 BURUNDI CONSTITUTION

The Burundi Constitution of 2005 was a product of the Arusha Peace Agreement and adopted via a referendum on 28 February 2005. But is the Arusha Agreement a supra-constitutional document or is the Burundi Constitution superior to the Arusha Agreement? This question was often taken for granted until the 2015 presidential elections in Burundi drew near and then incumbent Pierre Nkurunziza declared his intention to stand for re-election even though he had already served two five-year terms. Under Article 96 of the Constitution, a president is only entitled to serve two terms of five years each. The same Article provides that such president should be elected by *universal direct suffrage*.[39] At the same time, Article 302 of the Constitution prescribed for the first post-transition president to be elected by 'universal indirect suffrage' (through the elected National Assembly) and not 'universal direct suffrage' (as stipulated in Article 96). The contentious issue was about the process of election prescribed by both Articles 96 and 302. Does the combined reading of Articles 96 and 302 preclude the incumbent who was elected by universal indirect suffrage (and who had served two five-year terms) from being eligible for re-election? In *The Constitutional Court of Burundi, Sitting in Bujumbura in the Matter of the Interpretation of the Constitution,*[40] although the issue for determination was the interpretation of Articles 96 and 302 of the Constitution, to answer this question, the Constitutional Court had to define the nature of the relationship between the Arusha Peace Agreement and the Constitution and their respective positions in the hierarchy of legal norms within the Burundi domestic legal order. The Court emphasised the contextual background surrounding the birth of the Constitution, noting that in order to understand the 'spirit' and intent of the Constitution drafters, it is imperative 'to examine the documents which inspired the Burundian drafters and therefore, special attention will be given to the Arusha Peace and Reconciliation

39 See Article 96 of the Burundi 2005 Constitution (Emphasis added).

40 See *In the Republic of Burundi Constitutional Court, Sitting in Bujumbura in the Matter of the Interpretation of The Constitution RCCB 303*, delivered on 4 May 2015. The translation used here was commissioned by the Pan African Lawyers Union (PALU), available at <https://www.ihrda.org/wp-content/uploads/2015/05/Judgment-of-Burundi-Constitutional-Court-ENGLISH-Translation.pdf> (accessed on 28 October 2023).

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Agreement for Burundi, a genuine, unavoidable and indispensable document from which the inspiration was drawn by the Burundian Constitution drafters'.[41] The Court stated further:

> [t]hat it was not only the Arusha Peace and Reconciliation Agreement that the drafters drew inspiration from. That other documents, particularly, the Burundi Charter of National Unity Referendum, 1991, inspired the Burundian drafters but never became supra constitutional. Additionally, it is useful to recall that the Arusha Peace and Reconciliation Agreement underwent a juridification process in order to make it part of the national legal system by a vote in Parliament on Law No. 1/017 of 1 December 2000 on the Adoption of the Arusha Peace and Reconciliation Agreement for Burundi. … Considering that, though the Arusha Peace and Reconciliation Agreement is not supra constitutional, it is nonetheless the Constitution's bedrock particularly the sections relating to constitutional principles. That whosoever violates the main constitutional principles of the Arusha Agreement cannot claim to respect the Constitution.[42]

The Court noted that the drafters of the Constitution wanted to prevent any president from serving more than two terms as stipulated in Chapter 1, Article 7, Protocol II of the Arusha Peace Agreement.[43] The Court held further that the drafters of the Constitution had misinterpreted the recommendations of the Arusha Peace Agreement.[44] The Court then concluded that '[c]onsidering that since, rather than objecting to the form of election enshrined in Article 96 as the Agreements had wanted, Article 302 of the Constitution, given where it appears in the Constitution—under "Provisions for the First Post Transition Period"—and the vagueness of the word "exceptionally" appears to be independent of Article 96 of the same Constitution thereby creating a completely exceptional and special mandate which is unrelated to Article 96.'[45] The Court was at pains to point out that although the Arusha Peace Agreement was clear that no president may serve more than two terms, the vague wording of Article 302 of the Constitution, which was supposed to reflect Chapter 1, Article 7, Protocol II of the Arusha Peace Agreement, and the use of the word 'exceptionally' in Article 302, located in the Chapter on 'Provisions for the First Post Transition Period' in the Constitution, delinked this provision from Article 96 'of the same Constitution thereby *creating a completely exceptional and special mandate* [for the first-post-transition

41 See RCCB 303 at 4.
42 Ibid.
43 Ibid at 4–5.
44 Ibid at 6.
45 Ibid.

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elected president] which is unrelated to Article 96'.[46] The Court read these provisions together with the provisions of Articles 186 and 190 of the Electoral Code of April 2005 and concluded that 'though the Arusha Peace and Reconciliation Agreement had recommended that no President serves more than two terms, the vague nature of Article 302 of the Constitution made a third term possible for a president who headed the first post-transition period'.[47] The Court summed up the basis of its reasoning for the above conclusion:

> Considering that Article 302, for its part, came up with a special universal indirect suffrage mandate and had nothing to do with the mandate provided for in Article 96… [c]onsidering that as stated above, the spirit and the letter of Arusha Peace and Reconciliation Agreements must be respected and that no president can serve more than two terms, the president elected under Article 302 of the current constitution may renew his term once by universal direct suffrage without violating the Constitution … . Article 96 means that the number of direct universal suffrage terms is limited to only two and that Article 302 creates a special indirect universal suffrage term which has nothing to do with the terms described in Article 96. […T]he renewal, for at least one last time, of the current presidential term for five years is not contrary to the Constitution of the Republic of Burundi.[48]

This judgment has been criticised on three major grounds. First, Stef Vadengiste argues that it is 'remarkable' that the Court did not refer to the Explanatory Statement of the draft Constitution.[49] To be sure, the Explanatory Statement notes, '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.'[50] From the outset, it should be pointed out that the question of normative hierarchy between the Constitution and the Arusha Peace Agreement was not directly before the Court. So, it was not surprising that the Court did not expressly pronounce on it but referred to the Arusha Peace Agreement as a document that inspired the drafters of the Constitution and whose content could guide the Court in constitutional interpretation and identifying the intention of the drafters and the 'spirit' of the Constitution. Besides the Peace Agreement, the Court considered other pre-constitution documents such as the Charter on

46 Ibid.
47 Ibid.
48 Ibid at 7.
49 See The Explanatory Statement.
50 See Vandeginste *In Need of a Guardian Angel* op cit note 17 at 15.

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Unity, but concluded that while these documents inspired the drafters of the Constitution, they did not constitute a higher legal norm and were not superior to the Constitution. The Court adopted a textual reading and positivist interpretation, and had it considered the Explanatory Statement, it is most probable that it would have come to the same conclusion—that the Arusha Peace Agreement is not a supra-constitutional document and it is not superior to the Constitution of Burundi. Indeed, the Constitutional Court missed a golden opportunity to categorically determine the legal status of the Arusha Agreement in terms of normative hierarchy vis-à-vis. The Court stated that the Arusha Peace Agreement is not a supra-constitutional document, and by implication, even though the Arusha Peace Agreement inspired the Burundian Constitution, it was not superior to the Constitution.[51] It must also be noted that the Arusha Peace Agreement is a political settlement—an agreement that may at best have quasi-legal character and persuasive effect like all other peace accords and agreements between parties to armed struggle. It is usually not intended to be a legal supernorm in the domestic legal order but designed to pave the way for the emergence of such supernorm in a domestic legal system, which in this case is the 2005 Burundian Constitution.

In my view, it will be stretching the legal status of a peace agreement too far to argue that the provisions of the Arusha Peace Agreement can supersede the final Constitution that it inspired or produced. Moreover, as pointed out by the Constitutional Court, there were other documents that inspired the 2005 Burundian Constitution, but they never became supra-constitutional documents or hierarchically superior to the Constitution of Burundi in the hierarchy of legal norms in Burundi's legal system.[52] The Court also alluded to the juridification exercise which had to be carried out by the Parliament of Burundi in order to bestow legality on the Arusha Peace Agreement, suggesting that the Arusha Peace Agreement existed within the legal framework of the Burundi Constitution and not outside of or above it.[53] The Arusha Peace Agreement is no doubt a useful interpretive guide to the final Constitution; it was a politico-legal roadmap intended to guide the pilgrims to the promised land of a desired outcome, which was a legal document—the final Constitution. With all the omissions in the drafting process, once the provisions became concretised in the final constitutional document, that document becomes the basic legal norm in the legal order of Burundi until amended or superseded by a latter constitution or some other effective legal order.

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51 See RCCB 303 at 4.

52 Ibid.

53 Ibid.

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Secondly, some critics wondered how the Constitutional Court could refer to the 'spirit' of the Arusha Peace Agreement as the document that inspired the drafters of the Constitution and the 'Constitution's bedrock', and in the same breath, could come to the conclusion that the Arusha Peace Agreement never became supra-constitutional.[54] To the extent that the Court was referring to the norms, principles and values that informed the provisions enshrined in the Constitution, one can agree with the Court that it is possible for the contents of the Arusha Peace Agreement to inspire the drafters of the Constitution and for the 'spirit' of the Peace Agreement to permeate the final provisions of the Constitution without the Peace Agreement itself necessarily becoming a supra-constitutional document, once such Constitution is enacted into law (especially through a referendum, as was the case in Burundi).[55] It is in this sense that an extra-constitutional document as a peace agreement can at the same time constitute the 'bedrock' of the contents and provisions of the Constitution it gives birth to post-transition, without becoming the highest source of legal norms in the domestic legal order.[56] Furthermore, the constitutional referendum arguably had some legal impact on the supremacy character of the Constitution vis-à-vis the Arusha Peace Agreement that gave rise to it. The above argument is strengthened by the fact that the Constitution was submitted to a referendum. Obviously, unlike the Arusha Agreement, which was signed by parties not necessarily deriving their authority from the people, the final Constitution, as a legal document, derives its authority directly from the people who conferred legitimacy on the actions of the drafters and the product of the process—the Constitution, by the ratification of the final document. It is also arguable that this referendum also amounts to an ex post facto ratification of the legal acts of the signatories to the Arusha Agreement.

The final criticism levelled against the Constitutional Court's judgment that I will consider here is the self-exile of one of the judges on the eve of the judgment, allegedly due to political pressure exerted by the government; thus, raising questions regarding the independence of the judiciary and the credibility of the Constitutional Court judgment.[57] In my view, this criticism is more political than legal, and weak, indirect rather than conclusive evidence. In any case, in addressing this issue, it is important to situate the case in the broader context in Burundi at the time. The Constitutional Court's ruling that the term of office of a transitional president elected under

54 Ibid.
55 See Vandeginste *In Need of a Guardian Angel'* op cit note 17 at 15.
56 Bell op cit note 36 at 391–92.
57 Daley and Popplewell op cit note 12 at 649.

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Article 302 was 'exceptional' and should be excluded for purposes of Article 96 of the Constitution prescribing presidential term limits, may not have been a desirable outcome, and may be considered morally wrong. However, it appears constitutionally valid under Burundian law even though we may question the independence of the Constitutional Court of Burundi that delivered the judgment, due to the fact that the Vice President of the Court fled immediately after the judgment was delivered. Besides consideration regarding the judge fleeing Burundi, in the absence of any other credible evidence, we have to assume that the judgment of the Constitutional Court was rendered on the basis of legal analysis and application of the Constitution by the apex court of Burundi. There is no doubt that President Nkurunziza exploited the ambiguity created by Articles 302 and 96, but the question of the prejudices of individual judges and how judges decide hard cases has to be separated from the independence of the judiciary, especially in election-related disputes in transitional-justice societies in Africa if ceasefires and transitional elections are to stand a chance of bringing about lasting peace. One cannot correct the problem without addressing the broader systemic and inherent institutional weaknesses that contributed to the collapse of state institutions resulting in armed conflict in the first place. This is even more so in Burundi where the conflict was underpinned by ethnic and identity politics, necessitating a new constitutional order.

Usually, constitutionalism is aimed at limiting the exercise of governmental power to avoid abuse and arbitrary use of political power. Hence, constitutionalism constitutes a strong weapon in the hands of political opposition parties and actors. However, in the case of Burundi, because of the inadvertent ambiguity in Articles 96 and 302, in the way they captured the letter and spirit of Chapter 1, Article 7, Protocol II of the Arusha Peace Agreement relating to presidential term limits, the provisions could be interpreted literally as allowing a third term—as the Constitutional Court found. It was possible for Nkurunziza's supporters to frame the contestation as a matter of constitutionalism and rule-of-law compliance by arguing that the Constitution should be strictly adhered to and the interpretation of Articles 96 and 302 be left to those constitutionally mandated to interpret it—the Constitutional Court.[58] The Arusha Accord as a peace agreement was deliberately precise and detailed in its provision for the maximum term limits for the Presidency and the transformation of political institutions and exercise of governmental power.[59] This was intended to facilitate compliance and implementation in the long

[58] Vandeginste (2016) op cit note 12 at 58.
[59] Bell op cit note 36 at 396.

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term, but as it turns out, such detail and precision could undermine the actual implementation if any of the dynamics or assumptions upon which they were based, changed. This, in the case of Nkurunziza's ambition for a third term in office, combined with changes on the ground during his first and second terms in office, became the change in self-interest necessary to drive his desire to remain in office beyond the constitutionally permissible limit.

The failure of the Constitution to reproduce the Arusha provision on presidential term limits word for word cannot solely be viewed as a negative omission. It should not be forgotten that this was a peace agreement and was designed not as a final constitution but as a broad framework of agreement on principles and institutions for the emergent state and its legal and political arrangements. As Bell notes, the process of drafting the final constitution and its actual implementation is developmental and affords the broader society the opportunity for civic participation and ownership beyond the few incremental steps typically involving rebels or non-state armed groups like CNDD-FDD, regional organisations and international mediators who negotiated or brokered the ceasefire deal and final peace agreement.[60] The participation and local ownership of the process and the emergent constitution from the peace agreement is one important value produced by the constitutional referendum and the Constitutional Court judgment in this case. In my view, not only did the judgment set a precedent, it also reinforced the legitimisation of the Constitution that was made based on the Arusha Peace Agreement—Burundians took ownership of the process and its final outcome.

Interpreted in this light, the Constitutional Court ruling contributes significantly to the consolidation of the legal framework of the post-Arusha Peace Agreement in Burundi. Although domestic courts may not be entirely capable of safeguarding the sanctity of peace agreements and securing the peace in the midst of violent opposition by the parties, '[c]ourts and tribunals have the capacity to extend an agreement's meaning where they find it to be part of the legal framework',[61] and examples of this abound elsewhere and it did not necessarily signify that the rule of law and constitutionalism was sacrificed on the altar of political expediency.

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60 Ibid at 374.

61 Ibid at 389. For example, in the Northern Ireland case, the decision of the Court effectively revised the electoral procedures outlined in the Peace Agreement in order to prevent the collapse of the legislature and the progress recorded so far by the peace process. See Christine Bell op cit note 36 at 389, particularly at footnote 103, citing *Robinson v. Secretary of State for Northern Ireland* [2002] United Kingdom House of Lords, at 32.

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PART IV

CONCLUSION

As aptly demonstrated in the literature, I have argued in this paper that peace agreements by their very nature hardly fit neatly within the domestic legal order. This is because of the focus on trying to deal with the local and international aspects of the internal conflicts that necessitated the peace treaty while resolving the immediate and remote causes of the conflict for a transitional and sustainable long-term society. This partly explains why many peace agreements fail; however, Burundi, after many hiccups, has progressed to a stage where the Constitutional Court was able to discharge its basic functions. This is one important contribution of the Burundi Constitutional Court judgment. If not anything else, the Constitutional Court clarified the status of the Arusha Agreement. Secondly, it pronounced authoritatively on the relationship between the 2005 Constitution of Burundi and the Arusha Peace Agreement. Thirdly, the Constitutional Court judgment signified both the importance of the Arusha Peace Agreement and the Constitution of Burundi existing in a symbiotic and complementary relationship. The judgement therefore laid the precedence for the development of future constitutional jurisprudence in relation to the Constitution and the Arusha Peace and Reconciliation Agreement for Burundi. This should be seen as part of the legalisation process that will strengthen the contents of the Agreement as the internal legal and judicial processes of Burundi pronouncing on the status of the Agreement implies that the country has taken ownership of the Agreement. Of course, not all the outcomes of the Constitutional Court judgement were palatable or even desirable for all actors, especially as it relates to the controversial third-term election of former President Jean Pierre Nkurunziza. The lesson to learn from the experience is that external role-players, such as the AU, as well as internal political actors should take a more holistic and futuristic view that transcends the immediate political climate of fear, in order to appreciate the potential that the Constitutional Court judgement holds for constitutional jurisprudence development, the rule of law and political stability in Burundi.

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