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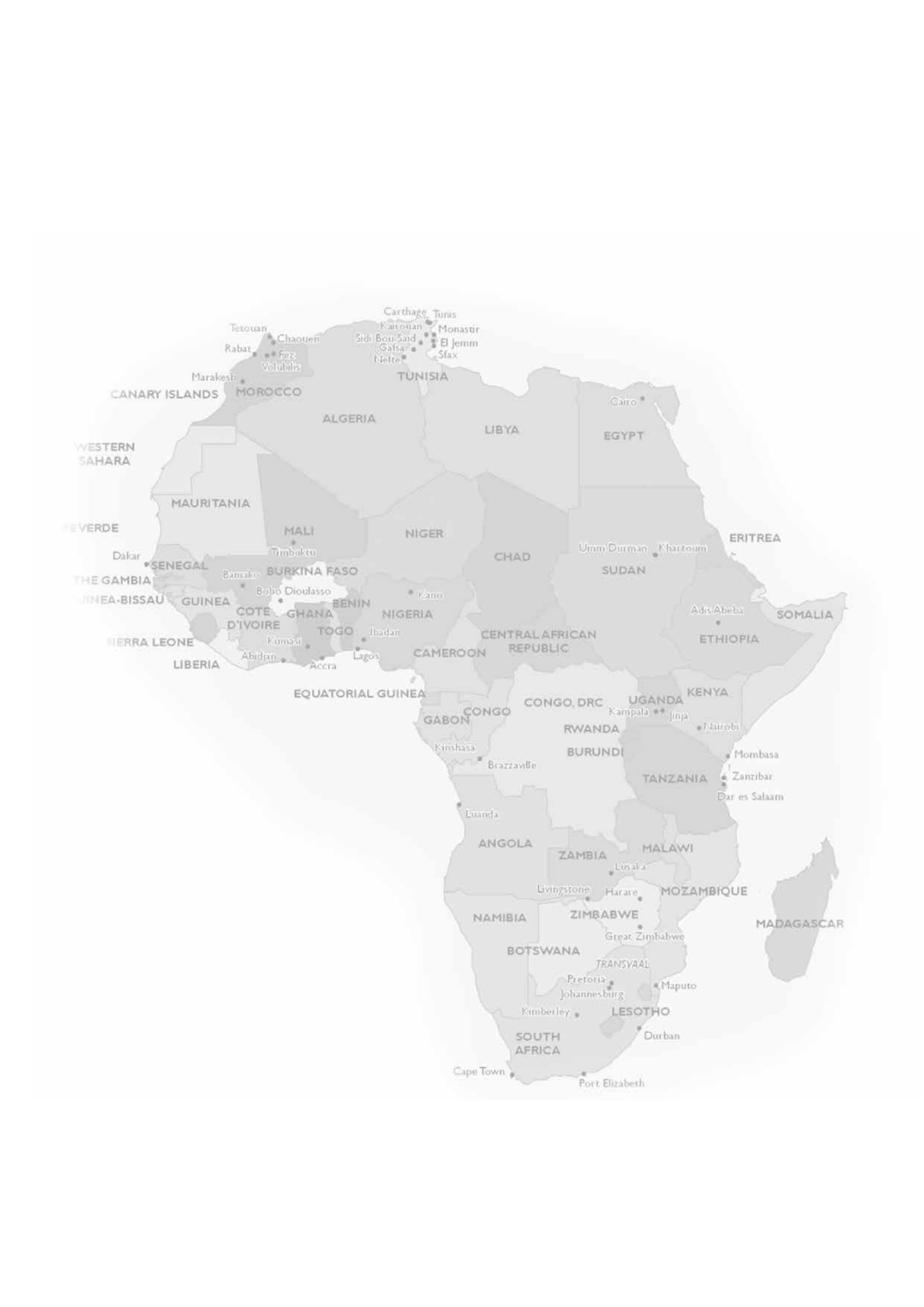
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VOLUME 16

Foreword

Young Burundian researchers share the results of the second research workshop on the rule of law in Burundi, by contributing their findings in this issue of the "African Law Study Library." As in the first workshop, they have benefited from the scientific supervision of the Dean of the Faculty of Law of the University of Burundi, Professor Stanislas Makoroka and Professor Hartmut Hamann of the Freie Universität Berlin, with funding from the "Konrad Adenauer Foundation."

This issue focuses once again on the concept of the rule of law as a political order, system of government and a driving force of regional integration in very diverse ways. It is always a question of whether, in the involvement of its institutions, Burundi continues to convey democratic values and if it's always respectful of human rights. Each research endeavors, in this regard, to perceive the reality on the ground, make as accurate as possible observations in the field on the question and, with pragmatism, analyze and report the results which are discussed, amongst young researchers from the sub-region, before being translated into scientific publication.

Five papers cover the different fields of constitutional law, both formal and substantive criminal law, international humanitarian law and public international law, specifically the sub-regional organizations.

In his article, " Institutional Protection of Minority Rights in Unitary States: Use of the Second Chamber of Parliament in the Burundian Case," Mr. Berry Nibogora questions the Senate's capability to protect minority rights, in a unitary state. His analysis leads him to conclude that, with appropriate constitutional powers, the Senate may be an effective protector of the rights of minorities in a majority rule system. In a sharply divided society, different identities can be adequately protected by the Senate, particularly in the exercise of central power. It depends, however, on the powers conferred to it and on the legitimacy of the representation of the diversities of the components of the population provided by its members.

Three other researchers have taken interest in the criminal field. Bernard Ntahiraja raises the question of whether "in Burundian law, deprivation of liberty before trial is a rule or an exception." The interest of the analysis lies less in the response as it does the rational search for the causes of the systematic use of preventive detention whether there are serious suspicions of an offense, or not.

While the fundamental documents of Burundi proclaim the principle of freedom as a rule and detention as an exception, informed and detailed reading of the Code of Criminal Procedure rather encourages reservation. It turns out, in fact, that when interpreting the relevant provisions of the Code of Criminal Procedure, the Courts of Burundi, reverse the implication of this principle, making the deprivation of liberty before trial the rule rather than the exception.

To resolve the situation, an overhaul of the penal institutions in the sense of further separation of justice and a rebalancing of the powers of prosecutors and criminal courts, is needed. The same applies to the questioning of the responsibilities of perpetrators of powers of preventive detention.

Still on criminal matters, Mr. Aimé-Parfait Niyonkuru proposed reflection on "The Anti-Corruption Court of Burundi: When the question of jurisdiction arises in reverse direction." Since 2006, a new special mechanism to prevent and punish corruption and related offenses was introduced in Burundi. It consists of a three organs: the Anti-Corruption Court, the Prosecutor General of the said Court and the Special Anti-Corruption Brigade responsible for conducting investigations. The Court and its Prosecutor General have management autonomy, its own budget and a General Secretariat.

While the 2006 law on the prevention and punishment of corruption lists the offense of abuse of corporate assets in the list of offenses related to corruption, the Penal Code of 2009 breaks this order and takes the offense of "misuse of corporate assets" in the category of offenses relating to public and private companies. From this editorial "inconsistency", the Anti-Corruption Court inferred an important consequence of jurisdiction. Reviewing in the direction of restricting its judicial subject matter, it transferred, for competence reasons, all records relating to the offense of abuse of corporate assets to the High Court and the Prosecutor's Office, following the state of pretrial procedures.

On the contrary, regarding the offense of false declarations, likely offense and punishable in Article 14 of the law on the prevention and punishment of corruption and related offenses, but that does not automatically constitute a body and in an independent manner, an offense related to corruption, the Anti-Corruption Court has always ruled, without justification, that it had jurisdiction in this case and has already delivered judgments of conviction and acquittal. It has, therefore, acknowledged jurisdiction of the offense, solving the issue of jurisdiction in a direction opposite to that in which the same question arises in the case of the offense of misuse of corporate assets.

If, in relation to both offenses, the question of the jurisdiction of the Anti-Corruption Court was not discussed in court, nonetheless it calls for some interest. Monitoring the legal news of the anti-corruption court has demonstrated that the anti-corruption court considered itself incompetent where the law recognizes it jurisdiction (misuse of corporate assets) and acknowledged its competence for an offense for which the law that establishes it does not give jurisdiction (misrepresentation).

That is why it is important that the anti-corruption court, due to an offense that the prosecution considers within its jurisdiction, establishes, through a sufficiently reasoned decision, the legal basis of its competence and scope. By executing this requirement, the judge does not proceed arbitrarily. It must be based on the interpretation of the relevant rules; what the Anti-Corruption Court usually does not and should be doing from now on. In his article "The State of positive law in Burundi, on the implementation of the Rome Statute of the International Criminal Court," Mr. Emery Nukuri opines that ratification of the Rome Statute of the International Criminal Court by Burundi has a major breakthrough in the fight against impunity and exudes great hope that the most serious crimes will not recur with impunity, because in so doing, Burundi has pledged to investigate international crimes and prosecute the perpetrators under the principle of "rule" being referred to the ICC to exercise jurisdiction only when the Burundian courts would not have the will to act or would be unable to do so.

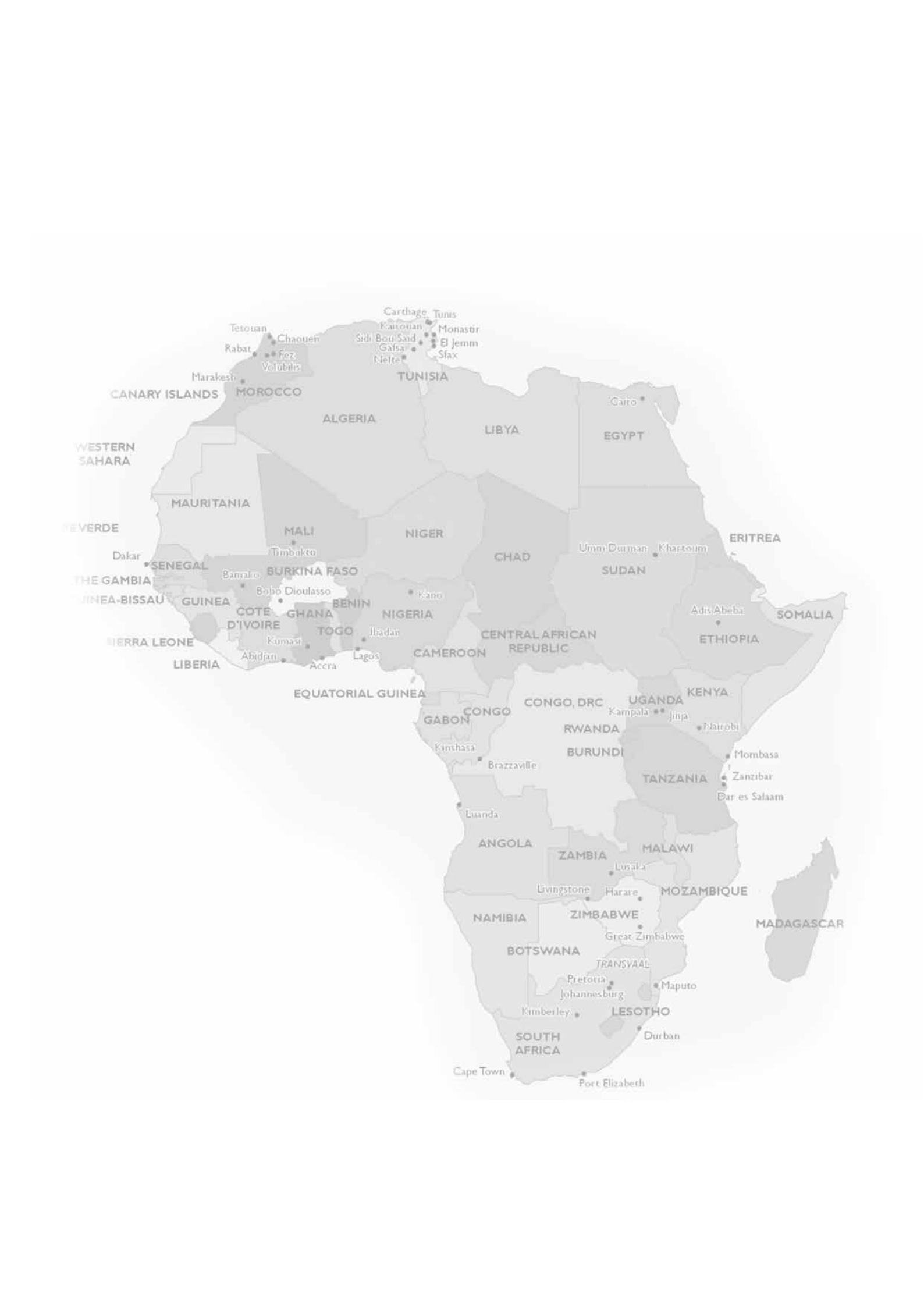
It was, however, noted by the researcher that the implementation of the Rome Statute by Burundi as well as the various measures and practices that translate into reality at the national level have not yet been fully accomplished. The same applies to the mechanism at the level of the overall military commander, the establishment of the High Court of Justice to try the most senior politicians in the country, the ratification of the Agreement on the Privileges and Immunities of the ICC of the revised Code of Criminal Procedure, to include provisions protecting victims and witnesses as well as a compensation fund for victims, and to formalize collaboration and cooperation between the ICC and the Burundian courts. The Burundian penal institutions should finally investigate recent allegations of international crimes and begin to exercise their primacy in the prosecution of international crimes.

Finally, the article by Mr. Désiré Ngabonziza on "The problem of the integration of Burundi in many sub-regional organizations" raises the question of Burundi's membership in many sub-regional organizations whose objectives are often overlapping. While accepting that a country can find reasons to belong to several organizations, the author notes that, given not only its geographical position, limited material and human resources to devote to effective and efficient participation in such organizations but also, and especially, because of the "conflictual" skill assigned to some of them, Burundi, should make the wise choice to belong to organizations that best protect its interests as the ICGLR in the field of security, the East African Community and COMESA in the area of economic integration, the Lake Tanganyika Authority in the field of protection and conservation of the environment.

All these studies have been the subject of discussions between the authors, first, and then with experts and have benefited greatly from the supplementation of discussions by other researchers in the sub-region during a seminar held in Nairobi in November 2012 and organized by the Konrad Adenauer Foundation.

We wish to bear witness to the interest and relevance of these analyses and wish to encourage researchers to contribute towards the promotion of the rule of law in Burundi.

Hartmut Hamann ***Stanislas Makoroka***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INSTITUTIONAL PROTECTION OF MINORITY RIGHTS IN UNITARY STATES: THE USE OF THE SECOND CHAMBER OF PARLIAMENT IN THE BURUNDIAN CASE

By **Berry Didier NIBOGORA***

1 INTRODUCTION

This paper discusses the issue of designing a second Chamber of parliament to ensure the protection of ethnic minorities in a unitary state. The little available literature has focused on the subject of the present inquiry in federal states where the issues of diversity and the protection of sub national groups raise more interest and controversies.[1] Thus, this discussion seeks to reflect on the efficacy of such an institution and the pre-conditions for the ultimate success of its mandate in a legislative framework dominated by a more popular lower House. It also looks at the mode of appointment of its members and its relationship with the independence and the composition of this institution. To do so, the paper will use the Burundian case as an illustration of the use of a second Chamber to protect minorities in a unitary state. By focusing on the origin, the mandate and the powers of this institution in the Burundian constitutional framework, the paper explores the costs and benefits of such a system and the contribution of this institution in the protection of the interests of different minorities in Burundi. This discussion also attempts to reach some conclusions which may be generalised in the broad debate on normative and institutional design to accommodate minorities in divided societies.

The paper is divided in four sections. The first section gives account of different institutions generally designed to protect and promote the rights of minorities. While the issue of managing diversity is given more relevance in states that have adopted federal political systems or federations,[2] it holds true that even unitary states are not as homogeneous as to ignore the divisions and tensions generated by or likely to arise from differences based on various grounds of identity – ethnic, racial, religious, linguistic, class, etc. Therefore, the recognition of diversity and the institutional framework adopted to respond to it are also relevant in unitary states. However, some institutional responses are peculiar to federal political systems such as the creation and powers of sub-national units, the relationship between the national institutions and regional arrangements at sub-national level, briefly the existence and functioning of two separate and independent levels of government.

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1 The question of ethnic diversity and the state response has attracted more academic interest in relation to federalism and decentralisation than in instances of unitary states.

2 The author is aware of controversies around the terms "federations", "federal political system" and "federalism", but there is no room for debating this issue in such a limited work. For a helpful discussion, see RL Watts "Federalism, federal political systems and federations" (1998) 1*Annual Review of Political Science* 119 at 121; DJ Elazar*Exploring federalism* (1987) Tuscaloosa: University of Alabama Press 4-5 as quoted in Yonatan TesfayeFesshaEthnic *Diversity and Federalism: Constitution making in South Africa and Ethiopia* Way Court East: Ashgate Publishing (2010) 26-27.

The second section deals with the origin, the composition and the mandate of the second Chamber in the Burundian constitutional arrangement and its current and potential role to protect minority rights. The Senate has been established in Burundi to serve as a watchdog of the strict implementation of diversity-related provisions and plays, therefore, a key role in ensuring the stability in the present and the future of Burundian politics. This section discusses the appointment system of its members and the powers it holds in the oversight role of the governmental activities, the legislative review and the just distribution of public services.

The third section identifies the achievements, the limits and failures of the Burundian Senate in the protection and promotion of the interests of diverse ethnic groups. In light of the above, I identify the costs and benefits of such a system, while reflecting on the normative ways of improving its performances and dynamism.

In the fourth section, I give some concluding remarks and make key recommendations informed by 'generalizable' lessons from such a model of institutional response.

2 Institutional and normative design to protect the rights of minorities in diverse societies and the Burundian constitutional setting

Most of the countries in the world are more ethnically heterogeneous than homogeneous.[3] The accommodation of plural identities within the states' boundaries has ranged from the adoption of a kind of decentralisation within purely asserted unitary states,[4] to federal political systems with more or less constitutionally entrenched powers recognised to sub-national units. Hence, the protection of the interests of the minorities followed the pattern of justice as discussed in a different context by Fraser. The latter asserted that from a welfare state that was paternally concerned with the redistribution of resources to under-privileged classes, the notion of justice moved towards a recognition of cultural diversity and the consideration of all categories of the diverse society as having equal rights and being full partners in social interaction.[5] The next phase of social justice has manifested in form of representation of all citizens in different institutions, through what she termed as 'participatory parity' in the decision-making processes.[6]

Similarly, the failure of the nation-building projects has been followed by recognition of the prevailing ethnic differences and the adoption of an institutional response that promotes national unity while accommodating diversity between existing communities. The key features varied from designing federal arrangements which consecrate two levels of government – the national and the sub-national institutions;[7] the entrenchment of a justifiable bill of rights; to the promotion of the shared rule by ensuring of a representation of constituent units at the national level. The goal of representation in national institutions is achieved through various ways. The executive may consider including representatives that reflect different communities according to their importance reflected by the electoral results, and the legislative may also have the same configuration as a result of the adoption of an electoral system of proportional representation (PR) in choosing the members of the lower house, as opposed to the plurality-majority system that results in exclusion of the losers. As

[3] Yonatan (n 2 above) 1.

[4] This is the case of Burundi whose constitution asserts the unitary nature of the State while recognising ethnic and religious diversity. See art 1 of the Constitution of Burundi, Law No 1/010 of 18 March 2005 (the 2005 Constitution).

[5] See N Fraser "Re-framing justice in a globalising world" in Terry Lovell (ed) *(Mis)recognition , social inequality and social justice* Routledge (2007) 20.

[6] Fraser (n 5 above) 21.

[7] See O'Leary *Building an inclusive state* (2004) 3, quoted in Yonatan (n 2 above) 27.

rightly argued the PR system gives opportunities between communities and increases the level of mutual understanding.[8] The second Chamber, where established, reflects the most institutional response to the need for voicing the interests of diverse groups in the national decision-making processes. But its success depends on the system of appointing its members and the powers and functions that is granted.[9] In the event that it is carefully designed, so as to get members that have sufficient legitimacy from their constituencies and exert their functions conscientiously, the upper house may be an important feature that balances the two conflicting interests of accommodating diversity and preserving unity.

The institutional setting described above does not exclusively find its expression in federal states. Contrary to Norman's assertion, not only 'federalists are likely to be receptive to a bicameral legislature',[10] but also constitutional makers in unitary states as well. Especially after an ethnic-related conflict as it was the case in Burundi, the constitutional design reflects the same dilemmas of diversity *versus* unity, and includes a bicameral legislature. Although the challenges of accommodation are expressed in different terms than it may be in federal states, as the Burundian debate was all about the promotion of democratic structures while ensuring the participation of different minorities, the Arusha Peace and Reconciliation Agreement (APRA) signed in 2000[11] sets up the basis for a political system that attempts to respond to the asserted ethnic diversity while preserving the will of the majority, inherent to democratic processes. To achieve this, the negotiating parties agreed on a power-sharing system that foresaw a bill of rights and a 'powerful' constitutional court, an over-representation of ethnic minorities in all levels of governance through the system of quotas, and a second Chamber to oversee the mainstreaming of the interests of all ethnic groups in all governmental activities.[12] One of the overall solutions stated in the APRA was the design of 'political institutions that include and secure all societal segments of Burundi',[13] a country where life has been polarised along ethnic lines due to the sustained relationship between ethnicity and political power.[14] Most of the APRA ethnic-related provisions have been maintained in subsequent constitutions, including the current 2005 Constitution.[15] The latter contains an enforceable bill of rights,[16] an Independent National Electoral Commission (INEC) in charge of organising elections and ensuring compliance of electoral results with constitutional provisions related to ethnic and gender representation,[17] an ethnically diversified presidency,[18] an over-representation of ethnic minorities through

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[8] F Rocher; et al "Recognition claims, partisan politics and institutional constraints: Belgium, Spain and Canada in a comparative perspective" in J Tully and A Alan Gagnon (eds) *Multinational democracies* Cambridge: Cambridge University Press (2001) 176-200, quoted in Yonatan (n 2 above) 50.

[9] Yonatan (n 2 above) 54.

[10] W Norman "Federal Constitutionalism I: Options for Federal Design" in *Nation-building, Federalism, and Secession in Multinational State* Oxford: Oxford University Press (2006) 94 at 112.

[11] The APRA set up a political solution to the Burundian conflict referred to as 'an essentially political conflict with important *ethnic* dimensions'. See APRA, Protocol I, art 4.

[12] See APRA, Protocol II, art 6(16).

[13] APRA, Protocol I, art 5(2).

[14] See P Uvin "Ethnicity and Power in Burundi and Rwanda: Different Paths to Mass Violence" (1999) 31(3) *Comparative Politics* New York: University of New York 253 at 265.

[15] The 2005 Constitution was promulgated after being adopted by referendum and upheld provisions on the protection and over-representation of ethnic minorities (13% of *Tutsi* represented by 40% in the Key institutions, and 1% of *Twa* represented by 3% in the National Assembly).

[16] Art 19-61 of the 2005 Constitution.

[17] Art 91. The Electoral Code, which has a constitutional status, provides also for an electoral system of proportional representation based on 'fixed' lists which reflect ethnic diversity (for a list of three candidate, at least one must be of different ethnic affiliation). See art 108 of the Electoral Code, Law No 1/22 of 18 September 2009.

[18] The Constitution provides that the Vice-Presidents are from different ethnic and political groups. See art 124 of the 2005 Constitution.

the system of quotas,[19] and a Senate to oversee the compliance with the above-mentioned provisions. According to the APRA, the Senate was mainly in charge of:[20]

1. Overseeing the governmental activities in order to ensure the implementation of the APRA and to make sure that the required balances are respected in the public sector;
2. Investigating and making recommendations in order to guarantee that no region is excluded from the delivery of public services;
3. Monitoring the implementation of constitutional provisions requiring the respect of inclusiveness and balances in any public service or in the security sector;
4. Approving the appointments to key positions, especially those related to the citizens' safety such as, organs of the defence and security, the judiciary, the territorial administration, as well as in the appointment of members of the INEC;
5. Reviewing and approving the legislation passed by the lower house or initiating bills for a legislative adoption.

Although this was not the first time of providing for a Senate in the Burundian constitutional history,[21] the assignment to it of an oversight role with regard to ethnically-sensitive provisions was something new in Burundi. Its establishment triumphed over controversies and oppositions from the proponents of a democratic system based on the will of majority.[22] In the following section, I deal with the historical evolution and the place of the Senate in the current constitutional system.

3 Origin, composition and mandate of the second Chamber in the Burundian constitutional design

3.1 Origin of the Senate

The idea of establishing a second Chamber in the Burundian constitutional history did not start with the negotiations held in Arusha in 1998.[23] In the first post-independence Constitution of the Kingdom of Burundi promulgated by *MwamiMwambutsa* IV on 16 October 1962,[24] it was stated that the legislative powers are collectively exercised by the National Assembly, the King and the Senate.[25] However, this was a mere option as the same Constitution provided that 'the Senate could be created on the initiative of the legislative power".[26] Ultimately, it was on the initiative of the King and the National Assembly.

This option was exercised and a Senate created shortly after the legislative elections of May 1965.[27] Its composition reflected 50% of *Hutu* and 50% of *Tutsi,* including eight elected

[19] The Constitution provides that in the Cabinet, in the state-owned companies, and in the National Assembly, *Hutu* must not exceed 60% and 40% of *Tutsi*. See Arts 129, 143 and 164, respectively.

[20] APRA, Protocol 2, art 6, para 16.

[21] Its creation had been also envisaged in the first post-independence Constitution. See Section below.

[22] See Appendix 1.I.B para 4 to the APRA, explaining the provisions of Protocol II, specifically on the Senate.

[23] The Arusha negotiations that started in 1998 with the mediation of the then Tanzanian President Julius Nyerere, taken over by Nelson Madela and successively the South African Presidents, resulted in the APRA. One can easily notice a South African influence in the political solutions to the Burundian conflict. See a similar point by S Vandeginste "Power sharing, conflict and transition in Burundi: Twenty years of trial and error" (2009)3 *Africa Spectrum* 63 at 65.

[24] *Mwami* means the King in the terminology used during the Burundian monarchy.

[25] Art 24 of the 1962 Constitution of the Kingdom of Burundi.

[26] Art 50 of the 1962 Constitution. The provision does not use the verb 'must' or 'shall', but leaves a margin of discretion to the *Mwami* and the National Assembly by using the word 'could'.

[27] After the independence of Burundi in July 1962, a constitution was promulgated in October 1962 (OBB, 1963, No 1 bis) and provided for legislative elections whose winner (the chairperson of the winning party) would be appoint

Senators, four co-opted by their peers and four others appointed by the King. Its mandate was to review the legislation passed by the National Assembly, which was operating in a climate of inter-ethnic rivalry due to the divisions that arose within the independence party after the assassination of the independence hero. This first Senate did not last a long time. It only held one preliminary session before it was dissolved in October 1965 and its Spokesperson was killed, following the political turmoil which seriously handicapped its normal functioning.[28] One may raise the question why it has taken almost three years to create the Senate. Indeed, it should be reminded that a controversy arose about the creation of an organ (The Senate) which was viewed as a non-democratic body by some political actors, partisan of the majority-based democracy. The main rationale of its creation was to appease inter-ethnic tensions by an inclusive institution which was meant to transcend different cleavages through a system of double parity – ethnic and regional.[29] Few months later in 1966, the military putsch by Captain Michel Micombero ended the monarchy and its democratic institutions. From then, Burundians lived under successive military regimes up until 2002, when a transitional government was established as a result of the Arusha peace negotiations. One can assert, however, that the use of a Senate as an institutional response to the ethnic identity question was in the minds of Burundians since independence. The establishment of the 1965 Senate is illustrative and displays the attachment of Burundians to this institution.

As foreseen in the APRA, a Senate was established in 2002 as part of the transitional institutions. The Constitutional Court's decision of 2002 approved its composition.[30] It had the mandate and powers of overseeing the governmental activities while checking that laws passed by the National Assembly serve all components of the Burundian society. Importantly, it was in charge of guaranteeing the compliance with provisions on ethnic representation, as it was the intent of the negotiators of the APRA.[31] It was with no surprise that the 2005 elections included a suffrage for members of the Senate, in accordance with the current Constitution.

3.2 Composition and Powers of the Second Chamber under the Current Constitution

As a result, and as a continuation of political compromises made in Arusha, the current Constitution of 2005 provides for a second Chamber of the Parliament – the Senate.[32] It is composed of two ethnically different delegates from each of the eighteen provinces,[33] three members from the ethnic group of *Twa*co – opted by the INEC,[34] and all former Presidents are also *de jure* members of the Senate.[35] In total, the current Senate counts 41 members.

Prime Minister to head the executive under the overall symbolic authority of the *Mwami.* Despite the fact that the appointed Prime Minister, Ngendandumwe, was a *Hutu* – killed few months after he was sworn in – the *Mwami*did not appoint a *Hutu* to take him over. He appointed a *Tutsi* and this triggered inter-ethnic violence.See JT Hottinger "Burundi: The causes of the conflict and its development" (2008) 2 available at http://www.bmlv.gov.at/pdf_pool/publikationen/09_fij_08_bbc.pdf, accessed 31 August 2011.

28 See E Madirisha 'Le Sénat du Burundi' *IWACU* du 23 Août 2011, available at http://www.iwacu-burundi.org/spip.php?article682, accessed 12 September 2011.

29 The number of Senators was ethnically balanced and was also equal in number for all provinces (2 per province). See*Sénat du Burundi de la période monarchique à la troisième législature* Bujumbura-Burundi : Publications du Sénat du Burundi (2010) availableatwww.senat.bi, accessed 21 September 2011.

30 See Constitutional Court Judgment *RCCB 24* of 25 January 2002.

31 n 20 above.

32 Arts 179-187.

33 Art 180(1). Provinces are not autonomous units but administrative subdivisions to implement decisions taken at the national level, while communes are decentralised local units administered by Local Councils. See, for the status of Communes, art 1 of Law No 1/02 of 25 January 2010 on the Organisation of the Communal Administration.

34 Art 180(2) & art 141 of the Electoral Code.

35 As above.

The system of appointment of its members consists of indirect suffrage by the college of members of the local councils[36] of different Communes of a given Province. Candidates are presented by political parties or independents and must be of different ethnic affiliation, and elected during two separate votes.[37] In addition to the elected number of Senators and the former Presidents, the co-opted senators from the ethnic group of *Twa* must be from different regions.[38] 30% of the total number must be women, and if the outcome of the elections does not reflect such a representation, the INEC corrects the imbalances by the system of co-optation.[39] This provision has been added to all provisions concerning elections during the recent amendment of the Electoral code, as it had been noticed that where it was not explicitly stated the representation of women was lacking.

The above described system of appointment ensures equal representation of both ethnic groups, while promoting, simultaneously, gender participation. However, although the system of power sharing that established a second Chamber for equal representation of diversity in Burundi was regarded 'as close as any African state has come to implementing Lijphart's consociation formula",[40] it has had the opposite result of 'de-ethnicising' the political competition in Burundi.[41] This resulted from the main characteristic of all consociation democracies endorsed in the Burundian political system, namely the inter-ethnic "elite cooperation".[42] Unfortunately, the domination of one ruling party, the National Council for the Defence of Democracy – Front for the Defence of Democracy (NCDD-FDD), undermines the diversity in the composition of the Senate as no limitation of members from the same political party is provided for.[43]

As far as the powers and functions are concerned, the Senate approves the appointments to key positions and ensures the strict implementation of provisions related to various representations, while checking the compliance of the legislative and policy measures with the interests of all ethnic groups. It also has the mandate of a second reading of bills passed by the lower Chamber.[44] It is worth noting that the latter can always override the Senate if disagreements persist on particular amendments.[45] However, if the involved matters are related to the amendment of the Constitution or any law of constitutional status, including laws related to the delineation and competences of sub-national divisions of the territory, a joint commission of members from both chambers is created and strives to reach an

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[36] The members of the local or communal councils, who will form the college of electors during the senatorial elections, are directly elected in universal suffrage. See Electoral Code, art 181, para 2.

[37] As above.

[38] As above, para 3.

[39] As above, para 4.

[40] R Lemarchand "Consociationalism and Power Sharing in Africa: Rwanda, Burundi and the Democratic Republic of the Congo" (2006) 106(422) *African Affairs* 1-20 quoted in Vandeginste (n 23 above) 64

[41] The effect of recognising ethnic affiliation as a relevant political factor, without institutionalising the ethnic identity, has shift the ground of political mobilisation, or even political animosity, to the inter-parties competition.

[42] In addition to the four characteristics of consociational democracy almost all present in the Burundian constitutional system – the grand coalition, mutual veto (*de facto* in the Burundian case), proportionality and a high degree of autonomy of each segment (absent in Burundi) – the elite cooperation is described as the main feature of consociationalism. See A Lijphart*Democracy in Plural Societies: A comparative exploration* New Haven: Yale University Press (1977) 1 quoted in MPCM Van Schendelen "Consociational Democracy: The Views of ArendLijphart and Collected Criticisms" *The Political Science Reviewer* Rotterdam: Erasmus University (1983) 143 at 153

[43] As the requirements concern ethnic, regional and gender representation; political parties arrange their lists of candidates so as to meet those requirements. As a result, the party that had overwhelmingly won the communal elections will dominate the Senate, which was the case during the 2010 elections. See S Vandeginste "Power sharing as a fragile safety valve in times of electoral turmoil: the costs and benefits of Burundi's 2010 elections" (2011)49(2) *Journal of African Modern Studies* Cambridge University Press321

[44] Art 189 of the 2005 Constitution.

[45] Art 190.

agreed proposal which will be passed without debate.[46] If an agreement is not reached, the President of the Republic can either declare the bill void or the lower Chamber will have the last say.[47] With regard to the majority required to pass bills in the Senate, the Constitution requires strong majority of two third of the senators. This means that, although the Burundian system does not recognise explicitly veto rights to minorities, the number of senators required to deliberate (2/3), and the number of votes required for a bill to pass successfully (2/3), result in a *de facto* veto right of *Tutsi* Senators, and their *Hutu* colleagues inevitably have to seek for allies across ethnic lines.[48] These provisions are guaranteed in the Constitution whose amendment is tied by exceptional requirements. The proposal of constitutional amendment must be approved either by referendum,[49] or by a positive vote of four fifth of members of the National Assembly and two third of the Senators,[50] bearing in mind that no project of amendment shall be considered if it undermines the national unity, the cohesion of the Burundian people, the secular nature of the state, reconciliation, democracy and territorial integrity.[51] Although the content of these concepts have not been clarified, it is submitted that the revision of the constitutional provisions that guarantee the political existence of ethnic minorities would undermine the national unity, the national cohesion and/or reconciliation.

It is quite clear that the Senate has important powers in the legislative and executive processes in Burundi. Although it can be over-ruled by the National Assembly with the support of the President of the Republic, or the latter declaring the bill void, it remains true that its status in the institutional protection of minorities rights and gender representation is unprecedented. It is against this status that the following section assesses its achievements and discusses its limits.

4 Achievements and limits of the Burundian Senate

It is premature to assess the realisations of the acting Senate since it was elected only in 2010. Thus, this section relies on the performances and shortcomings of the Senate during the legislature of 2005 to 2010. Moreover, the domination of the composition of the Senate and its debates by the ruling party have not so far allowed for dissenting voices and diversity-orientated initiatives.

Having said that, the visibility of the Senate during the 2005-2010 period has been ensured by its disapproving votes that have been opposed against some politically-sensitive appointments.[52] The strict respect of ethnic quotas in the governmental practice can also be attributed to its dissuading role of (dis)approval. However, this may be further explained by its mere existence and the spontaneous contestations from the public opinion generated by any appointment list that lacks ethnic balance rather than the (deficient) Senate's dynamic implementation of its oversight role.

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46 Art 191.

47 As above.

48 Vandeginste (n 23 above) 77.

49 Art 298 of the 2005 Constitution.

50 Art 300.

51 Art 299.

52 In 2009, two proposals of appointments in diplomatic representation and in the judiciary were highly contested in the public as they were not in accordance with ethnic balances and exigencies of experience. The Senate disapproved these proposals and they were sent back for adjustment. More recently, some senators suggested that a commission of inquiry in relation to appointments should be established and the undertaken nomination by the Executive should be sent to the Senate a reasonable period before the session of approbation.

This involvement of the Senate has not been the same in relation to its role of making a second reading of the legislation, whereby most of the amendments suggested by the Senate concerned grammatical errors. Indeed, although the legislative review by the Senate was undermined by the blockage that froze legislative activities in the lower Chamber from February 2007 to June 2008;[53] this may not justify the low record of adopting only three bills in the session of June 2006.[54]

On the positive side, one may appreciate the investigation and the report issued by the Senate on the living conditions of the ethnic group of *Twa*.[55] Although the question of the implementation of recommendations therein remains unanswered, the mere fact of focusing the attention of the Senate on this issue and the prospect of inviting concerned ministers to respond to questions of Senators with regard to what they have done so far, have an impact on the governmental policy with regard to this marginalised community.

Under the same chapter, a senatorial committee was created to investigate the compliance of ethnic, regional and gender balances in the public administration.[56] Except the delay of three months within which the Committee should have handed over its report,[57] there has not been public release on any information on the findings of the Committee. Equally, the Senate successfully countered the attempts of the ruling party and the President to control the electoral commission by appointing members close to NCDD-FDD.[58]

As a negative record, the Senate has not always appropriately fulfilled its watchdog function with regard to gender participation. No initiative has been taken to ensure the systematic representation of women in lower institutions,[59] and the replacements of resignations and destitutions did not take into account gender equity.[60]

The overall benefit of such a system of explicit recognition of identities and institutional arrangements that ensure a certain level of compliance is the sentiment of security and participation among ethnic communities. Minorities and the whole system of consociational arrangement gain from such a strict compliance. But, this entails some costs in terms of the democratic nature of such choices – viewed from the angle of reshaping electoral results[61] – and, importantly, the merits and competence of those appointed on ethnic, regional and gender participation criteria. Between the costs and benefits, there is an emergence of a tradition of compromising and negotiating across ethnic lines. Moreover, while the role

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53 A series of dissenting voices arose in the different political parties due to imprisonment of a key figure of the ruling party and other members of the opposition parties. As a result, a coalition was formed between members of the lower House who were affiliated to opposition parties and dissenters from the ruling party. The latter had no longer the required majority to hold a session and pass bills.

54 The period was characterised by a normative proliferation due to a strong will to implement reforms by the new government that was sworn in on 28 August 2005. Despite this trend, the Senate only passed 3 bills. See "Senat du Burundi" (n 29 above) 58.

55 See *Report on the living conditions of Batwa in Burundi* (2008) available at www.senat.bi accessed 25 September 2011.

56 Senate of Burundi, Internal Instruction No 12 of 16 July 2008, art 1.

57 As above, art 2.

58 A 2008 Presidential Decree on the establishment and the functioning of the electoral commission put it clearly under the control of the incumbent government. The Senate, together with the opposition parties and diplomatic representation managed to make the President review the list of members proposed in 2009.

59 This explains specific provisions introduced during the amendments of the Electoral Code (see art 181) and Law on Communal Administration (see art 10) to spell out explicitly the 30% as minimum quotas of women's representation in Local Councils.

60 The Second Vice-President (a woman) who resigned was not replaced by a woman but the appointment was approved by the Senate without asking any explanation.

61 See the case against power sharing by IS Spears "Understanding inclusive peace agreements in Africa: The problems of sharing power" (2000) 21(1) *Third World Quarterly* 105 at 108-112.

of consociational political parties,[62] as instruments of 'centripetalism' in ethnically divided post-conflict societies, needs to be further researched,[63] their coexistence in the Burundian Senate was questioned by the results of the communal elections. Indeed, an overwhelming victory of one political party may guarantee ethnic, regional and gender representation, but not necessarily the needed political and ideological diversity. This has prevented and continues to be an obstacle to the institutional dynamism of the Senate, which should undertake reflection on appropriate bills that may correct ethnic imbalances in public services while preserving the competence and merits of the members. In fact, the research and investigation component of the Senate's mandate have not been sufficiently used so far to document and recommend policy reform in public services and resources delivery. The use of these powers may set a precedent of a dynamic institution that would go beyond a passive and routine attitude of always waiting for bills from the lower house to approve.

Finally, the assessment of the record of the Senate should be conducted through a systematic comparison of its performances and the prescribed constitutional functions. Unfortunately, the apparent one-party ruling system which resulted from the 2010 general elections diluted the dynamics of the Burundian consociational system and made its organs totally affiliated and loyal to the winning party to such an extent that the public and political dynamics are remotely calculated in the NCDD-FDD ruling spheres. But, on the basis of the information available, some conclusions and recommendations are made in the following section.

5 Concluding remarks

With constitutional powers that allow for an effective exercise of safeguard and minority protection functions, a Senate can become an important feature within a majotarianism – drunk political setting. Be it in a federal or unitary state, the upper Chamber remains the appropriate institution at the central level that reflects and stands for the interests of different identities in a divided society. However, this depends on its powers and the legitimacy of its members in relation to their respective groups of affiliation. Therefore, as evidenced in the Burundian case, the institutionalisation of different identities does not, fortunately enough, prevent from the emergence of other grounds of political mobilisation. Rather than freezing people's identities and deepening ethnic cleavages and divisions,[64] the consociational system in Burundi has resulted in an unforeseen effect of de-ethnicizing political competition,[65] and a cross parties' trend to a neo-patrimonial politics that increasingly drives political mobilisation and mobility. It also came out of the discussion that, outside any idea of federalism, Burundian constitutional makers have a clear intention of using a second chamber as an institutional response to inter-ethnic rivalry since independence. Whether it has succeeded to contain conflict or not is a different question to which it may be premature to attempt a clear-cut answer. This may be, among other things, an explanatory factor to the boycott of the 2010 elections by the main opposition parties. They were aware that with carefully arranged lists of candidates, the ruling party that won the communal elections will

[62] The Burundian Constitution and Law on Political Parties prohibit ethnic-based parties and require reflection of both *Hutu* and *Tutsi* among the members and the ruling committee of any political party.

[63] It has been argued that political, and particularly the partisan, organization of particularistic identities is generally undesirable as such political party is likely to reinforce inter-communal conflict. SeeMatthijsBogaards (2007) "Electoral Systems, Party Systems, and Ethnicity in Africa", in Matthias Basedau, Gero Erdmann and Andreas Mehler (eds) *Votes, Money and Violence. Political Parties and Elections in Africa* Uppsala: Nordic Africa Institute (2008) 168–93, as quoted in Matthias Basedau and Anika Moroff "Parties in chains: Do ethnic party bans in Africa promote peace?" (2011) 17(2) *Party Politics* 205 at 207.

[64] See in general the point by P Roeder "Power Dividing as an Alternative to Ethnic Power Sharing" in D Rothchild and P Roeder (eds) *Sustainable Peace, Power and Democracy after Civil Wars*, Cornell University Press (2005) 51-82

[65] n 41 above.

obviously occupy the majority of the seats in the Senate, as the Constitution provides for ethnic, regional and gender diversity, but not necessarily political and ideological diversity. Throughout the discussion of the Burundian case, it was also highlighted in fact that the Senate can be over-ruled by the lower house in instances of persistent disagreement, regardless of the ethnically-sensitive nature of the matters involved. It is suggested that, although the extent to which senators legitimately represent the interests of the ethnic group of their affiliation is questionable in a political setting dominated by a *de facto* one-party system[66] and identification of political actors with their party rather than their ethnic group, the balance of powers between the two chambers of the parliament should be reconsidered in order to give precedence to the Senate in ethnic-sensitive matters. Since the amendment of the Constitution is a complicated and risky undertaking, use of the Constitutional Court; which has constitutional interpretative powers is suggested,[67] although its independence is highly contested.[68]

Finally, more often than not in deeply divided societies, consociational arrangements that leave sufficient room to inclusive institutions at national level are likely to increase inter-ethnic cooperation while promoting dialogue across ethnic lines. The upper chamber is one of these institutions that, regardless of the nature of the state, increases security of different groups and constitutes a forum where the interests of all societal segments are voiced on equal basis. With a limited diversity and smaller size of the state, the Burundian case may not give conclusive and generalizable lessons to largely diversified societies within a geographically huge state. However, the successes of its consociational setting, the de-ethicizing effect of the power-sharing system and the consociational nature of political parties, coupled with the role played or likely to be played by the Senate should inspire constitutional drafters or reformers in divided unitary and federal states.

[66] This resulted from the recent 2010 elections whereby the main opposition parties withdrew from the competition after losing the first (communal) elections. The ruling party overwhelmingly got 64% in the communal elections, 81 of the 106 seats in the National Assembly and 32 of the 41 Senators.

[67] Art 225 of the 2005 Constitution.

[68] In 2008, in a case lodged by the President of the National Assembly, the Constitutional Court ruled that MPs that changed their political affiliation were occupying their seats in the National Assembly unconstitutionally. See Constitutional Court Judgement *RCCB 213* of 5 June 2008.

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DEPRIVATION OF LIBERTY BEFORE TRIAL UNDER BURUNDIAN LAW: EXCEPTION OR RULE?

By **Bernard NTAHIRAJA**[*]

«The search for crimes requires stringency, it is a war that human justice leads to cruelty, but there's generosity and compassion into the war. The brave is compassionate; should it be that the lawyer was barbaric? «

Voltaire, "Commentary on the book" Of Crimes and Punishment " (1766), Complete Works of Voltaire. Policy and legislation, vol.1, Brussels, Ode and Wodon, 1827, p.275.

INTRODUCTION

Deprivation of liberty before trial is a subject of dialectic conflict where both interests are involved: On the one hand, is the interest of the accused as he is presumed innocent, and on the other, is the concurrent right of the community to protection and safety. The latter requires that the action of justice leads to the discovery of truth and eventual conviction of the offender when his guilt would be established.

Since the era of enlightenment, confinement in jail did not seem normal; unless it was as punishment inflicted by court, after a trial. The fact is, however, that at all times; prison was the ultimate resolve of putting people outside the society in order to protect itself against the perpetrator's actions; whether real, alleged; or worse, imagined. According to Artières and Lascoumes, the first social function of prison confinement is the creation and maintenance of some public order. According to these authors, prison remains, since time immemorial, the correctional norm, a place of detention[69]. It is a place of safety before being a place of execution of a sentence. In this sense, pre-trial detention appears to be insurmountable, while remaining legal heresy. Some also see the principle as a form of "*necessary injustice*."[70] (One should, however, not dwell on the philosophical controversy that may arise from this conclusion. The unjust, in fact, can it ever be necessary?). Modern legislation on prison confinements is, thus, always on the look-out for a balance between the protection of freedom and the requirements of public order.

The balance between order and freedom varies from society to society, from era to era. The aim of this paper is to review the progress made in Burundi today, in 2012. After two decades of liberalization of political life and twelve years of implementation of the *new* Criminal Procedure Code, review of one of the most important freedoms in any political regime, which claims to exercise democracy, is suddenly thrilling. It is even better when one

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[69] Artières (Philippe) and Lascoumes (Pierre): *To govern, enclose. Prison the unsurpassable model?* The National Foundation for Political Science Press, Paris, 2004.

[70] Luchini, quoted by Capdevielle (John) & Robert (Philippe): *Between order and liberty, detention: two centuries of debate*, L'Harmattan, Paris, 1992, p.201.

takes into account the effects that the long political conflict that rocked - and perhaps still shakes - Burundi may have produced on the regime of freedoms. This is indeed a known fact that in any major political change, prison occupies an important position in the system of governance. This paper, however, will limit itself to a specific type of deprivations of liberty: those ordered before judgment.The importance of the latter is no longer in effect to show who knows the Burundian prisons. To take just one example, from 2000 to 2010, the proportion of remand prisoners compared to the total prison population was constantly over 55%, reaching 73% in some years; as in 2007.[71] The purpose of this paper is not, however, to analyze the statistical behavior of the phenomenon and its possible implications, from a sociological point of view. The study will focus exclusively on the legal system making this possible.

The balance on which it poses, resides greatly, in the national legal array. Though superfluous to point out that the rule of law is now *internationalized*. Burundi, like almost all other countries in the world, is a party to international conventions and other legal instruments which, in essence, limit – perhaps for the better – the scope of its sovereignty in the choice of this equilibrium. In our case here, these instruments provide that, in criminal proceedings, *freedom is the rule, detention is the exception*.[72] Deprivations of liberty cannot be established as a rule, regardless of the will of the national Ruler. As a proclamation, the beautiful phrase above is also reflected in various legal texts of domestic Burundian law, the greatest of which is the Constitution.

This paper seeks to discover whether Burundian law - both in letter and in its interpretation by the Courts, is satisfactory at this level, that is to say, if it does not deviate from this principle. The hypothesis of this paper is that, in spite of the aforesaid proclamation, informed and detailed reading of the Criminal Procedure Code calls for caution. According to the interpretation of the relevant provisions of this text by the Courts of Burundi, it is more accurate to say that it reverses the direction of the above proposal, making the rule the exception and the exception the rule.

To demonstrate the above the principle as laid in international and constitutional law will first be presented (I). The relevant provisions of the Criminal Procedure Code governing the two main measures of deprivation of liberty, custody and preventive detention, will be analyzed in detail (II). A conclusion will wrap up the work.

I. SUPRA-LEGISLATIVE PROTECTION OF FREEDOM UNDER CRIMINAL PROCEDURE

Rules hierarchically superior to the Criminal Procedure Code (Act) and linking it to Burundi govern in principle, the material deprivation of liberty during criminal proceedings. They are derived from international legal instruments and from the Constitution.

I.1. International legal instruments

I.1.1. Universal Declaration of Human Rights of 10.12.1948

Article 3 of the Universal Declaration of Human Rights (UDHR)[73] states that: everyone has the right to life, liberty and security of person[74]. Article 9 of the text adds by stating: "*No one*

[71] Department of Justice, panel of the Ministry of Justice, Burundi, 1st edition, 2011, p.8. www.justice.gov.bi (accessed 26/10/2012).

[72] We refer in particular to Article 9 of the International Convention on Civil and Political Rights and 6 of the African Charter on Human and Peoples' Rights.

[73] Article 3 of the Universal Declaration of Human Rights (UDHR)

[74] DAVID (E) & Van Assche (C): Code of Public International Law, 3rd edition, Bruylant, Brussels, 2006, p. 192.

shall be subjected to arbitrary arrest, detention or exile."[75] The suspicion of having committed an offense alone does not put an end to this right. In criminal proceedings, an individual has equally the right to the presumption of innocence supported by Article 11, paragraph 1 of the same statement.[76]

For a long time, the legal effect of this statement was considered minimal. It is argued in effect that states did not want to bind effectively, if not, the argument goes; they would have simply signed and ratified a convention. The argument loses increasingly its significance based on the majority with which the text was adopted (48 votes for, 0 against, 8 abstentions and two non-voting)[77], the frequency with which states and international organizations makes reference to it in their bilateral relations and policies respectively, a doctrine increasingly growing in this text recognizes a customary nature, in whole or in some of its provisions[78]. Regarding Burundi, the question only has academic interest. The Republic of Burundi is, indeed, party to another instrument negotiated and signed just to make more stringent the obligations contained in the statement: i.e. the International Covenant on Civil and Political Rights of 16th December 1966. At the regional level, it is also bound by the African Charter on Human and Peoples' Rights adopted in Nairobi on June 27th, 1981. Likewise, the Constitution of Burundi of 18/3/2005 acknowledges the same value to the rights proclaimed by the Declaration as those proposed by the other instruments, both international and regional[79].

I.1.2. International Convention on Civil and Political Rights of 19th December 1966 and the African Charter on Human and Peoples' Rights of 27th June 1981.

It is since 14th March 1990 that Burundi became party to two of the first texts under (ICCPR), twenty four years after its adoption and fourteen years after its coming into force at the international level[80]. Paragraph 1 of Article 9 of this text establishes the principle prohibiting arbitrary arrest and detention. It stipulates that: *"Everyone has the right to liberty and security of person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds as is in accordance with the procedure established by law"*.[81]

Of common logic and as shown by a careful reading of this text, arrest and detention are not completely prohibited as such. They should only take place following a procedure and for the reasons specified *by law*. The use of the concept "law" shows that it is for the national Ruler to determine those reasons and that procedure. This does not mean, however, that this national *law* may have just any content. To support the contrary would deprive the convention of its effect in domestic law. Such is clearly not the intention of the authors of this instrument. The convention simply wanted to leave it to national legislators to decide how to implement this provision, taking into account their specific contexts, by essential variables. The law that

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75 Ibid

76 Ibid

77 DAVID (E) & Van Assche (C): op.cit, p. 191.

78 For a detailed discussion of this issue, see in particular Hannum (Hurst): The status of the Universal Declaration of Human Rights in National and International Law, 25 Ga. Journal of International and Comparative Law, 287 (1995 to 1996), pp.289 -399.

79 Article 19 of Law No. 1/010 of 18 March 2005 on the promulgation of the Constitution of the Republic of Burundi stipulates that:'' The rights and duties proclaimed and guaranteed, inter alia, the Universal Declaration of Human rights, the International Covenants on Human Rights, the African Charter on Human and Peoples' Rights, the Convention on the Elimination of All Forms of Discrimination against Women and Convention on the Rights of the Child are an integral part of the Constitution of the Republic of Burundi'' in OBB ter/2005 No. 3, p. 5.

80 Decree-Law No. 1/009 of 14 March 1990 on the accession of Burundi to the International Covenant on Civil and Political Rights, unreported (not published in OBB).

81 DAVID (E) & Van Assche (C): op. cit. p.220.

States adopt, in this regard, must at least provide the guarantees contained in paragraphs 2 to 5 of Article 9. These relate in particular to the right to be informed of the reasons for an arrest, pertain to asking a judge to review the lawfulness of the arrest and / or detention, to be presented as soon as possible before the judge in suspicion of having committed an offense and, on the same assumption, to be quickly tried or released. Another important safeguard is the right to compensation for unlawful detention[82]. A state, whose laws, governing arrests and detentions do not contain such guarantees, violates, Article 9 of the Convention.

Article 9 of the Convention not only prohibits *illegal* detention. It proscribes mainly that it can be arbitrary. The Committee on Human Rights of the United Nations had to clarify that the arbitrary nature of detention is not to be confused with its illegality. The first concept is broader. It characterizes arrests and detentions carried out in an *improper, unfair, and unpredictable manner and in violation of legal procedures*[83]. Besides being legal, arrest and detention must therefore be reasonable in all circumstances. They should, furthermore, be *necessary*, mainly to prevent the escape of the accused, protect evidence and prevent the repetition of the offense[84]. It is on the State, then, that rests the burden of proving the reasonable and necessary characteristics of arrests and detentions that it operates, even under its own domestic law.[85]

It is the nature of necessity which is most related to our concern in this paper. Paragraph 3 of Article 9 of the ICCPR stipulates that *"... the detention of persons awaiting trial* ***shall not be the rule.****"*(Emphasis added).[86] In other words, this article enshrines the principle, already noted earlier, that in criminal proceedings, *freedom is the rule, detention is the exception*.

In the same way, Article 6 of the African Charter on Human and Peoples' Rights can be interpreted in the same way as Article 9 of the ICCPR. This text binds Burundi since 28/07/1989.[87]

It is also interesting to note that it is extremely difficult that a State claims at the moment, not to be bound by the obligation to protect the freedom and the safety of its people. One considers that even a state which would extraordinarily ratify any agreement or convention on human rights would not escape this obligation, at least if she is a member of the United Nations[88].

To what extent does the Constitution of Burundi reflect these international commitments?

I.2. Constitutional protection of freedom during criminal proceedings in Burundi

The Constitution of Burundi enshrines the right to freedom and to safety in two ways. The first incorporates the rights and freedoms enshrined in legal instruments to which it is party. Article 19 stipulates that these rights and freedoms *"... constitute an integral part of*

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82 ibid

83 Communication No. 458/1991, A. W. Mukong against Cameroon (Views adopted July 21, 1994), in UN doc. GAOR, A/49/40 (vol. II), p. 181, para. 9.8.

84 Communication No. 458/1991, A. W. Mukong against Cameroon (Views adopted July 21, 1994), in UN doc. GAOR, A/49/40 (vol. II), p. 181, para. 9.8.

85 13 Communication No. 305/1988, H. van Alphen v. against the Netherlands (Views adopted July 23, 1990), in UN doc. GAOR, A/45/40 (vol. II), p. 115, para. 5.8

86 DAVID (Eric) & Van Assche (Cedric): Code of Public International Law, 5th Edition update, 2011, Ed Bruylant, Brussels, 2011, p.259.

87 Decree-Law No. 1/029 of 28.07.1989 on the ratification of the African Charter on Human and Peoples' Rights (unpublished at the OBB), unpublished.

88 International Court of Justice, Case of Hostages in Tehran www.icj-cij.org

the Constitution of the Republic of Burundi ..."[89]. Subsequently, it establishes this right, itself, directly and explicitly in Article 39. The first paragraph of the text stipulates that *"no one shall be deprived of his liberty except in accordance with law"*[90].

In the same vein, Article 42 prohibits the subjection to security measures except in the cases and manner provided by law, notably, including for reasons of public order or state security[91].

Let's note, however, that the Constitution of Burundi restricts itself to the principles. It does not go into detail to specify the technical conditions under which the deprivation of liberty must operate. It leaves it to the law. The classic judge would see no problem with it. He would support, rather, that it goes without saying. Indeed, it is constantly repeated that it is not in the Constitution to provide details of the structure of freedoms. However, comparative law encourages debate on this statement. Purely as an example, the constitutions of Germany, Belgium, Spain and Italy determine for themselves the duration of custody[92]. They do not refer to any other law to do so. The consequence is that the freedoms are found away from the legislators' dispositions. They are, thus, better protected against political contingencies. Even though it refers to the law for specific details, and overcoming this imperfection is required, the Burundian constitution enshrines, as we have seen, the rule of freedom and exceptional character of detention. This also applies to the conventions and declarations mentioned above. In addition, their provisions are, in theory, directly applicable to the Burundian court. Is it enough, thus far, to enable the Burundian litigant (or one residing in Burundi) benefit from it, in fact? It seems wise to say no. Burundi is no different from a majority of African states for which Bakary Traoré made the following observation:

"It is not enough to know the reality of human rights in African countries, to refer to its constitution or international conventions to which it is a party ....theoretically-applicable standards resulting from such instruments does not really account for the reality .... Reference must be made to criminal laws. These are laws that reveal the true policy of human rights.... One must especially refer to the practices of governments and administrations in order to have a clear idea of the situation of human rights in a country...."[93]

II. ANATOMY OF THE TWO MAIN PROTECTIVE MEASURES: CUSTODY AND PREVENTIVE DETENTION.

Incarceration and preventive detention are by far the custodial measures that are most commonly used in the Burundian criminal procedure. They are, however, not the only ones laid down by the Burundian Parliament. There are others which are in existence. This is the case of supervised confinement (Article 67-70) and retention in view of contempt of court (Article 8 of the CPC). This paper focuses on these two measures that exist, since, in addition to being the most commonly used, they are more related to traditional criminal procedure.

II.1. Custody

Custody is a measure of retention of a person at the place of his arrest or at a police station or at an area of supervised confinement, for the purpose of an undertaking by the police or

[89] See supra, note 11.
[90] O.B.B No. 3ter/2005, p. 7.
[91] O.B.B No. 3ter/2005, p. 7.
[92] French Senate, working documents of the Senate, The Garde à vue, Series of Compared Legislation, No. LC 204 in December 2009.
[93] Quoted by MBAYE (Kéba): Human rights in Africa, 2nd edition, Ed A. Pedone, 13, rue Soufflot, Paris, 2002, p.82.

the judicial system[94]. It is the responsibility of the Judicial Police Officer.

Under Burundian law, the main legal problems put forward by police custody are related to the conditions of its implementation, the authority that decides its implementation and its control. Its length can no longer be ignored.

II.1.1. Conditions for implementation, almost non-existent

Under Article 58 of the Criminal Procedure Code, it is executed at custody *for the purposes of an undertaking by the police and justice*[95]. The rule seems clear and reasonable regarding police custody ordered for a judicial purpose. It is less, or not at all, in respect to the one decided for judicial police.

Custody for the purposes of a justice undertaking is the one whereby people are arrested in order to serve a custodial sentence or coercive imprisonment[96]. Article 58 of the CPC states that these people should be, *immediately*, placed in custody[97]. As for the arrests for a judicial police undertaking, the first problem is the people that may be subject to it. Paragraph 2 of Article 59, which is supposed to list them, refers to paragraphs 2 and 3 of Article 3 of the Code. They speak in very general terms, of acts that the Judicial Police impose and of the people they may be allowed to question: it concerns alleged, suspected or reported perpetrators, as well as individuals who may provide information on these people.[98] Each of these individuals (either alleged or accomplice, current or potential witness ...) can be put in police custody. The only unique and vague condition is that the Judicial Police Officer feels *led* to keep him at his disposal[99].

The JPO, then, has enormous discretion. He only considers the need to hold the person for the purposes of his investigation. International legality of this pattern of incarceration is however questionable. In Van Alphen v. Netherlands, the United Nations Human Rights Committee stated that the deprivation of liberty could only proceed, on the sole ground that: "*... the importance of the investigation requiring continued presence of the suspect.*"[100] In the domestic nomenclature of the country in question, deprivation of liberty is called preventive detention, but, of course, the same reasoning applies to police custody.

The Burundian JPO has this enormous power to all forms of investigation. While in comparative law, there are more and more laws restricting custody in situations of flagrante delicto; this is not the case in Burundian law. Custody may be ordered in Burundi under the said preliminary investigation, that is to say, common law; and even the execution of a letter rogatory.[101] Under Belgian law, except in a few rare exceptions, arrest (and custody) by the judicial police officer may only take place in case of a flagrant crime or *flagrante delicto*.[102] This is also the case in Italy[103]. Under normal preliminary investigations; if there is need to resort to custody, it is the Prosecutor or the Investigating Judge; as appropriate, who makes

94 Article 58 of the CPC in Codes and Laws of Burundi, revised and updated on 31 December 2006, Volume II, p. 235.
95 Article 58 of the CPC in Codes and Laws of Burundi, revised and updated on 31 December 2006, Volume II, p. 235.
96 Article 59 para. 3 of the Criminal Procedure Code, in Codes and Laws of Burundi (31 December 2006), p.236.
97 Article 59 para. 3 of the Criminal Procedure Code, in Codes and Laws of Burundi (31 December 2006), p.236.
98 Article 59 para. 3 of the Criminal Procedure Code, in Codes and Laws of Burundi (31 December 2006), pp.231-232.
99 Article 59, paragraph 2 of the Criminal Procedure Code,, in Codes and Laws of Burundi (31 December 2006), pp.231.
100 See Van Alphen v. Netherlands, 1990, No. 305/1998, in HENNEBEL (Ludovic): Jurisprudence of the Committee of Human Rights of the United Nations, Ed Bruylant, 2007, p.161.
101 Article 59 para. 3 of the Criminal Procedure Code; in Codes and Laws of Burundi (31 December 2006); pp.231-232.
102 Article 1; 4 of the Law of 20 July 1990. - Law on remand.
103 French Senate; working documents of the Senate; Custody, Series of Comparative Legislation; pp.35-36.

the decision. It is also necessary that significant evidence of guilt related to a crime or an offense exists.[104]

The Criminal Procedure Code does not stipulate any condition related to the severity of the suspected offense. It is not even required that there are reasons to fear the escape of the perpetrator or, even, that serious charges exist at his expense. This is however not the case in most foreign rights. About the gravity of the pursued contravention when in comparative law, the rule that custody should be subject to the suspicion of having committed an offense of some gravity, seems to be well established; the Burundian law requires no such thing. Nothing prohibits the use of custody for even the most minor offenses. However, countries in the sub-region, including Rwanda, agree otherwise. The JPO of Rwanda, for example, can keep one in custody only if the offense that he is pursuing is punishable by two years' imprisonment or more.[105] It is interesting to observe that, from this perspective, Rwanda, a country in many ways comparable to Burundi, sets the bar higher for custody than does Burundi in the case of preventive detention.[106] In Germany and Spain, custody can only be applied if the suspected offense is punishable by at least five years' imprisonment[107].

This virtual absence of substantive conditions on the use of custody creates a form of *police sovereignty*. Weak control, therefore, aggravates the situation.

II.1.2 Control problem of custody

Custody is in theory under the supervision of the Public Prosecutor. In fact, this control is almost non-existent. It's an Open secret, in fact, that throughout the preliminary investigation, the prosecution usually confirms what the Judicial Police does[108]. This may be a problem connected with the malfunctioning conditions of different actors in the criminal chain. However, from a strictly legal standpoint, the control regime is far from perfect. More specifically, control of custody problems upon execution and of the responsible authority.

II.1.2.1. Time control

To control custody requires that the authority in charge - the prosecution - examines them. This is usually by way of legal records through which it is informed. Under Article 61, 1 of the CPC, custody is always subject to a report prepared by the Judicial Police Officer[109]. It must then be forwarded to the Public Prosecutor (Article 61 para.6). The latter has indeed important powers of ordering an end to police custody that he does not consider necessary or is no longer justifiable. It is also his prerogative to authorize the extension of police custody after the initial period of 7 days[110]. The problem however is that the law does not determine the period within which the records should be disclosed, except when the JPO just wants to request authorization to extend the custody. Shorter custodies and whose extension the JPO does not consider necessary to request can remain unknown to the Prosecutor. In the best case, they will be communicated to him but long after the release of the concerned. Effective control of legality and / or opportunity will have lost its relevance.

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104 Article 2 of the Law of 20 July 1990. - Law on remand.

105 Article 37 of the Code of Criminal Procedure (Act No. 20/2006 of 22/04/2006).

106 As pointed out below, Art. 71 Burundian CCP requires that the offense is punishable by one year imprisonment to justify detention. We will relook on the issue.

107 French Senate; working documents of the Senate; Custody, Series of Comparative Legislation; p. 7

108 SUZUGUYE (Deo): Problems of compliance with the principle of immediate conduct of the person deprived of liberty before a competent judicial authority, Written Submission of DESS, UNESCO / University of Burundi, 2009, p.14, unpublished.

109 Codes and Laws of Burundi (31 December 2006), p.236.

110 Art.60 of the CCP in Codes and Laws of Burundi (31 December 2006), p.236.

Even when the JPO finds it necessary to request an extension of the retention, in practice, the Prosecutor is informed of placement in custody at the end of the period of the latter[111]. It is therefore not possible to order that it be terminated earlier if he deemed it not to be warranted. It is also very common, even at the end of seven days, that the person will be kept in detention without being presented to the Prosecutor. In 2010, the NGO, NCR Justice & Democracy, noted that, of the 2317 cases of detention exceeding 7 days, only 78 (4%) had been formally extended by permission of the Prosecutor or his substitute. The other 2259 police custodies (96%) had been extended *de facto*. The detainees were therefore deprived of liberty without any justification, and therefore illegally.

More fundamentally, the control of custody raises the issue of the authority that provides it.

II.1.3. Supervisory authority: questionable international legality of the control exercised by the Public Prosecution Department.

Under Article 9, 3 of the ICCPR, the control of the regularity of any pre-trial detention is done through presentation before the judge. Exceptionally, the prisoner may be brought before any other authority authorized by law to exercise such functions. According to the United Nations Human Rights Committee, the public prosecution department does not generally meet the requirements of independence, objectivity and impartiality required for this[112]. It is indeed essential that this "authority" be independent of the executive and of the parties. The Burundian Department of Public Prosecution does not meet these conditions. In addition to being named, written and promoted by the Executive, it is under the direct authority of the Ministry of Justice. This may even require it to pursue[113].

The supervisor should also not be able to intervene later in the trial, representing the accusing party. The risk is in fact confirmed that the detention – confirmed and extended – is used as leverage to extract confessions. Such pressure could be particularly enormous that Burundian custody becomes of a fairly long period.

II.1.3. One of the longest custodies in the world

With a period of seven days, that may be extended up to double – and it is, in most cases –, custody in Burundi is one of the longest in the world. This time far exceeds the length of the same measure in neighboring countries. In Tanzania, as in many other States that use Common Law, custody lasts 24 hours[114]. Under Rwandan law, it is 72 hours and cannot be renewed[115]. In fact, the maximum time is often even exceeded. In 2010, NCR Justice & Democracy totaled 53% of cases of detention that have exceeded the maximum period of 14 days[116].

The rule of international law at stake here is the one that requires the detainee to be brought before a judge within a reasonably short time. According to the United Nations Human Rights Committee, this period must be the shortest possible. Its "reasonableness" is assessed on a case by case basis. References exist, however. The Committee has already considered

[111] NCR Study on the functioning of the criminal chain, p. 69.
[112] Communication No. 521/1992: Kulomin v. Hungary, 22 March 1996, in UN doc. GAOR, A/51/40 (vol. II), p. 81, para. 11.3.
[113] Article 130 of Law No. 1/08 17 March 2005 on the Code of Organization and Jurisdiction of Courts, Codes and Laws of Burundi (31 December 2006), p.168. See also Law No. 1/001 of 29 February 2000 on the reformation of the Statute of Magistrates in OBB No. 2/2000, p. 149-163.
[114] Chris Maina Peter: Human Rights in Tanzania: Selected cases and materials, p. 598.
[115] Article 37 of the Law No. 20/2006 of 22/04/2006
[116] NCR Study on functioning of the criminal chain, pp.70-71.

excessive and contrary to Article 9, 3 of the ICCPR, a time limit of 4 days[117]. In the case of Burundi, the time period for appearance before a judge may even extend significantly. Of the 14 days during custody, in fact, it can be added 15 days of detention under provisional arrest warrant. In fact, in Burundian law, the authorization given by the Prosecutor to extend the retention is not done by issuance of a warrant. It therefore does not affect the nature of the respective measure which remains to be custody. This is however not the case in some foreign laws. Under the Belgian law, for example, the duration of custody is 24 hours and the individual can only be detained if the investigating judge issues a provisional arrest warrant, thus transforming custody into preventive detention[118].

Whenever possible, the Police *take advantage* of these flaws in legislation.

II.1.4 Abuse of "sovereignty" entrenched in the morals of JPOs

Any holder of power – insufficiently or not totally – controlled is tempted to abuse it. The Burundian police officers are not exempt from this law of nature that Montesquieu highlighted, over two centuries ago. One of the biggest abuses consists of misuse of power. Most Burundian JPOs mainly engage the power of a bailiff, in fact, and help in the recovery of claims not yet established by judgment. They enforce their power to arrest and detain alleged creditors at the mercy of those concerned, to recover their "due", without having to endure the length of court proceedings. They, thus, force the alleged debtors to carry out their orders, by imprisoning them or threatening them with jail. In a survey conducted in 2010 by NCR Justice & Democracy, police reported without fear or scruple, that: "The poor and the unrepentant pay once they are imprisoned."[119] Not fooled at all, the JPO forged a criminal offense to these disputes through a pure private law. . It is called "breach of trust" refusal or delay in payment. After all, he is not a lawyer even less a judge. Nobody will blame him for having *mistaken*, he says. Unbelievable but true.

In addition to these diversions which, in almost all cases are cashed, there is a deeply-rooted idea within the body of JPOs according to which a good JPO must use his powers of imprisonment. Without this, he would be perceived as ineffective. It is, thus, very common to hear them say:'' A JPO who does not incarcerate is one that does not work''[120]

From a quantitative point of view, the importance of these abuses is more significantly that the JPO's quality is, in Burundian law, generously distributed. Actually, under Article 2 of the CPC, the judicial police incorporate the services of the judicial police of the State Counsel's Office; those specialized from the Department of the Public Prosecutor's Office and those of the public administration[121]. The reorganization of the Burundian Police in 2004 did not change anything substantial[122]. Certainly, the Public Prosecutor's Office has been abolished and replaced by the Judicial Police, but it has not withdrawn the value of a JPO to the personal specialized police forces; quite the contrary. As for the JPOs drawn from the public administration, in addition to those who have been esteemed highly and maintained quality, of course, the possibility of continuing to appoint others, by the Minister for Justice,

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[117] Communication nr. 625/1995, Mr. Freemantle c. Jamaica, 24/3/2000, in UN doc. GAOR, A/55/40 (Vol. II), p.19, para 7.4.

[118] French Senate, working documents of the Senate, Custody, Comparative Law, p. 24.

[119] NCR Justice & Democracy study on the functioning of the criminal chain in Burundi, February 2011, p. 20.

[120] NCR Justice & Democracy study on the functioning of the criminal chain in Burundi, February 2011, p. 20.

[121] Codes and Laws of Burundi (31 December 2006), p. 231.

[122] See, for more details, the law nr 1/020 of 31 December 2004 on the establishment, organization, missions, composition and functioning of the National Police, especially articles 27-32 (version published on www.grandslacs.net, source consulted on 15/11/2012).

under Article 147 of COCJ is still planned[123]. However, as has always been, the doctrine denounces mixing administrative and judicial police. Previously in 1968, Robert KINT noted that in order to maintain public order more easily, the administrative authorities may be tempted to use the rights granted to them as JPOs to take certain actions with respect to people who have not committed any offense, the most formidable of these "measures" being, of course, the deprivation of liberty[124].

Huge legislative loopholes also characterize other forms of deprivation of liberty: preventive custody.

II.2. Preventive detention

The concept of preventive detention (détention préventive in French) does not always mean the same thing. In Tanzanian law, for example, it refers to a form of detention decided by the President of the Republic whose purpose is to confine, without order of the court, any person considered dangerous to the security of the state. So it has nothing to do with any criminal proceedings. This is therefore referred to as an imprisonment of administrative law[125]. In Burundian law, on the contrary, it is a measure that deprives an individual of his liberty to satisfy a number of purposes associated in particular with the protection of public order, the need to maintain the detainee at the disposition of justice, the protection of the accused.... In some Western laws, the concept of *temporary custody* is used. It is taken more respectfully as a form of freedom. It also translates better the principle that freedom is the rule and detention the exception. [126]

Again, preventive detention is in the middle of two opposing but equally important dialectics: the defense of society and the preservation of individual freedom, hitherto presumed innocent. Burundian law, as are almost all other modern national rights, subjects them to prerequisites and conditions that are relatively difficult to fulfill. In terms of jurisdiction, remand is tentatively decided by the public prosecutor subject to subsequent confirmation by the court.

In Burundian law, the main problems of custody are related to the conditions of excessively broad background in the absence of credible and less intrusive alternatives to freedom and the exorbitant powers of the Public Prosecutor.

II.2. 1. Prerequisites to a limited protective scope

The principle legal matter is found in Article 71 of the Code of Criminal Procedure, which states that:

"The accused cannot be put under preventive detention unless there is sufficient evidence against him to prove his guilt and that if the facts alleged against him appear to violate the law and are punishable by a sentence of at least one year's imprisonment."

In addition, preventive detention may be ordered or maintained if it is the only way to satisfy at least one of the following conditions:

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[123] Codes and Laws of Burundi, p.169.
[124] KINT (Robert): Considerations repressive judicial organization of Burundi. Legal and Administrative Review of Burundi, 4th quarter, 1968, p. 21.
[125] MAINA (P.C), op. cit, p. 580.
[126] See infra, point II.2.7., P. 21-22.

1. preserve evidence and material clues or prevent, either pressure on witnesses or victims, or collusion between defendants, co-perpetrators or accomplices;
2. preserve public order in lieu of the actual disorder caused by the offense;
3. protect the suspect;
4. prevent the crime from continuing;
5. guarantee that the suspect appears before a court. "[127]

Analysis of this paper shows that preventive detention is subject to conditions relating to:
- The severity of the charges against the person: The offense must be punishable by at least one year's imprisonment.
- The existence of sufficient evidence to prove one's guilt.
- In the absence of other means to satisfy one of the 5 conditions listed above.

A separate study of each of these conditions highlights the rather theoretical nature of the principle of freedom.

II.2.1.1. Seriousness of the charges

An accused person cannot be taken into custody, if the facts alleged against him are punishable by imprisonment of one year or less[128]. It is quite understandable that the legislature did admit preventive detention for offenses of certain gravity. It would be unfortunate indeed that individuals are preventively detained and at the end of the trial, they will simply be sentenced to fines or sentences of imprisonment whose duration would be lower than the period spent in preventive custody. This seems to be a direct involvement of the principle that freedom is the rule.

However, the Burundian courts refuse to apply the special laws which, in principle, make detentions even more extraordinary under this perspective. In the case of MCDA 5337/ NDD, for example, the Appeal Division of the Judicial Chamber of the Supreme Court of Burundi refused to apply Article 140 of the Code of Organization and Jurisdiction of Courts. It states in black and white, that, unless it's flagrante delicto, the accused, who enjoys a privilege of jurisdiction can only be detained preventively in case of offenses for which the penalty is *more than* 5 years' imprisonment. In this particular case, the defendant was a Commissioner of Police and was charged with extortion, an offense for which the penalty is between 6 months and 5 years' imprisonment. However, the Court upheld the detention determined primarily by the first judge, without any justification[129]. In relation to Article 71 of the Code of Criminal Procedure, the provision that was dismissed herein was, however, the most appropriate. In addition to being the most supportive of the freedom of the accused person, and therefore, preferable as such, it was the *lexspecialis*.

By requiring that the charges against the accused are punishable only by a year of imprisonment to justify detention, Burundian law is also less demanding in the world in this respect. In French law, for example, preventive detention can take place only for crimes, i.e. offenses punishable by more than five years' imprisonment[130]. In Rwandan law, the offense must be punishable by at least two years' imprisonment.[131]

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[127] Article 71 of the Criminal Procedure Code
[128] Article 71 of the Criminal Procedure Code
[129] MCDA 5337/NDD
[130] Article 144 of the New Criminal Procedure Code
[131] Article 93 of Law No. 20/2006 of 22/04/2006), p. 14.

II.2.1.2: Existence of sufficient evidence of culpability

Requiring the existence of charges of guilt before ordering preventive detention may seem surprising; file merits being out of question at this stage. However, it should prevent the rights' holders of detention to use them casually. This is to encourage them to avoid, as much as possible, to detain individuals who are visibly exonerated by the trial judge, without charges.

Through the guilt charges, the Burundian legislature is not merely interested in the listing of offense evidence. Jurisprudence indicates that what is really sought after is the existence of "serious indications" of guilt[132]. Prima facie evidence of the existence of these facts and their imputability to the defendant is required. The Order of preventive detention should, then, be expressly justified. The Burundian judge is, however, lax at this level. Fairly consistently, he merely states that there are serious indications of guilt. He does not bother to indicate which ones; much less discuss their probative value[133]. The liberality of the Burundian law at this level also shows the percentage of people preventively detained, but who the judge acquits in the end, precisely on the basis that the prosecution is unable to establish their guilt. In 2010, the NGO – NCR Justice & Democracy estimated this rate at 30%. Keeping in mind that, this percentage only lists files closed by a judgment on merit and therefore ignores both pending cases at the time of the study that the release occurred during the procedure – the largest number –, it is easy to ascertain in practice that, the existence of evidence of guilt is not sufficiently verified.

The seriousness of the offense and the existence of evidence of guilt are not sufficient in themselves to warrant a remand. Paragraph 2 of Article 72 of the CPC clearly indicates that detention should be the only way to satisfy at least one of the conditions listed therein. The decision to detain should, then, in principle, show sufficiently the justification that, there is no other way to achieve the same end by letting the accused go scot-free. This is far from being the case in the jurisprudence of the Supreme Court of Burundi.

II.2.2. Substantive conditions extensively interpreted

Some of these conditions are already bottomless pits. They are written in a way allowing the judge to add anything. This is particularly the case for the preservation of public order. Nevertheless, even the conditions drawn, relatively accurately, are interpreted fairly extensively. One-by-one analysis of these conditions makes it possible for one to notice this fact.

II.2.2.1. Maintaining clues and physical evidence, or prevent, either pressure on witnesses or victims; or collusion between defendants, co-perpetrators or accomplices.

When ordering a remand for this purpose, the Supreme Court seems to disregard the statutory requirement that the detention, to be ordered, must be the *only way* to achieve the intended purpose. In a case involving a police officer who had been denounced by his subordinates, the Court was limited to declare "aware that the junior officers who charged X (the accused) should be protected and kept free from any pressure and intimidation."[134]

[132] See in particular RMPAC 788/N.M
[133] See in particular cases RMPAC 788/NM, RMPG5337/NDD.
[134] RMPC 5337/NDD.

The judgment was in no way challenged to show how, in fact, the 'pressure' and 'bullying' in question were to be feared. However, it is wrong to take them automatically and necessary. The Court even refused to consider the case, more than likely, of change in administrative status of the defendant, subsequent to prosecution. It was indeed very unlikely that the accused be maintained in his hierarchical position.

II.2.2.2. Maintain public order

Public order is a concept whose field is difficult to define. The United Nations Human Rights Committee finds it unacceptable that only security concerns or those of public order may justify detention without trial; some brief as they are, in a democratic state governed by the principles of the rule of law[135]. Echoing a widespread idea in theory, the Committee notes that public order is a vague concept in terms of its content. Indeed, it provides overly broad latitudes to the executive because it is hardly controllable by the judge.

In some countries like France, public order alone no longer justifies pretrial detention, except for the punishable crimes by more than five years' imprisonment[136].

II.2.2.3. Protecting the accused

Enclosing an adult of sound mind to protect him might seem paradoxical. Not that protection can ever, in itself, justify a deprivation of liberty. Far from it! The problem is that this deprivation of liberty is a measure of criminal procedure apparently directed to a false target. In fact, it undermines the presumption of innocence of the person who is the object of the claim, leaving in total tranquility, authors of acts against which it is supposed to protect. One of resultant phenomena of this kind of imprisonment in Burundi is witchcraft. The judicial police officers and prosecutors confirm quite frequently to have detained perpetrators and accomplices of this act to protect them against lynching by the masses. The segregated inmate is then locked "*until the spirits are appeased*."[137] The biggest legal issue is that, in most cases, it is known beforehand that the inmate is not in the wrong basically by the reason that his acts are not usually unlawful.

For this reason, as in all others, no attempt is made, in practice, to check if detention is the *only* and best – way – to protect him. But more fundamentally, it should be noted that in almost all cases, no action against the perpetrators of threats is exercised. The whole question is to know who, of the perpetrator or the victim of threats, should legitimately be subject to detention for protection.

II.2.2.4. Ending an offense or preventing its recurrence

The Public prosecution rarely relies on this act in order to justify its request for authorization or extension of remand. Moreover, arrest to terminate an actual offense is still, in practice, ordered by the JPO in the exercise of his special powers in cases of *flagrante delicto*. The public prosecutor also boasts, of course, of the same power.

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[135] Committee on Human Rights of the United Nations, General Observation no,. 8.
[136] DAVID (Mélique): Preventive detention in France, DEA, Université de Lille 2.
[137] NCR Justice & Democracy study on the functioning of the criminal chain, 2010, p. 104.

II.2.2.5. Guaranteeing the detention of the suspect to be presented before a judge: Who proves and what evidence to prove?

Here, as elsewhere, the failure – or rather the absence – of justification is symptomatic of the few ways that the Burundian judge grants the principle that freedom is the rule and detention the exception. While Article 71, Para. 2 of the CPC clearly states that detention should be the *only way* to comply with any conditions that establish – here, detention of the indicted person awaiting appearance before the court - the Burundian judge merely repeats in almost all edicts that "there is no guarantee that the accused could remain at the disposal of justice."[138] The unwillingness of the defendant and his propensity to escape are then presumed. They are in no way proven, not even discussed.

In regional comparative law, courses in human rights have, however, indicated that the risk of escape should not be presumed. It must be established. According to this law, the national court may not simply state that there was a risk of escape and thus confirm the detentions. It is less convincing when, in inevitably different cases, the decision consists of identical formulae; as it is commonly here. Each case is indeed unique. The judge must also show, in each case, that there was no other means of custody of the defendant to be presented before the courts[139]. The Burundian court is, thus, deficient until now.

Certainly, it is necessary to prevent the escape of a perpetrator who wants to evade impending punishment. However, escape is not always to be feared. It requires a sure delinquent who can find refuge at his friends or with people of means to go abroad and live there. Such opportunities are a reserve of a minority for which precautions should be taken. The other defendants must therefore not suffer for what is the prerequisite of a small number of individuals[140].

No less important is the question of burden of proof. Who is it to prove that the accused will not remain at the disposal of justice once released? Obviously, the burden rests on the prosecution given that it is he who is the plaintiff in the Council Chamber. In practice, however, it is the defendant who is required to submit to the Court guarantees of his future availability to be brought before the courts[141].

If the Supreme Court adopts an interpretation of conditions of preventive detention that is, obviously, too extensive, it is perhaps because the Burundian law provides no intermediary between freedom ('total' or plain and simple) and detention.

II.2. 3. Absence of a mechanism of supervised release

One of the recurrent arguments put forward in practice, to justify pre-trial detention, is one that claims that neither do untried prisoners appear in public hearings nor for the execution of sentences when they are convicted[142]. The judge therefore does not have much choice when there is fear that outright freedom of the accused will make him unreachable.

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[138] See especially RMPG AC 767/NJA 13/04/2011, 3rd sheet, verso, second paragraph and RMPGAC 774/BF of 2/3/2011.

[139] See in particular European Court of Human Rights, Case Ya'ci & Sargm v. Turkey, Judgment of 8 June 1995, Series A, No. 319-A, p. 19, para. 52.

[140] MERLE, R. and VITU, A. : *Treaty of criminal law*, Part II, 3rd ed, Ed Cujas, 4.6, 8, rue de la Maison Blanche, Paris, 1979, p. 450.

[141] See especially RMPG AC 767/NJA 13/04/2011 etRMPGAC 774/BF of 2/3/2011.

[142] NCR Justice and Democracy, p. 105.

In comparative law, however, there is an intermediary between simple and pure freedom, and detention. The Rwandan criminal procedure law[143], as are the Belgian and French laws, notably organizes what they call "judicial review". As a type of "probation", the institution subjects the accused to monitoring and obligations which are likely to disregard some of the disadvantages of unconditional freedom, avoiding at the same time the negative consequences of incarceration[144].

A certain opinion confounds judicial and electronic surveillance. It holds, then, that it is impossible for Burundi, given the limited nature of technology at the disposal of justice. The truth however is that the second is only a modality of the first. In the laws that organize it, judicial control consists generally of conditions quite similar to those of the Burundian law on interim release[145]. There is no reason for the existence of this gap by Burundian criminal procedure. In actual fact, if a person, who was detained initially, under certain conditions, can be temporarily released, why not use the same means earlier enough – compliance of the suspect to certain restrictive conditions of freedom, and thus prevent the concerned party from being detained?

Besides these successor rules, that have a very broad interpretation, and of this institutional vacuum, the concentration of investigative and prosecutorial powers in the hands of a single body - the Public prosecutor's office - renders delusive procedural guarantees in terms of freedom.

II.2.4. Absence of a trial judge and subsequent conflict of interest.

Under Burundian law, the powers of preliminary investigation and prosecution rest in the hands of the Public Prosecutor. The separation of judicial functions is hitherto incomplete. The criminal justice system requires the performance of various tasks. In the so-called pre-trial stage, these tasks are essentially in investigation (including creation of the criminal case file comprising particularly sufficient evidence of the facts alleged and the identity of their author, ...) and the pursuit (implementation of public prosecution). The other phases are constituted by the ruling and execution.

In legislation that inspired ours and in accordance with the teachings of political theories of the eighteenth century, these functions are assigned, at least in part, to different organs. Even though the rule has known some variations, the investigation is carried out by the judge while the prosecution is carried out by the Public Prosecutor. It is therefore the investigating judge who decides the need to use coercion or violate individual rights and freedoms[146]. In Burundian law, this separation does not exist. Investigation and prosecution are in the hands of the same Section – Public Prosecution. It has the power to detain (formal act of investigation) under the pretext of presenting the detainee to a judge for confirmation before the 15th day. Given that it was this department which later accuses him before the trial court, we can legitimately fear that the power to detain is abused to extract confessions. The conflict of interest, thus created, works to the detriment of the accused.

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[143] Article 87 of the Criminal Procedure Code (Amendment Act 2004).

[144] MERLE, R. et VITU, A. op cit, pp. 447-448.

[145] See for that in particular Article 76 of the Criminal Procedure Code, in Codes and Laws of Burundi (31 December 2006), p. 237.

[146] Tulkens, F. & Van KELCHOVE M. *Introduction to Criminal Law: Legal and Criminological Aspects*, 4th ed, Kluwer Legal Publishing Belgium and E. Story-Scientia, 1998. Kouterveld 2, p.517.

The fear of abuse of power to detain is even greater for a relatively long period usually between the start of the detention and the presentation of the accused in court. In Burundian practice, the 15 days of the provisional arrest warrant are added, in effect, most often to the 14 days of prolonged detention.

The period of the validity of the provisional warrant of arrest seems problematic in itself. Furthermore it far exceeds the maxima estimated by the United Nations Human Rights Committee[147]; it is incommensurate with that of similar measures in the sub-region. Under Rwandan law, for example, the provisional warrant pf arrest lasts only 7 days[148].

Before or no later than the expiry of the period of validity of the provisional arrest warrant, the detainee must be brought before a judge. The latter's control, however, is limited in scope under Burundian law.

II.2.5. Look at the judge's limited scope.

The view that the Council chamber gives to remand is limited, at least from three points of view. It is first limited in scope. It is, also, by the exorbitant powers of the public prosecutor in the case of an appeal. The view of the judge is finally limited by the constraints – legal and factual – of the periodic inspection.

From the point of view of the subject of judicial review, the Council Chamber ascertains whether the conditions laid down by Article 71 of the Criminal Procedure Code are met. It then decides to order/extend, or not, preventive detention. The question is to know at what point the judge is to assess the legality of the detention; the day of the arrest or the one of the presentation of accused before him? Case law indicates that the court considers the time at which the prisoner has been presented before it. If it considers that the conditions laid down by law for preventive detention are complied with, so far, it puts the concerned party under arrest. It concerns itself little or not, of the previous situation. Upon Requests for release, based on the illegality of the custody under the provisional arrest warrant, the judge responds on a consistent basis that "*failure to comply with the provisions of Article 71 (sic)*[149] *of the Criminal Procedure Code is not sanctioned by release*."[150]

The judge does not have control *per se* since he does not sanction the illegality that he says. In certain foreign laws, however, the pre-trial detention judge also takes up the issue of the lawfulness of the detention before referral. Under Rwandan law, for example, the judge has the same obligation to open the criminal case of illegal detention if any is suspected[151].

Another limitation on the powers of the judge is constituted by the powers of the public prosecutor in the case of an appeal. When the judge makes an order refusing to allow the detention, the prosecution may appeal. The law stipulates, in principle, that the concerned party is released[152]. This is, however, not the case if the offense for which the offender is

147 See infra note 48.

148 Article 96 of the Criminal Procedure Code (Act nr. 20/2006 of 22/4/2006).

149 In most cases, there is the question of appearance before the judge after the expiry of the period of validity of provisional arrest warrant. The relevant provision is the one addressed by Article 72 3 of the Criminal Procedure Code, and not art. 71 of the Code.

150 RMPGAC 794/BP of 27/4/2011, 3rd sheet, the third expected RMPCA 788/NM of 10/3/2011. (4th sheet, expected 8th) RMPAC 753/NM du19/5/2011 (second sheet, the second expected) and RMPG 5031 of 13/1/2011 (4th sheet, 5th expected).

151 Article 89 of Law No. 20/2006 of 22/04/2006), amending and supplementing the Code of Criminal Procedure Rwandan, Special OJ No May 27, 2006, p.14.

152 Article 84, para. 1. of the Code of Criminal Procedure Codes and Laws of Burundi (31 December 2006), p.238.

prosecuted is punishable by more than five years' penal servitude. For such offenses, the law allows the investigating judge to direct that the detention is pursued, even before he files an appeal. He only has to give an order to the detention house[153]. This unique power granted to the Executive to neutralize the effects of a judgment is also found in Tanzanian law. In this latter system, the equivalent of the Attorney General of the Republic (Director of Public Prosecutions) may oppose a bail decided by the judge, simply by stating that in his opinion, the release of the accused would prejudice the interests of the State. Of course, it is in politically-sensitive case files that this prerogative is most commonly implemented[154]. Finally, regular judicial review is limited, both in law and in fact. The legal order problem is that at some point, this control is no longer required. Article 89 of the Criminal Procedure Code provides that once the trial case is entered, the suspect is held in custody until verdict is given, unless he enjoys provisional release[155]. In other words, the monthly review of the lawfulness and appropriateness of detention ceases. This can lead to enormous abuses of power. Indeed, the prosecution then has the opportunity to keep an accused person in custody, with little or no evidence to support, by hastening to get to the trial judge. With a somewhat slow justice system, the person will sink in jail for a period that is rather longer. He will, ultimately, be released citing lack of charges against him. The pre-trial detention will have been, at this point, used for punitive purposes.

The problem in fact is that, in practice, detention continues beyond 30 days without any renewal order being taken, contrary to the requirements of Article 75 of the CPC. In 2010, RCN Justice & Democratie pointed out that the order extending detention was found in only 4% of rather historical case files of preventive detention of more than 30 days[156].

II.2.6. Potentially-unlimited detention for a category of offenses

Despite the possibility of a continuous renewal of the order of preventive detention under article 75 para.1 of the CPC, para. 2 of the same article posit, all the same, a limit for punishable offenses of less than 5 years. For this type of offenses, preventive detention cannot exceed twelve months in any way[157]. In contrast, persons prosecuted for crimes are not affected by this time limit. This means that they could be held indefinitely as a precautionary measure. The freedom of a person put in that category is suspended at the closure of the file of merits and that may mean, in the context of Burundi, a decade or more[158].

The system was the same in France under the law of 17th July 1970[159]. The situation changed since the Act of 6th July 1989 which sets the maximum duration to one year in criminal cases and four months in correctional matters[160]. In Rwandan law similarly pre-trial detention may be extended beyond six (6) months for offenses and one year for crimes[161]. The African Commission on Human and Peoples' Rights has declared, contrary to Article 6 of the Charter, the indefinite pre-trial detention. It has even stated that this form of detention is tantamount to arbitrary detention[162].

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153 Article 84, para. 2, 3 and 4 of the Code of Criminal Procedure Codes and Laws of Burundi (31 December 2006), p.238.

154 MAINA, P. C. op. cit, p. 596.

155 Codes and Laws of Burundi, revised and updated on 31 December 2006, Part II, p.238

156 NCR Justice and Democracy, Study on the functioning of the criminal chain, 2010, p.7.

157 Article 75, para. 2 of the CPC *in Codes and Laws of Burundi*, revised and updated on 31 December 2006, Part II, p.237.

158 In an interview with an officer of the legal Department of MPIMBA prison in September 2012, the names of those detained since 1996 have been given to me. For reasons known only to him, he did not want them to be published.

159 Merle R. and VITU, A., op cit, p. 462.

160 SOYER (J.C.) : *Droit Pénal et Procédure Pénale*, 8ème édition, Librairie Générale de Droit et de Jurisprudence, Paris, 1990, p.272.

161 Article 100 para. 3 of the Criminal Procedure Code.

162 ACHPR, World Organization against Torture et al. Against Zaire. Communications Nos. *25/89, 47/90, 56/91 and 100/93, decision adopted during the nineteenth session, in March 1996, para. 67*. For the full text, visit http://www.up.ac.za/chr/).

II.2.7. In detail, we would say: terminology that barely conceals the slightly libertarian orientation of the legislator and the judge.

As it has been shown in the previous lines, the main measure of detention before trial is called *preventive* detention. The decision to release is called *bail;* and not put into outright freedom. It is as if, during prosecution, the applicant was not being held, and if, extraordinarily, he was released, that should be understood to have lasted for a very limited time (temporarily) and subject to relatively strict conditions.

The confusion is more pronounced in judicial practice. Indeed, Burundi's Criminal Procedure Code distinguishes between *bail and release from custody*[163]. However, it ignores the practical concept completely. Any release that occurs in the process of detention regardless of the authority that decides it and the conditions under which it is subjected is called bail[164].

CONCLUSION

This paper has shown that the establishment of the principle of freedom and uniqueness of pre-trial detention is pure theory. Pure theory, first, by the conditions under which the Criminal Procedure Code subjects custody and preventive detention are likely to be susceptible to broad interpretation. They are, in fact, interpreted in this way. Theoretical, subsequently, by what the Public Prosecution, prosecuting authority, also performs the functions of investigation, creating an obvious conflict of interest, a source of abuse of power. An overhaul of the institutions, in a sense to further separate functions of justice, is required. The same Public Prosecution, also, enjoys powers that significantly reduce the degree of judicial control.

It remains, however, that protection that is exclusively envisaged is bound to have limited effects. Any form of protection that wishes to be effective must recognize an important part in the questioning of the responsibilities of perpetrators of abuses, in both civil and criminal fields. It does not lose sight of the context in which, the society it is addressing, is found. It must specifically include, in its approach, the fight against impunity, in general, and mass education on human rights. We will have, thus, created a context in which the rule can be truly rule and exception remains exception. The creation of this context is crucial because, as pointed out by Kueingienda:

> "*Habeas corpus* has no value by itself, so perfect and meticulous that it might be the regulation. More by this procedure, civil liberties are guaranteed, in England, by public opinion which ceased to apologize and accept arbitrariness." [165]

[163] See for example Article 77 of the Criminal Procedure Code, Codes and Laws of Burundi (31 December 2006), p.237.
[164] See RMPGAC 794/BP including records of 27/4/2011, 10/3/2011 RMPCA of 788/NM, RMPAC 753/NM of19/5/2011and RMPG 5031 of 13/1/2011.
[165] KUEINGIENDA (M): *The protection of civil liberties: Comparison of French and Anglo-Saxon systems*, L'Harmattan, 2002, p.153.

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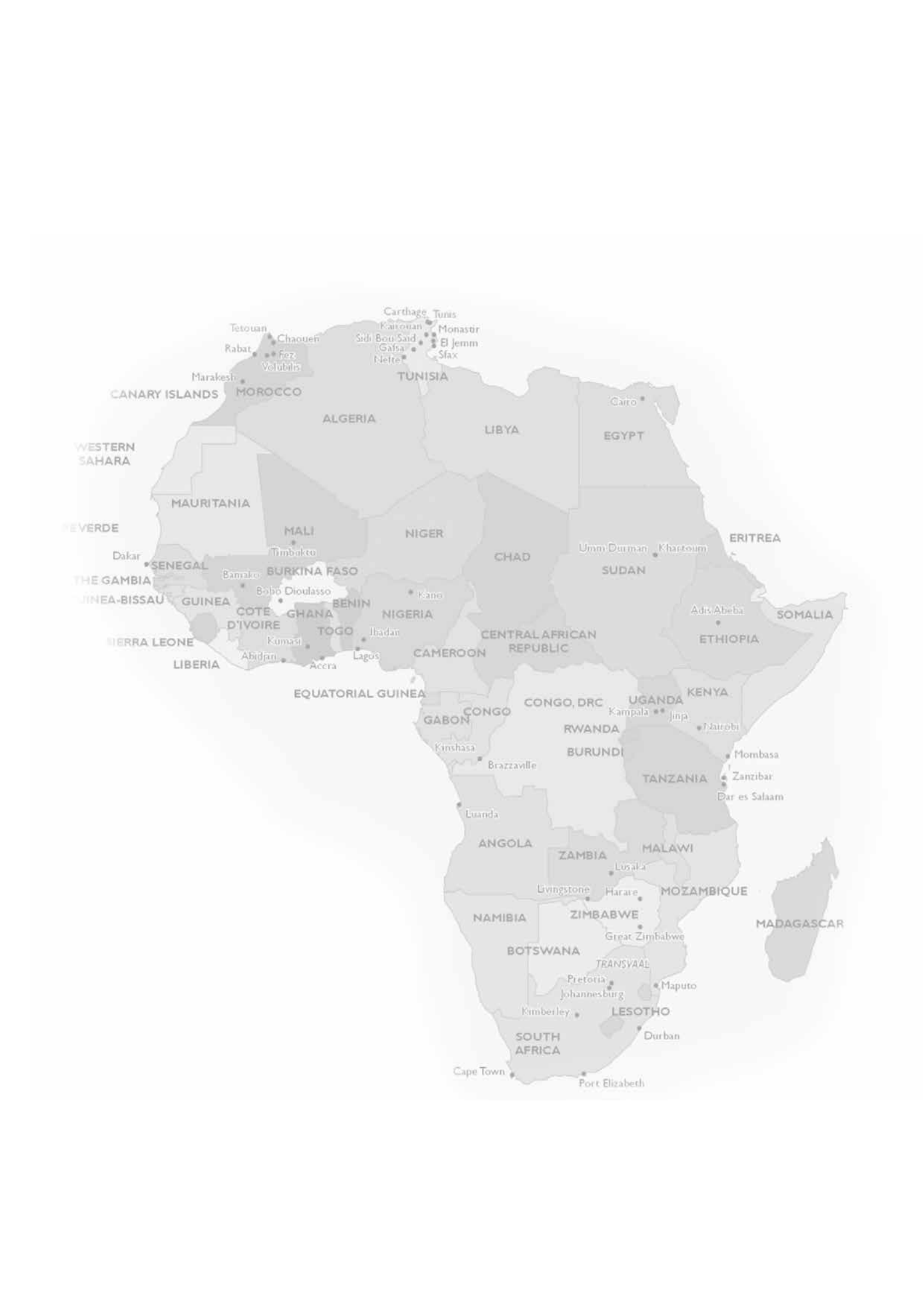
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ANTI-CORRUPTION COURT OF BURUNDI: WHEN THE QUESTION OF JURISDICTION ARISES IN REVERSE DIRECTION

By **Aimé Parfait NIYONKURU***

INTRODUCTION

In 2006, Burundi came up with a special law on the prevention and repression of corruption and related offenses[167]. This legislation was very timely. It proposed to bring a great remedy for the evils for which Burundi suffered, then, and still does today; corruption[168], establishing a "new special mechanism" to prevent and punish corruption and related offenses.

This special mechanism is composed of a *trio* of organs namely the Anti-Corruption Court, the Prosecutor General of the said Court and the Special Anti-Corruption Brigade[169]. The anti-corruption court and the Legal Department of that Court were established by a unique law on 13th December 2006[170] whereas the Special Brigade to fight against corruption was created two weeks later[171].

And to allow the mechanism hereby established to effectively fulfill its mission, the law provides that the Court and the Prosecutor General will have management autonomy. To this end, following the example of the Supreme Court and the Prosecutor General of the Republic[172], the Anti-Corruption Prosecutor's Office and its Court have their own budget and a General Secretariat.

In 2009, a bill amending the Criminal Code was enacted[173]. This legislation incorporates the offense of corruption and related offenses to corruption to be those that the anti-corruption Court is specifically tasked to suppress. However, this law upsets the order in which these offenses were established in the 2006 law.

While the 2006 law on the prevention and punishment of corruption lists the offense of abuse of corporate assets in the list of offenses related to corruption[174], the Penal Code of 2009 breaks this order and takes up the offense of misuse of corporate assets[175] in the category

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167 Law No. 1/12 of 18 April 2006 on the prevention and punishment of corruption and related offenses, OBB, No. 4/06.

168 Voy.Niyonkuru, AP, "The impunity in Burundi: causes, consequences and outcomes," Journal of jurisprudence of the Supreme Court of Burundi, the first quarter of 2012, pp.78 ff.

169 Law No. 1/12 of 18 April 2006, supra, s.3 and 17.

170 Law No. 1/36 of 13 December 2006 establishing the Anti-Corruption Court, OBB, No. 12/2006.

171 Law No. 1/37 of 28 December 2006 on the establishment, organization and operation of the special anti-corruption brigade, OBB, No. 12c/2006.

172 Art. 18, 12 and 22 of Law No. 1/07 of 25 February 2005 governing the Supreme Court, OBB, No. 3c/2005.

173 Law No. 1/05 of 22 April 2009 amending the Criminal Code, OBB, No. 4 bis/2009.

174 Art.61 of Law No. 1/12 of 18 April 2006 on measures to prevent and combat corruption and related offenses, OBB, No. 4/06.

175 Art.464 of Law No. 1/05 of 22 April 2009 amending the Criminal Code, OBB, No. 4 bis/2009.

of offenses relating to public and private companies[176]. This Editorial "inconsistency?" the Anti-Corruption Court has deduced an important consequence of jurisdiction.

Since 2009, the Anti-Corruption Court therefore considered that it was not the "only one having jurisdiction" of the offense of abuse of corporate assets notwithstanding the provisions of article 22 of the 2006 Act on Measures of prevention and punishment of corruption and related offenses. All records relating to the offense of abuse of social goods that were the jurisdiction of the Anti-Corruption Court and the Prosecutor General's Office were sent "for establishment of jurisdiction" to the High Court and the Government's Attorney General respectively.

This relinquishment of jurisdiction raises questions both in terms of procedure and substance. We will focus on the substance and will limit the procedure. In this case, is it true that the enactment of the 2009 Act amending the Penal Code revised with a view of restriction, of the subject-matter of the Anti-Corruption Court, for which it would no longer have jurisdiction over the offense of abuse of corporate assets? This is the first question that will be at the center of our reflection.

With regard to the offense of misrepresentation, and punishable under Article 14 of the Law on the Prevention and Punishment of corruption and related offenses, the Anti-Corruption Court has already ruled conviction and acquittal. It therefore recognized jurisdiction over the offense.

Here, the question of the jurisdiction of the Anti-Corruption Court arises in reverse direction to that in which the same question applies to the case of the offense of misuse of corporate assets; whence, the wording of the title of this topic, which is the subject of our essay.

The mere fact that the offense of misrepresentation is stipulated and punishable by law on the prevention and punishment of corruption and related offenses, does it confer automatically and exclusively, to the Anti-Corruption Court, the subject-matter jurisdiction to hear this offense? This is the second question that this discussion will address.

I. Is the Anti-Corruption Court the only one having exclusive jurisdiction to try the offense of corruption and related offenses?

Under article 22 of the law on the prevention and fight against corruption and related offenses *"The Anti-Corruption Court* ***has exclusive jurisdiction***[177] *to try corruption offenses and related offenses under this present law."*

This article should be read and interpreted in conjunction with other relevant sections of the Act, and in particular Articles 23 and 24[178]. Indeed, it is not correct to say that anti-corruption Court has exclusive jurisdiction to hear corruption offenses and offenses related

[176] Forming Chapter IV of Title VI of the Criminal Code of 2009.

[177] Emphasis added.

[178] Article 23 of the law on the prevention and punishment of corruption and related offenses "*The judgments of the Anti-Corruption Court are subject to objection, appeal before the Judicial Chamber of the Supreme Court and of cassation before the full Supreme Court sitting. They are subject to review pursuant to Article 43 of the law governing the Supreme Court. " Article 24 of the same law states: "Under the supervision of the Attorney General of the Republic, the Public Prosecutor at the Anti-Corruption Court in search of dependants or people who do not enjoy the privilege of jurisdiction laid down by Article 32 of the law governing the Supreme Court and 28 of this law, bribery and related offenses of corruption, receives accusations related thereto, makes every investigative actions and takes Court action when it does not decide on the Prima Facie non-case procedure . For this purpose, it receives among other records from the Special Anti-Corruption Brigade, from the Court of Auditors or any other public finance institution monitoring as well as audit reports containing offenses covered by this Law ".*

to corruption. The truth is that the Anti-Corruption Court, subject to the provisions relating to the privilege of jurisdiction, has in the first instance, the capacity to preside over the offense of corruption and related corruption offenses; only as a first resort, since the rulings of the Anti-Corruption Court are susceptible to appeal at the Appeal's Section of the Judicial Chamber of the Supreme Court. The Supreme Court therefore has capacity to rule, even in the second degree, over the offense of corruption and offenses related to corruption.

In addition, by virtue of the privilege of jurisdiction that they enjoy, some people cannot be tried by the Anti-Corruption Court, including for the offense of corruption and related corruption offenses. In criminal cases, these people are litigants, both at the first and second level, of the Supreme Court.

These are the judges of the Supreme Court, the Constitutional Court, the Courts of Appeal, Administrative Courts, Military Court, the Prosecutor General of the Republic, offices of the senior public prosecutors of the Courts of Appeal and the Military magistrate, Provincial Governors, political decision-makers and the authorized public representatives having, at least, the rank of a Minister, senators, Members of Parliament, General Officers of the Burundian armed forces[179], Burundian police officers with the rank of OPC1[180], Commissioners of Police[181] as well as members of the Independent National Commission on Human Rights[182]. Similarly, persons subject to service Discipline of the High Court of Justice namely: the President of the Republic, his Vice-Presidents and Speakers of the two chambers of parliament, are outside the jurisdiction of the Anti-Corruption Court.

The exclusion of these categories of persons within the jurisdiction of the Anti-Corruption Court has earned the 2006 Act the criticism that it instituted a specialized criminal court, the Anti-Corruption Court, only" for the small fish "[183],or" junior officers "[184].

It is intriguing to note that, in spite of its status and its place in society and among other institutions of the Republic, the Ombudsman does not enjoy exemption from jurisdiction. Similarly, except in the presumption of their rank and their status as provided in Article 20 of the 2006 Act, the judges of the Anti-Corruption Prosecutor's Office and the Court have not been granted the privilege of jurisdiction. But it must be recalled that the exemption from jurisdiction is not presumed. In both cases, one might think that this is an oversight and not the translation, in letter, of the conscious will of the legislature.

Based on developments on this issue and subject to clarifications made thereto, it can be concluded that the anti-corruption Court presides over the offense of corruption and related corruption offenses committed within the entire territory of the Republic of Burundi. In addition to corruption, active and passive, these offenses are: bribery, the practice of influence peddling, misappropriation and embezzlement of assets, fraudulent management, illicit enrichment, favoritism, illegal acquisition of equity stakes, misuse of public assets, and money laundering[185].

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[179] Art. 32 of Law No. 1/07 of 25 February 2005 governing the Supreme Court, OBB, No. 3 c/2005 art. 138 of Law No. 1/008 of 17 March 2005 on the Code of Organization and Jurisdiction of Courts, OBB, No. 3 c/2005.

[180] Voy. Law No. 1/18 of 31 December 2010 on the status of officers of the National Police of Burundi, OBB # 12 c/2010.

[181] Idem

[182] Art.19 of Law No. 1/04 of 5 January 2011 on the establishment of the Independent National Commission on Human Rights, OBB, No. 1/2011.

[183] OAG *Comment of the RCCB 160-161 on the judgment of the Constitutional Court and critical analysis of the law on the prevention and punishment of corruption and related offenses*, May 2006, p.16.

[184] PAGE *literature review prior to the completion of the diagnostic study of the legal and judicial system in Burundi*, May 2008, p.27.

[185] Article 50 to 62 of Law No. 1/12 of 18 April 2006 laying down measures for the prevention and punishment of corruption and related offenses, OBB, No. 4/06.

In order to be an offense related to corruption according to the law on prevention and repression of corruption of 2006[186], the offense on misuse of public property falls, in principle, within the jurisdiction of the Anti-Corruption Court.

Proponents of the view that the offense on abuse of corporate assets would fall under, despite the projections of the 2006 law on the prevention and fight against corruption and related offenses, the ordinary courts invoke the law of 2009 on the review of the Burundian Penal Code[187] which would not take the offense of abuse of corporate assets among the list of offenses related to corruption.

However, this claim is devoid of any serious legal basis; and rightly so. The enactment of the Criminal Code of 2009 did not affect the jurisdiction of the anti-corruption Court while the position of the offense in the Penal Code is justified in methodological considerations and does not affect in any way the existing powers of jurisdiction.

II. Enactment of the Criminal Code of 2009 did not affect the jurisdiction of the Anti-Corruption Court.

II.1. Penal Code of 2009 contains no provisions dealing with jurisdiction.

The Penal Code of 2009, following the example of that of 1981, contains almost exclusively, only rules of principle or substantive law that determine elements and conditions that are common to all offenses and all penalties (Book I) as well as rules which define, particularly, the elements of each offense and the penalties that apply (book II).

Apart from Articles 8 to 11 that solve the question of jurisdiction of the Burundian criminal justice, in general, no other provision deals with either the competence or the procedure. Questions relating to these areas are answered either in the code of organization and jurisdiction of courts[188], or in specific criminal statutes[189], or in provisions of criminal nature incidentally inserted in non-criminal laws[190].

In the case of the offense of misuse of corporate assets, neither the code of the court organization nor its jurisdiction, much less the Penal Code, confer jurisdiction for prosecution and trial on ordinary courts. Suffice to say that Article 22 of the 2006 law on prevention and suppression of corruption attributed to the Anti-Corruption Court's jurisdiction is applicable "to hearing corruption offenses and offenses related to bribery projected by [the] law," abuse of public property being one of those[191].

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[186] Art. 61 of Law No. 1/12 of 18 April 2006, *supra*.

[187] Law No. 1/05 of 22 April 2009 amending the Penal Code No. O.B.B 4bis/2009.

[188] Law No. 1/008 of 17 March 2005 on the Code of Organization and Jurisdiction of Courts, OBB, No. 3c /2005.

[189] This is particularly true of Law No. 1/12 of 18 April 2006 on measures to prevent and combat corruption and related offenses, OBB, No. 4/06 of Law No. 1/004 of 8 May 2003 on the prevention and punishment of the crime of genocide, crimes against humanity and war crimes, OBB, No. 5/2003 and Decree-Law No. 1/5 of February 27 february 1980 establishing the Code of organization and the jurisdiction of military courts, OBB, No. 5/80.

[190] This is particularly true of the Labour Code (Law No. 1/037 of 7 July 1993, OBB No. 9/1993) of the Commercial Code (Law No. 1/07 of 26 April 2010, OBB No. 4 / 2010), codes of private companies and public participation (law No. 1/09 of 30 May 2011), the bankruptcy Law (law No. 1/07 of 15 March 2006, etc..

[191] Art. 61 of Law No. 1/12 of 18 April 2006, supra.

II.2. Position of the Article addressing the offense of abuse of corporate assets in the Criminal Code of 2009 is justified by methodological considerations which in no way affect the jurisdiction of the Anti-Corruption Court.

The Criminal Code of 2009 expressly repeals, either in whole or in part, the 2006 law on the prevention and fight against corruption and related offenses (1). If the legislature of 2009 broke the order in which corruption offenses and offenses related to corruption are classified in the 2006 law on the prevention and fight against corruption and related offenses is as a result of the inherent methodological considerations in any task of codification (2).

II.2.1 Penal Code of 2009 does not expressly repeal, either in whole or in part, the 2006 law on the prevention and Repression of Corruption and related offenses.

It seems that those who argue that jurisdiction to try persons charged with the offense of abuse of corporate assets is founded on the position of the article dealing with the offense of abuse of corporate assets in the Penal Code of 2009.

As a matter of fact, the editor of the Criminal Code of 2009 took up the offense of abuse of corporate assets[192] in the category of offenses relating to public and private companies[193], making the offense of bribery and other offenses related to bribery projected in the 2006 law, in a separate chapter[194]. In doing so, the legislature of 2009 was breaking the consolidation, carried out by the legislature of 2006 around the corruption offense, and of the offenses related to it.

If the group operated by the legislature of 2006 was broken by that of 2009, if the offense of misuse of corporate assets was separated from other corruption-related offenses, is there need to infer a change in the jurisdiction of the anti-Corruption Court that would, in this way, withdraw understanding of the offense of abuse of corporate assets in favor of ordinary courts?

To answer this question, it is important to ascertain the reasons which prompted the editor of the Criminal Code of 2009 to adjust the order established by the legislature in 2006 for the offense of corruption and related offenses.

The review of the penal code does not reveal any evidence relating to the conclusion that the legislature of 2009 had intended to withdraw, from the anti-corruption Court, knowledge of the offense of abuse of corporate assets in accordance with Articles 22 and 61 of the 2006 Act read together. In other words, the legislator of 2009 expressly repeals, albeit partially, the 2006 law which remains in force in its entirety. In fact, in relation to the offense of abuse of corporate assets, the two statutes are not contradictory and can be applied concurrently. It results from Article 623 of the Criminal Code of 2009 that *"special laws for which certain criminal provisions have been included in [this code] remain in force insofar as they are not contrary to [this law]."*

Even with the assumption of the existence of an inconsistency or a conflict between the two texts, the jurisdiction of the anti-Corruption would still be determined by the law of 2006.

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[192] Art. 465 of Law No. 1/05 of 22 April 2009, *supra*.

[193] This category is the object of Chapter IV (articles 458-466) Title VI of the Criminal Code, which deals with "crimes of an economic nature and against the public good" (art.412 470).

[194] Chapter II (art.420 446).

II.2.2. 2009 legislature had a dual objective: revision of the ordinary criminal code[195] and codification.

Certainly, one of the objectives of the legislature in 2009 was to reform the "ordinary criminal code" of 1981 through updating and modernization of certain laws. This reform had to be accompanied by the creation of new incriminations designed to punish new forms of violence that were not known at the promulgation of the Criminal Code of 1981. Thus, if we compare, in quantitative terms, the Criminal Code of 1981 and the one of 2009, we notice that there has been a considerable increase in the number of articles. It goes from 444 to 625. If we consider only book II, which generally bears crimes, the gap in terms of number of offenses is 126.

Only that this figure does not solely correspond to the new offenses created by the legislature in 2009. Dozens of offenses are as a result of a simple integration so much that, beyond a simple reform, the legislature does, a little bit, of codification.

By coding, we mean here the fact of identifying and gathering legal texts on the same subject, in order to approximate the grid by categories or criteria. This work is motivated by a methodological imperative to assure, legal subjects and users of legal texts, legibility of all the rules of a vast domain of law. It is in this prospect that the Criminal Code of 2009 has integrated dozens of provisions subject to special criminal laws and penal provisions scattered in mainly non-criminal laws. This is what explains, for example, the assumption by the same penal code; offenses subject to the 2006 law on the prevention and suppression of corruption.

The legislature reminds us of its desire for such codification in the explanatory memorandum of the Criminal Code of 2009 when it states that "*the scattered criminal law had been categorized under one title on offenses against the economy. New offenses, of an economic nature were introduced; the result of a new criminal behavior linked particularly to the development of new information technologies. This is the case of forgery and fraud in the IT sector, already enshrined in comparative law.* "

In formal terms, this codification effort, such commitment to ensure greater clarity of all the substantive rules of criminal law has generated "inconsistencies", and desired harmony, has not been fully achieved. This is particularly the case with regard to the offense of abuse of corporate assets which was amputated from the category of related offenses under the 2006 law to be classified in the category of offenses relating to public and private companies in the Penal Code of 2009.

An Advisor at the Anti-Corruption Court even finds it entirely logical that the offense of abuse of corporate assets has been placed among the offenses relating to public and private companies since this offense is only committed by" public[196] and private companies and that, for that matter, only by managers and staff of these companies.[197] "

Even when considering the offense of abuse of corporate assets, the existence of a mismatch between the Penal Code of 2009 and the Law on the Prevention and Punishment of

[195] The term "ordinary criminal code" is most appropriate since there are other specialized penal codes including military penal code without forgetting special criminal laws.

[196] Law No. 1/09 of 30 May 2011 (supra, footnote on page No. 24) was substituted for the name of the public company "company with public participation.

[197] Harerimana, A., *judicial Talk on the theme: the offense of abuse of corporate assets*, in May 2012, unpublished, p.20.

corruption and related offenses in 2006, this discrepancy does not lead to incompatibility in the application of both.

Even if it had resulted from the enactment of the Criminal Code of 2009, a conflict of texts, in a manner that it became impossible to apply concurrently these two texts, the conflicting laws would turn to the advantage of the special Act of 2006, and that, by applying the principle of the hierarchy of norms according to their content. By virtue of this principle, if the legislature first enacted a special law and a general law in the future, if the legislature **has not declared**[198] abolition of the special law and if both laws cannot be applied concurrently, it is the special law that has greater force and will prevail over the general law. Regarding case in question, it is the law on prevention and suppression of corruption and related offenses alone which would be applied; which accords the anti-corruption court jurisdiction over the offense of abuse public property. It is the application of the principle well known to legal experts *"legispeciali per generalem non derogatur"*.

III. Offense of misrepresentation: jurisdiction that raises questions.

The second question, which is central to our reflection, relates equally to competence, but it arises in reverse sense with respect to what has been developed in relation to the offense of abuse of corporate property. This question touches on the determination of the court having jurisdiction to preside over the offense of false statements.

The Anti-Corruption Court has already presided over several cases in which prevention was precisely the offense of false statements[199]. Convictions and acquittals have been pronounced. The Anti-Corruption Court has, *de facto*, recognized jurisdiction over the offense.

Admittedly, it is clear from the analysis of the judgments given earlier by the Anti-Corruption Court that, on the one hand, the defendants or their counsels never raised the objection to jurisdiction and, on the other hand, the Court never addressed, to ensure formally, the question of its own jurisdiction over the offense of false statements. Nevertheless, the question of the jurisdiction of the Anti-Corruption Court for the offense of false declarations arises in law.

III.1. Anti-corruption court does not bother to show the basis of its jurisdiction.

It is a well-known principle in criminal law. When a request for an application or a petition is being considered by a court, before considering any claims, it must first of all ensure its jurisdiction. It is a legal requirement that the trial judge must rule on its own jurisdiction and the decision on this jurisdiction must be substantiated. The Supreme Court of Burundi (the Chamber of Cassation) reiterated as a rule that, before any consideration of the arguments presented by the plaintiff, that the court must determine whether it has jurisdiction[200].

The obligation of the judge, receiving a request or a petition that is questioning his jurisdiction before considering the merits of the case, is rooted in the fact that a decision on jurisdiction

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198 Emphasis added

199 This is particularly true of business PRPP 859; *Public Prosecutor v. Faustin Ndikumana and Speech and Action on the Awakening of Consciousness and Evolution of attitudes*, judgment of 24th July 2012; *PRPP 203 NDAYISABA Jean Pierre v. Public Prosecutor* (opposition), judgment of 15th December 2008, PRPP 481 *Public Prosecutor v. Hitimana Marin*, judgment of 31/10/2011; PRPP 411 *Public Prosecutor v. Rugemintwaza Juvénal*, judgment of 30/12/2010.

200 CPR 153 *Rwuri Joseph v. Public Prosecutor*, judgment of 18 January 1979.

is not a trial preparatory, a simple measure of the administration of justice or merely legal actions, but a judicial act. But, every judicial act must be justified. In a nutshell, the duty to justify judicial decisions extends to the issue of jurisdiction.

Analysis of rulings of the Anti-Corruption Court, in particular those related to the offenses of misuse of corporate assets and false declarations, however, reveal that the judge of this Court is not used to adjudicating on his jurisdiction, including for the offense of false statements[201].

With regard, specifically, to the offense of false declarations, review of the case law shows that neither the submissions of the public prosecutor nor the conclusions of the civil parties are concerned about proving that the Anti-Corruption Court's jurisdiction to hear the offense of making false declarations before deciding on restitution and damages that may be caused to the victims of crime or their heirs, at their request or that of the Public Prosecution[202]. Similarly, the analysis of case law reveals that the accused persons have not raised any objection to jurisdiction. This would probably have pushed the Court to adjudicate on its jurisdiction to hear the offense of misrepresentation under the 2006 law on the prevention and suppression of corruption and related offenses.

The review of case law reveals, lastly, that when the anti-corruption court is presiding over the offense of false declarations before it on the basis of Articles 14 and 64 of Law No. 1/12 of 18th April 2012 on measures to prevent and suppress corruption and related offenses, the content is as follows:

> "If any person comprising the Special Anti-Corruption Brigade, a judicial authority or a public officer who has a duty to take up the said authority or, through the media, makes false, written or verbal, statements that do not reflect the truth in relation to offenses under this law, shall be punished with imprisonment of between five and ten years and pay a fine of five thousand to one million francs.
>
> If the culprit is a corporate body, it shall be punished by a fine of five to ten million francs. "
>
> *"Both public and private entities, are held responsible for corruption and related offenses under this law, when committed by their representatives or by those in positions of responsibility from among their ranks acting on behalf of these entities and on this basis:*
>
> 1 °. of power of representation;
>
> 2 °. of power of decision-making;
>
> 3 °. of power to control.
>
> *Liability of legal persons under the preceding paragraph does not exclude individual prosecutions of their representatives or their accomplices. "*

[201] Voy. PRPP including 859 *Public Prosecutor v. Faustin Ndikumana and Speech and Action on the Awakening of Consciousness and Evolution of attitudes*, judgment of 24 July 2012; PRPP 203 NDAYISABA *Jean Pierre v. Public Prosecutor (opposition)*, judgment of 15th December 2008; PRPP 481, *Public Prosecutor v. Hitimana Marin,* judgment of 31st October 2011; PRPP 411, *Public Prosecutor c. Rugemintwaza Juvénal*, judgment of 30th December 2010.

[202] Articles 93 in respect to law N ° 1/05 of 22nd April 2009 amending the Criminal Code, O.B.B, No. 4bis/2009.

In fact, the anti-corruption court purports, without giving reasons, to found its jurisdiction over the offense of making false declarations on Article 14 (for natural persons) and 64 (for legal persons)[203].

However, the Anti-Corruption Court is unable to legally assume jurisdiction in accordance with Articles 14 and 64 of the Law on the Prevention and Punishment of corruption; and rightly so. Articles 14 and 64, included above, are substantive rules whose content can be summarized as follows:

- The criminalization of the offense of false statements in relation to corruption and related offenses.
- Fixing the penalty for the perpetrator of the offense distinguishing whether the applicant is a natural person or a legal person.
- The terms and conditions of liability of legal persons for the offense of making false statements.

None of the two articles comprises jurisdictional rule. These are rules with only one content material. The basis of the jurisdiction of the Anti-Corruption Court must, therefore, be sought elsewhere.

III.2. False declaration is not an offense related to corruption and cannot fall within the jurisdiction of the Anti-Corruption Court.

According to Article 1 of the law on the prevention and Repression of Corruption and related offenses:

> *"This present Act aims at preventing and combating corruption and related offenses in government bodies of public and private organizations and non - governmental organizations."*

It is, moreover, known that, with regard to substantive jurisdiction, it is Article 22 of the 2006 Law on the Prevention and Repression of corruption that applies. In this present case, "The Anti-Corruption Court has jurisdiction to try the offenses of corruption and related offenses of corruption provided by [the Act]."

In order for the Anti-Corruption Court to have jurisdiction to adjudicate on the offense of misrepresentation, the issue in question must be an offense related to corruption. However, offenses related to corruption are provided for in Title IV, Chapter II, and Section 2 of the law on the prevention and Repression of Corruption and related offenses. This section focuses on offenses related to corruption that it enumerates in an exhaustive and nominative manner namely, in a respective order: extortion, influence peddling, embezzlement and misappropriation of property, fraudulent management, illicit enrichment, favoritism, taking illegal advantage, misuse of corporate assets and money laundering.

All in all, the anti-corruption court has jurisdiction only over crimes of corruption (active and passive) and those related to corruption offenses listed in the previous paragraph.

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[203] PRPP 859 *Public Prosecutor v. Faustin Ndikumana and Speech and Action on the Awakening of Consciousness and Evolution of attitudes*, judgment of 24 July 2012.

The offense of false statements is certainly laid down in Article 14 of the Law on Prevention and Repression of corruption. Through this article, the Burundian law makes it an offense for a natural or legal person, to make "*the Special Anti-Corruption Brigade, a judicial authority or a public officer who has a duty to take the said authority or through the press, false, written or verbal statements that do not reflect the truth in relation to offenses under [the] law against corruption and related offenses* ".

It remains true, however, that the offense of false statements, certainly laid down in Article 14, is not an offense related to corruption. Not being an offense related to corruption, it cannot meet institutional mechanisms for the prevention and Repression of Corruption and related offenses, especially, the Anti-Corruption Court.

Moreover, this provision does not confer jurisdiction on the Anti-Corruption Court to know the facts that it convicts. And this is not a scholarly interpretation. One only needs to read the statute as a whole rather than treating it as juxtaposition of unrelated or disparate articles. We could understand that the Anti-Corruption Court recognizes jurisdiction to adjudicate on the offense of false statements in at least one hypothesis; the one on complicity of the author of false statements with the author of the offense of bribery; or other corruption-related offense, under the 2006 law. But this hypothesis is to be excluded considering the proceedings of the offense of false statements that the Court has already closed or are still pending before the Court itself.

Currently, the only comparison that we note between the offense of corruption, corruption-related offenses and the authors and perpetrators of false statements, judged by the anti-corruption court or prosecuted before, is that false statements relate specifically to corruption and corruption-related offenses; which cannot, in the absence of evidence of criminal involvement provided in the Penal Code, constitute a case of complicity. Finally, would it make sense to pursue an accomplice without addressing the author or co-author? Finally, those who argue that the Anti-Corruption Court has jurisdiction to try the offense of false statements could be tempted to claim such jurisdiction of the position of the offense in the law on the prevention and Repression of Corruption and related offenses; to no avail. With regard to jurisdiction, this is not the position, in a text, of a provision creating an offense that is relevant. It is rather that which the legislature has agreed on. In this case, the law of 2006 was clear on at least two points:

1. The anti-corruption court, the Prosecutor General and his Special Brigade have jurisdiction only in matters of corruption and related offenses.
2. False statements or statements that do not reflect the truth, in relation to corruption offenses and violations, do not constitute either corruption or an offense related to corruption.

Consequently, this offense is not the jurisdiction of judicial mechanisms specially set up to combat corruption and related offenses, such as the anti-corruption court, the Prosecutor General and its special brigade.

But that does not mean that there is no jurisdiction to punish the participants (authors, co-authors and accomplices) of this offense. Since the law does not grant knowledge of the offense to any special jurisdiction, and especially not to the Anti-Corruption Court, it suffices to read only the first paragraph of Article 17 of the Code of Organization and

Jurisdiction of Courts[204] for an answer that does not require genius in its understanding: *"The First Instance courts have jurisdiction to hear all the offenses whose material or territorial jurisdiction is not assigned to any other jurisdiction."*

Conclusion

In relation to offenses of misuse of corporate assets and false statements, the issue of jurisdiction of the Anti-Corruption Court has not yet arisen in the courtroom.

In the case of the offense of false statements, it also applies to corporate entities that have never previously objected lack of jurisdiction of the said Court. What would apparently have had obliged it to rule on its own jurisdiction through a substantiated decision.

As for the offense of abuse of corporate assets, the confusion continues. After making the judgments of conviction and acquittal, the Anti-Corruption Court considered, at one time, that this offense was not one of the offenses within its jurisdiction. Records before it were transferred to regional courts that supposedly had territorial jurisdiction.

Though, in relation to both offenses, the question of the jurisdiction of the Anti-Corruption Court was not discussed in court, the issue still remains of great interest. After closely following the legal news of the Anti-Corruption Court, we focused on the 2006 law that determines the substantive jurisdiction of this Court. It is at that moment that we found that, through two offenses: misuse of corporate assets and false statements, the question of jurisdiction of the Court arose in reverse directions.

Following the developments that have gone into this discussion, it was precisely demonstrated that the Anti-Corruption Court considered itself incompetent where the law recognizes its jurisdiction (misuse of corporate assets) and recognized itself as competent for an offense, for which the law that constitutes it, does not give it jurisdiction (false statements).

In all cases, it is up to the Anti-Corruption Court, dealing with an offense that the prosecution considers within its jurisdiction, to establish, through a sufficiently substantiated decision, the legal basis for its jurisdiction. Indeed, it is known by legal experts that among the issues that must be addressed prior to the end of a case before a court, is the question of jurisdiction. It is up to the adjudicating court – here, the Anti-Corruption Court, to appreciate its jurisdiction and scope. In carrying out this requirement, the court does not proceed arbitrarily. It must be founded on interpretation of the rules which determine jurisdiction on the issue brought before it. What the Anti-Corruption Court does not, generally, do and should be doing henceforth.

[204] Law No. 1/008 of 17 March 2005 on the Code of Organization and Jurisdiction of Courts, *O.B.B, No. 3 c*/2005.

THE STATE OF POSITIVE LAW IN BURUNDI WITH REGARD TO THE IMPLEMENTATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

By Emery NUKURI*

ACRONYMS AND ABBREVIATIONS

AAPRB	:	Arusha Agreement for Peace and Reconciliation in Burundi.
Art.	:	Article
AFDRC	:	Armed Forces of the Democratic Republic of Congo
CAR	:	Central African Republic
Chap.	:	Chapter
CPC	:	Criminal Procedure Code
DFLR	:	Democratic Forces for the Liberation of Rwanda
DRC	:	Democratic Republic of Congo
Ex-RAF	:	Ex-Rwandan Armed Forces
ICC	:	International Criminal Court
LRA	:	Lord Resistance Army
M23	:	Movement of 23 March
NCDD-FDD	:	National Council for the Defense of Democracy
NCPD	:	National Council for People's Defense
NLF	:	National Liberation Forces
NRMD	:	National Revolutionary Movement for Development
OBB	:	Official Bulletin of Burundi
Para	:	Paragraph
RFI	:	Radio France Internationale
UN	:	United Nations

0. INTRODUCTION AND BACKGROUND

Burundi is a country that has experienced civil war since its independence until very recently with the signing of the peace agreements[205] with rebel groups. During this turbulent history; heinous crimes have been committed and the establishment of transitional justice mechanisms, provided for in the Arusha Peace Agreement of 2000[206] for dealing with them, are experiencing delays. (And in the opinion of some, international crimes continue to be committed, even presently). Human Rights Activists and UN experts report international crimes that continue to be committed today with impunity in the form of massacre[207] or

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[205] The Arusha Peace Agreement of August 28, 2000, the Global Cease-fire of 16th November 2003 between the Government of Burundi and the NCDD-FDD, the Global ceasefire Agreement of Dar- es-Salaam of 7 September 2006 between the Government of Burundi and the NLF Palipehutu.

[206] Articles 6 and 7 of chap I, Protocol I of the Arusha Peace Agreement for Peace and Reconciliation in Burundi, p18-19, *in Codes and laws of Burundi*, Volume I, 2010, pp. 28-54.

[207] See this article by RFI: Burundi: NLF accused of Gatumba's Massacre, 07th October 2011. FNL of Agathon Rwasa are accused by the Secret Service of Burundi to have planned the massacre of 39 people on the night of September 18th to 19th, 2011 in

extrajudicial killings[208].

In addition, the Great Lakes region, in which Burundi lies is experiencing significant socio-political instability (and its countries have a history that is related) these successive conflicts ensue in the country along the cross borders of rebel movements. The *Intarahamwe*[209] and Ex-RAF[210], after having killed thousands of people during the 1994[211] genocide in Rwanda, fled to Congo[212] where they are fighting in the name of the DFLR[213] and continue to claim thousands of civilian casualties. Similarly Ugandan rebels of the LRA[214] are currently in CAR and DRC[215] where they commit abuses against the civilian population. What would happen if they came to Burundi? Would Burundi, leave them to continue committing crimes or would she consider her options? Certainly, the Burundian government should prepare for military combat and arrest them. She must have a legal arsenal enabling her to prosecute the perpetrators of domestic or foreign international crimes and to cooperate fully with the ICC. The ratification of the Rome Statute of the International Criminal Court by Burundi dated 21st September 2004, which came into force in Burundi, December 1, 2004, pursuant to the Rome Statute[216], is a major breakthrough in the fight against impunity. This ratification was an important step and a hope that crimes will not be repeated with impunity. By ratifying the Rome Statute, Burundi has pledged to investigate international crimes and prosecute the perpetrators under the principle of primacy. Thus the ICC may exercise its jurisdiction only when the Burundian courts do not have the will to act or are unable to do so[217].

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a bar in Gatumba. Available at www.rfi.fr/afrique/2011107-burundi-fnl-accuses-massacre-gatumba . After national and international media will make a series of revelations involving senior members of the Police and the National Intelligence Service, see the article by RFI « *Coup de théâtre dans le Procès des auteurs présumés de l'attaque de Gatumba* » of December 14th, 2011 available on the site www.rfi.fr/afrique/20111214-burundi-procès-auteurs-présumés-gatumba (accessed 17/09/2012).

[208] See also *the 2012 Report on the situation of human rights in Burundi* by Amnesty International on www.amnesty.org/fr/région/burundi/report-2012 which reports 57 cases of extrajudicial killings also identified in a UN report.

[209] Interahamwe is the largest Rwandan militia, created in 1992 by the ruling party MRND of Juvénal Habyarimana, in Rwanda. *Interahamwe* means "those who fight together" in Kinyarwanda. These militias are responsible for most killings during the genocide in 1994. Their name is assigned by the international media to any party militias involved in the genocide and who could not, in fact, be distinguished on the ground. The Impuzamugambi are, for example, the militia of the Coalition for the Defence of the Republic (CDR) and they massacre with the Interahamwe . The organization is placed on the official list of terrorist organizations in the United States. Read about *the report of the independent commission of inquiry into the actions of the United Nations during the 1994 genocide in Rwanda* S/1999 / 1257, p10 ff available on the website www.un.org/french/documents/view-doc.asp?symbol=S/1999/1527 (accessed 05/06/2012) and the article entitled: Genocide in Rwanda available at http://fr.wikipedia.org/wiki/G%C3%A9nocide_au_Rwanda (accessed 17/09/2012)

[210] Ex-Rwandan Armed Forces

[211] *Report of the Independent Commission of Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda,* S/1999/1257, p3. Pursuant to the first sentence (after the letter and annex) of the Report: "*Some 800,000 people were killed during the 1994 genocide in Rwanda*"

[212] See this article of *aidhRwanda 1994 Tutsi genocide, historical landmarks*, 2004 available on the website www.aidh.org/rwand/reperes.htm (Accessed 17/09/2012)

[213] Democratic Liberation Forces of Rwanda is an armed group formed in the DRC in 2000. Defending the interests of Rwandan Hutu refugees in DRC and opposing the Rwandan Government of Paul KAGAME, it would have taken over from the Army for the Liberation of Rwanda and would count in its ranks ex-FAR and Interahamwe responsible for the Rwandan genocide, a claim that it denies http://fr.wikipedia.org/wiki/FDLR (accessed 03/04/2012)

[214] *The Lord ResistanceArmy*, rebellion in northern Uganda, which currently operates in the Central African Republic and the Democratic Republic of Congo.

[215] In Central African Republic and the Democratic Republic of Congo

[216] Article 126 2 of the Rome Statute, the United Nations, Treaty Series, Vol 2187, No. 38554), ratified by Law No. 1/011 of 30 August 2003, OBB No. 9/2003, p.629.
"With respect to each State which ratifies, accepts or approves the present Statute or accedes thereto after the deposit of the sixtieth instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of month after the sixtieth day after filing by such State of its instrument of ratification, acceptance, approval or accession "

[217] *Article 17 of the ICC Statute: "Given the tenth paragraph of the Preamble and Article I, a case is inadmissible by the Court if: a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable to genuinely carry out the investigation or prosecution; b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision is the effect of unwillingness or inability of the State genuinely to carry out prosecution; (...) "*

To fulfill its obligations, it was important that Burundi revises its national legislation and provide the means to investigate these crimes and prosecute the perpetrators and where applicable to cooperate fully with the ICC. It is in this view that Burundi has integrated some of the crimes covered by the Statute of the ICC in its legislation by the Law No. 1/004 of 8th March 2003 on the suppression of the crime of genocide, crimes against humanity and of war crimes[218] as well as law No. 1/05 of 22nd April 2009 amending the Penal Code[219].

Have these two laws satisfactorily incorporated the definitions and general principles of the Rome Statute? Are these two laws adequate for the implementation of Burundi's international obligations with regard to prosecution of international crimes? Has the Criminal Procedure Code been revised to enable effective collaboration between the ICC and national courts? Has Burundi adopted a law on cooperation? Has Burundi ratified the Agreement on Privileges and Immunities of the ICC? What will be the relationship between the ICC and the transitional justice mechanisms in case of competition? Are there judgments handed down by national courts, in this field, since it seems, according to the experiences of some, that international crimes have been committed and are still being committed?

It is these questions that our paper entitled «***The State of positive law in Burundi with regard to the implementation of the Rome Statute of the International Criminal Court***» will try to answer.

Burundi had the choice between developing a single law covering all aspects of implementation and modifying existing laws separately. She made, based on the facts, the second choice.

From a methodological point of view, we are going to see the current state of implementation and see what remains to be done in each area by exploiting the different pieces of legislation, and by interviewing different practitioners and stakeholders.

Thus, in the first chapter entitled «Criminalization» we will analyze how Burundi has incorporated, into the new Criminal Code, crimes provided for by the Rome Statute and the general principles of criminal law which determine accountability for international crimes perpetrators, offenses against the administration of justice of the ICC. We will also analyze the issue of interim immunities granted by the various peace agreements and the Relationships between the ICC and the Transitional justice mechanisms.

In a second chapter, entitled «prosecution and redress», we will see whether Burundi has complied with the requirements of the Statute of the ICC in terms of the duty to cooperate in the protection of victims and witnesses, on redress, as well as immunities of officials of the ICC.

In a third chapter entitled «the repression of international crimes by the Burundian courts» we'll see the step taken by Burundi in terms of repression of international crimes. A general conclusion will, then, close this paper.

[218] Law No. 1/004 of 8 March 2003 on the suppression of the crime of genocide, crimes against humanity and war crimes, OBB in 2003, No. 5, p 136.

[219] Law No. 1/05 of 22nd April 2009 amending the Penal Code.

Chap.1: CRIMINALISATION.

Section I: Crimes within the jurisdiction of the ICC.

§ 1. International crimes prescribed by the ICC as listed in the Burundian Criminal Code.

In this field, Burundi is one of the African states that have adopted national legislation incorporating, satisfactorily, the charges and the general principles of the Rome Statute of the ICC. Law No. 1/004 of 8th May 2004 on the suppression of the crime of genocide, crimes against humanity and war crimes in its Articles 2 to 4[220] and Articles 195, 196, 197, 198 of Law No. 1/05 of 22nd April 2009 amending the Penal Code[221] incorporate complete definitions of genocide, war crimes and crimes against humanity as set out in the ICC Statute, the Geneva Conventions of 1949. It should be noted, for all intents and purposes, that the crime of aggression is not punishable under the Burundian Criminal Code; something quite normal since Burundi has not ratified the amendment to article 8 of the ICC Statute adopted at the Review Conference in Kampala[222] by party States and consequently Burundi is not legally bound to implement this amendment.

But given the geopolitical situation in Burundi in the volatile Great Lakes region, where, for example, DRC constantly accuses Rwanda of having destabilized it through a new armed group M23[223], it is not inconceivable that Burundi could either be a victim of assault or even come under attack of one of its neighbors; it appears necessary that it ratifies and implements the Kampala amendment in order to enable it prosecute this kind of crime.

The Military Penal Code should equally be revised to allow military courts to effectively prosecute these crimes. Let's not forget that past crimes could not be committed without the intervention of the military and that their empowerment contributes to the prevention of these crimes.

§ 2. Offences affecting the administration of justice of the ICC

These offenses are provided for in Article 70 paragraph 1of the ICC Statute, which states:

"1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:

(a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;

(b) Presenting evidence that the party knows is false or forged;

(c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;

(d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose

[220] Article 2, 3, 4 of the Law No. 1/004 of 8th May 2004 on the suppression of the crime of genocide, crimes against humanity and war crimes

[221] Articles 195, 196, 197, 198 of Law No. 1/05 of 22nd April 2009 amending the Penal Code.

[222] http://www.icc-cpi.int

[223] The Movement was officially established in 23rd March 2012 in reference to the Goma Agreements of 23rd March 2009 between the Congolese government and the former rebel NCPD of Laurent Nkunda, by mutineers close to former General of the Armed Forces of the DRC (AFDRC) Bosco Ntaganda; who the ICC wanted to try for war crimes committed before, conquered much of aided North Kivu, according to the United Nations, by Rwanda.

of forcing or persuading the official not to perform, or to perform improperly, his or her duties;

(e) Retaliating against an official of the Court on account of duties performed by that or another official;

(f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.[224]

Paragraph 2 of this Article, *in conclusion,* states that: "The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State" (i.e. Burundi). Paragraph 4 a) of the same article adds that: "Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals."

This type of offense is found in the new Penal Code chap. III devoted to dealing with interference with administration of justice and contempt of **the authority of Burundian justice**. It is on this basis that Article 387 incriminates the irretrievable loss of evidence, Article 388: pressure on a victim, Article 399: perjury, Article 394: threats and intimidation, Article 401: subornation of witnesses or experts, Article 423: passive bribery of any official of the judiciary, any officer of the Public Prosecution or the Judicial Police[225]. Since the CPC has not yet been revised in order to formalize **the relations between the Burundian courts and the ICC**, it is difficult to punish these offenses because the restrictive interpretation of the criminal law does not permit integration of **the judges, prosecutors, clerks, lawyers and experts of the ICC.**

Thus, if we have to revise the CPC, it would be essential to revise the Penal Code and insert that offenses referred to in Article 70 of the ICC Statute are also suppressed so that investigations and prosecutions of the ICC are not hampered in the case where the ICC would have to try Burundians.

Section II. Accountability

Burundi has integrated the general principles set out in Articles 22 to 33 of Chapter III of the ICC Statute, which show the extent to which international crimes are attributable to their perpetrators. The manner in which, among them, these are provided for in Burundian law deserves special comments.

§ 1. Principle of irrelevance of official capacity

I. Meaning of the principle

This principle means that immunity attached to the official capacity of the perpetrator of an international crime is ineffective before the ICC. The Rome Statute expresses unequivocally this eminent principle of international criminal law in Article 27 as follows: *"1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular,*

[224] Article 70 of the ICC Statute.
[225] Articles 387, 388, 399, 394, 401, 423 of the Criminal Code of 2009.

official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence."[226]

II. Its implementation in Burundian law.

In theory, the Penal Code of 2009 provides neither in the objective nor subjective causes of irresponsibility, the official status of the offender. But in practice, we find that 5 senior Burundian officials enjoy *de facto* impunity. Why?

Under Article 117 of the Constitution of Burundi, "*The president of the Republic is not criminally responsible for acts performed in the exercise of his functions unless it is a case of high treason (...) High treason falls within the jurisdiction of the High Court of Justice (...)*[227] "Article 234 in turn provides that:" *the High Court has jurisdiction to hear the President of the Republic for high treason, the Speaker of the National Assembly, Speaker of the Senate and the Vice-presidents for crimes committed during their tenure. (...)*[228]. "Article 233 of the Constitution stipulates that: "*The High Court of Justice is composed of the Supreme Court and the Constitutional Court combined. It is chaired by the President of the Supreme Court; the Public prosecution is represented by the Attorney General of the Republic."*[229] Finally, under Article 236:" *The rules of organization and functioning of the High Court of Justice as well as the procedure applicable before they are fixed by an organic law. "*[230].

But at the moment, the High Court is a virtual court, since, up to now, organic law that determines the organization and procedure applicable before it, is yet to be enacted. So, unless you render meaningless the principle of complementarity, Burundi has not only the obligation to ensure that the Head of State, Speakers and Deputy Speakers of the two chambers of parliament may either be presented to the ICC and are brought before a national court for international crimes within the jurisdiction of the ICC.

The reasons for this legal vacuum are also amazing, to say the least. The government in Bujumbura denies the establishment of the High Court of Justice, for fear of a possible destabilization of institutions. According to the former Minister of Justice; Ancile NTAKABURIMVO: "*The current socio-political context in Burundi does not allow the establishment of the High Court of Justice." She says, "ill-intentioned people could use this high court to destabilize the country's institutions. Moreover, (she adds), people who would be prosecuted by the court are few in number, the sociopolitical context, therefore, currently, is not conducive. "*[231]

These arguments were viewed by qualified lawyers and some Burundian political actors as baseless. According to the Constitutionalist; Dr. Pascal RWANKARA: "*This High Court would be a safeguard to avoid any possibility of escape from justice, otherwise there is the problem of inequality of citizens before the law. (....) It does not legislate based on opportunism, but so much that the Constitution is respected. "*[232] According to the President of the Bujumbura Bar Association,

[226] Article 27 of the ICC Statute

[227] Article 117 of Law No. 1/010 of 18th March 2005 on the promulgation of the Constitution of the Republic of Burundi, in OBB 2005, p. 1-35.

[228] Article 234, ibid

[229] Article 233, ibid

[230] Article 236, ibid

[231] The former Minister of Justice Ancille Ntakaburimvo, quoted by the RNW, the international station in the Netherlands, Saturday, September 22, available on the website *http://www.rnw.nl/afrique/article/burundi-pas-question-d%E2%80%99une-haute-cour-de-justice*

[232] Doctor RWANKARA Pascal, quoted by the newspaper article Iwacu "*The" untouchables "of Ntakaburimvo*," July 06, 2011, available on the website http://www.iwacu-burundi.org/spip.php?article321

Master Isidore RUFYIKIRI: "*Some people in high places, of whom, ministers, police officials and others hide under the umbrella of the head of state, their hierarchical superior, to commit serious crimes, diverting public funds because they know they are protected.* " He goes on to say that "*Today, Burundians complain that the misappropriation of public funds and political assassinations are not punished.*"[233] Thus, absence of this high court would drive some Burundian authorities to commit serious crimes without worry. Could it be for this concern – it seems – that the former Minister feared?

On the side of Burundian political actors, the former head of State of Burundi and party member Sahwanya FRODEBU, Sylvestre NTIBANTUNGANYA, have indicated that the Burundian judiciary is incomplete without the high court. This underscores the excellent comparison: "*Imagine that the parliament is composed of only one chamber instead of two; then it would be an incomplete parliamentary structure. Today it is our legal structure which is incomplete while the Burundian constitution has this provision.*"[234] For him, no argument could be convincing enough for the non-establishment of the high court.

France noted the risk of conflict between the responsibility of the President of the Republic and the principle of irrelevance of official capacity and, before ratifying the Rome Statute, amended the Constitution by constitutional law n ° 99-568 of 8th July 1999 constitutional insertion in Title VI of the Constitution, article 53-2 and relative to the International criminal Court which states that: "*The French Republic may recognize the jurisdiction of the International criminal Court as provided by the treaty signed on the 18th July, 1998*"[235].

Burundi is one of the few countries in the world where the President of the Republic, the two vice presidents, the Speakers of the National Assembly and the Senate are not tried before any national court. Wouldn't we be tempted to support those who argue that the Burundian justice is a mysterious net that lets the big fish swim while retaining smaller ones? In addition, Burundi does not respect the principle of complementarity; how can the ICC be complementary to a High Court of Justice which does not exist? There is need to apply the principle of irrelevance of official capacity to the letter providing for the High Court of Justice, and that, by giving it the means to try the President of the Republic, the two Vice Presidents, the Speakers of the National Assembly and of the Senate.

Regarding the criminal liability of Members of Parliament and Senators, Article 150 of the Constitution of Burundi provides that: "*Members of parliament and senators cannot be prosecuted, investigated or arrested, detained or tried for opinions expressed or votes cast in the sessions. Except in cases of flagrante delicto, MPs and senators may only, during the sessions, be*

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[233] Master Isidore RUFYIKIRI, quoted by the RNW, the international station in the Netherlands, Saturday, September 22, available on the website *http://www.rnw.nl/afrique/article/burundi-pas-question-d%E2%80%99une-haute-cour-de-justice*

[234] NTIBANTUNGANYA Sylvester, quoted by the RNW, the international station in the Netherlands, Saturday, September 22, available on the website *http://www.rnw.nl/afrique/article/burundi-pas-question-d%E2%80%99une-haute-cour-de-justice*

[235] Constitutional Law No. 99-568 of 8th July 1999. The decision of the Constitutional Council and the law, have been the subject of many analyses listed on the website of the Constitutional Council (http://www.conseil-constitutionnel.fr/doctrine/98408dc.htm , last visited on August 18, 2012). See also
Martin GALLIE, Crimes internationaux et statut pénal du chef de l'Etat français, pp1-17 disponible sur le site internet *www.rfdi.net/doc/ColloqueCPIMartinGallie.pdf (visité le 20 juillet 2012)* , Mickaël BENILLOUCHE, « Droit français », in : A. CASSESE et Mireille DELMAS-MARTY, *Juridictions internationales et crimes internationaux*, PUF, 2002, pp. 159-193 ; Michel COSNARD, « Les immunités du chef d'Etat », SFDI, colloque de Clermon-Ferrand, *Le Chef d'Etat et le droit international*, Pedone, 2002, pp. 202-203 ; Regis de GOUTTES, « Conclusions sur l'arrêt de l'assemblée plénière de la Cour de cassation du 10 octobre 2001 », *Revue française de droit constitutionnel*, 49, 200 ; Jocelyn CLERCKX, « Le Statut de la Cour pénale internationale et le droit constitutionnel français », *Revue trimestrielle des droits de l'Homme,* 2000, pp.641-681; Benoît TABAKA, « Ratification du Statut de la Cour pénale internationale : la révision constitutionnelle française et rapide tour du monde des problèmes posés », http://www.jurisweb.citeweb.net/articles/17051999.htm.

prosecuted with the permission of the office of the National Assembly or the Senate office. MPs and senators can only be arrested, outside parliament sessions, with the authorization of the Office of the National Assembly for members of Parliament or Senate office for senators except in the case of flagrante delicto, authorized prosecution or already final sentencing. "[236]

There is a matter of concern for delay or simply a refusal of permission to pursue or arrest MPs and Senators by national courts or the ICC for committing international crimes. This risk is higher if it is a government member who controls both the parliamentary majority and, consequently, the Office, especially if these crimes were committed pursuant to a government policy in place[237]. Here the chances of seeing him tried by national courts or surrendered to the ICC are very slim.

In France, Article 26, paragraph 1 of the Constitution[238] guarantees absolute irresponsibility whose scope is limited to "opinions and votes cast" by a Member of Parliament, which is closely linked to the history, itself, of parliamentarism. The classic example given here is one of a member who, in a speech before Parliament, directly and publicly, incites commission of genocide. France does not have to contact the Bureau of the Assembly, from where springs the Parliamentary jurisdiction in question, since it would be difficult for it to challenge the criminal classification by the ICC[239]. So if it is indeed about a "crime", the Bureau's authorization is no longer required in accordance with Article 26, paragraph 2, of the Constitution[240]. That is why; the Constitution of the Republic of Burundi should simplify the procedure for granting permission for committing international crimes, or simply remove, the parliamentary immunity, which is intended to protect the Member of parliament in the exercise of his functions. However, the commission of international crimes is not part of the duties of a parliamentarian.

§ 2 Responsibility of commanders and other superiors.

Article 33, 1 of the Rome Statute provides that; the fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian; shall not relieve that person of criminal responsibility.[241] Burundian Penal Code is consistent with this article insofar as it has in Article 31, 1 ° that *"(...) Nonetheless, hierarchical order can never be used as an argument by the defense in cases of genocide, crimes against humanity, war crimes and other crimes punishable under international law, but it can only be considered for a reduced sentence. "*[242]

It is unfortunate that the Penal Code is silent on the Responsibility of Military Commanders as provided for in Article 28 of the ICC Statute which states that: *"(...) A military commander or person effectively acting as a military commander is criminally responsible for crimes within the jurisdiction of the Court committed by Forces under his command and effective control, or under his or her effective authority and control as the case may be, when he or she has not properly exercised*

[236] Article 150 of the Constitution of the Republic of Burundi
[237] Thus those who have committed international crimes in Rwanda, in the former Yugoslavia, had the blessing of the governments in place at the time and benefited from state apparatus to achieve their ends.
[238] Article 26, paragraph 1 of the Constitution of the French Republic
[239] S.AKTYPIS, the adaptation of the French criminal law statute of the International Criminal Court: State of affairs, in *Fundamental Rights*, No. 7, January 2008 - December 2009, pp1-35.
[240] Article 26, paragraph 2 of the Constitution of the French Republic
[241] Article 33, 1 of the Rome Statute.
[242] Article 31 1 of the Penal Code.

control over such forces (...). "[243] This is a significant legal gap in Burundian law with regard to implementation of the Statute when we know the role that the military leaders have played in the various crises in Burundi and, consequently, in the crimes that have been committed. It is, moreover, a step backwards with regard to international jurisprudence on command responsibility as affirmed by the ICTR in the Akayesu case concerning Article 6 (3) of the ICTR Statute: "*Article 6 (3) does not necessarily require that the superior be known, so that his or her criminal liability is conferred. It is only necessary that there is reason to know that his subordinates were about to commit a crime or had committed one and failed to take necessary and reasonable actions to prevent the said crime from being committed, or punish the perpetrators thereof.*"[244]

In conclusion, it is necessary that Burundi incorporates provisions in the penal code that stipulate the criminal liability of the military leader and ensure that, during the revision of the Military Criminal Code, this responsibility is very well detailed to avoid such outright impunity.

§ 3. Legislative reforms and immunities of the relationship between the ICC and the transitional justice mechanisms provided for in the Arusha Peace Agreement.

Provisional and temporary immunity was granted by several adopted laws and decrees, made pursuant to the Arusha Agreement, the cease fire agreement with NCDD-FDD signed in November 2003[245] and the Global ceasefire Agreement with PALIPEHUTU NLF signed in November 2006[246]. Other legislative and regulatory measures have been taken by the Government of Burundi in the context of immunity. In accordance with international obligations, the Government of Burundi has excluded from the field of application crimes of genocide, crimes against humanity and war crimes.

The suppression of these crimes is assigned by the Arusha Peace Agreement for transitional justice mechanisms that are really slow in implementation[247]. But, even if these immunities apply to crimes committed before the entry into force of the law, is it possible, under Burundian law, to prosecute a person enjoying immunity for crimes committed after the enactment of the law? In theory, yes, but since, in fact, if a people benefiting from immunity has been prosecuted and convicted for common crimes[248], logic would dictate that the perpetrators of international crimes be, a fortiori, prosecuted. But in practice, obstacles are bound to arise. The first obstacle is the uncertainty of the, so called, Jurisdiction *Ratione Temporis* of the Special Tribunal that will be created to prosecute past crimes[249], that is to say that, in the event that it is created; for what crimes committed? From when until when will it have such jurisdiction?

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[243] Article 28 of the Rome Statute, the United Nations, Treaty Series, Vol. 2187, No. 38554), ratified by Law No. 1/011 of 30th August 2003, in OBB No. 9/2003, p.629.

[244] Case: The Prosecutor vs. Jean Paul Akayesu, ICTR-96-4-T, 2 September 1998.

[245] Law No. 1/022 of 21st November 2003 provides immunity from prosecution for members of the CNDD-FDD.

[246] Law No. 1/32 of 22 November 2006 provides immunity from prosecution for members of PALIPEHUTU FNL

[247] Arusha Peace and Reconciliation Agreement, Protocol II, Articles 6-8

[248] Hussein Radjabu and co-accused cases, see the article of RFI: Imprisonment of Hussein Radjabu confirmed: "The Supreme Court confirmed, Monday, May 25, the conviction of the former president of the ruling party, Hussein Radjabu to 13 years in prison for plotting against the state. The former strongman of the country is also accused of recruiting ex-combatants rebels "maybe to disturb public order" on the website http://www.rfi.fr/actufr/articles/113/article_81388. asp

[249] The Arusha Peace Agreement provides in Articles 6 to 8 of the first protocol the establishment of an international commission of judicial inquiry, an international criminal court should conclude that the commission of the crimes of genocide, war crimes and crimes against humanity have been committed and a national commission for truth and reconciliation.

Protocol I of AAPRB on the "*The nature of the Burundian conflict, problems of genocide and exclusion and their solutions,*"[250] included the establishment of an international judicial commission of inquiry within 60 days whose conclusions would lead to the establishment of an international criminal tribunal for Burundi. It also provided in Article 8, the establishment, six months after the signing of the Agreement, of a so-called "*National Commission for Truth and Reconciliation*" charged with the responsibility of shedding light on, and establishing the truth of, the serious acts of violence committed during the cyclical conflicts that devastated Burundi's independence from the date of the signing of the Arusha Peace Agreement[251]. However, The Arusha agreement limited, on the date of signing (28th August 2000), the jurisdiction of the International Criminal Court. According to Kalomon's Report, it is necessary that the jurisdiction *ratione temporis* be extended to events that took place after 2000, and finally, according to the technical committee, the jurisdiction *ratione temporis* of the TRC be extended to events that took place up to December 4, 2008. What about the recent crimes, including the Gatumba massacre of 2011; is it still valid under extrajudicial executions? The special tribunal of Burundi is going to prosecute crimes until when? Is it until 2000, 2008, 2010, 2012, or even until later when it will be implemented? Won't there be a conflict of jurisdiction between the Special Court (**if created, because some would have a clean slate from the past**) and the ICC, at least for crimes committed after December 1, 2004; the date of entry into force of the ICC Statute for Burundi?

Thus, for example, following this reasoning, a perpetrator of a crime against humanity committed in 2007 for example i.e. after the entry into force of the ICC, will argue that neither the national courts nor and the ICC, can judge but that they will have to wait for the establishment of transitional justice mechanisms provided for in the Arusha Peace Agreement. It is urgent that the Burundian legislature does a study of laws and decrees related to amnesties and immunities already promulgated and decide whether they should pass a law that lifts the fog in this area by repealing those who hinder the prosecution of international crimes; at least for international crimes committed after the entry into force of the ICC. It could include, for example, the inapplicability of immunity for international crimes committed after 1 December 2004 and the exclusive jurisdiction of the ICC and national courts, and begin to suppress them pending the establishment of the Special Tribunal. Thus, the courts can prosecute them or bring them before the ICC instead of giving them a *de facto* amnesty.

Chap. II: PURSUIT AND REPARATION

Section I. Obligation to cooperate

The Rome Statute provides in Article 86: "*In accordance with the provisions of this Statute, States Parties shall cooperate fully with the Court in its investigation and prosecution of crimes within its jurisdiction.*"[252] This provision lays down the general obligation of States to cooperate with the International Criminal Court. Since we are dealing with the implementation of the ICC Statute by Burundi, Article 88 of Chapter IX draws our attention. Under this article entitled, "Availability of procedures under national law*: "States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.*"[253] It is interesting to know the legal step taken by Burundi in cooperation with the ICC, particularly as Article 54 3. C), states: "*The Prosecutor may seek the cooperation*

[250] Arusha Peace Agreement for Peace and Reconciliation in Burundi, Protocol I;
[251] Arusha Peace Agreement for Peace and Reconciliation in Burundi, Protocol I, Article 8.
[252] Article 86 of the Rome Statute
[253] Article 88 of the Rome Statute

of any State or intergovernmental organization or agreement in accordance with its respective jurisdiction and / or mandate;"[254].

It should be noted that Burundi is one of the state parties to the ICC Statute that have enacted legislation incorporating satisfactorily offenses and the general principles of the Rome Statute of the ICC but have neither promulgated nor drafted any text on cooperation[255].

As for the Law No. 1/015 of 20th July 1999 amending the Criminal Procedure Code, it makes no provision on cooperation with the ICC. This is all the more logical because at the time of its adoption, Burundi had not yet ratified the Rome Statute of the ICC.

At the current state, only the constitution of the Republic of Burundi could allow the transfer of a suspect to the ICC. It provides in Article 50 that: "(...) *No Burundian may be extradited abroad unless he or she is pursued by an international criminal court for genocide, war crimes and other crimes against humanity.*" And a Burundian could be surrendered to the ICC International Criminal Court in the absence of a reform of the Criminal Procedure Code.

What is surprising is that almost eight years after the ratification of the ICC Statute; the Burundian Parliament has not yet understood the need to adapt the CPC commitments that Burundi has made in ratifying the ICC Statute. Burundi must implement the ICC Statute by providing a legal process in accordance with Chapter IX of the Rome Statute of the ICC allowing it to be able to cooperate fully with the ICC and respond to any request for assistance.

In practice, the Burundian legislature has two choices: either to revise the CPC by including under Chapter IX of the Statute, in particular, the provisions relating to execution of requests for assistance from the ICC, to arrest suspects, and / or surrender to the ICC, cooperation in investigations and prosecutions conducted by the ICC etc., or adopt a specific law on cooperation with the ICC detailing the modalities of cooperation with the International Criminal Court as did the Belgian legislator in the Act on Cooperation with the International Criminal Court and the International Criminal Tribunals on 29 March 2004[256]. It provides in Article 3 that: "*In accordance with Article 86 of the Statute, Belgium cooperate fully with the Court in its investigation and prosecution that, the presently stated, leads to crimes within its jurisdiction*" and Article 4 that "*cooperation with the Court is governed by the provisions of the Statute, these Rules of Procedure and Evidence as well as Title II of this law.*"

Moreover, this law stipulates that the Minister of Justice is the central authority to receive requests from the Court and provide the Court with requests from the Belgian judicial authorities. It follows up to ensure[257], that the Court requests are sent to the central authority by any means of communication with a written record. They must be written in one of the official languages of Belgium or, failure to which, be accompanied by a certified translation into one of these languages[258] and that the Belgian judicial authorities may seek the cooperation of the Court. The requests are sent via the central authority. The Belgian authorities are

[254] Article 54,3 C) of the Rome Statute

[255] International Criminal Court, Implementation of the Rome Statute, Data Monitoring 1st Party, Amnesty International, May 2010.

[256] Belgian law on cooperation with the International Criminal Court and the International Criminal Court of 29 March 2004 available on the website August 20, 2012) http://www.ejustice.just.fgov.be/cgi/article_body.pl?language=fr&caller=summary&pub_date=04-04-01&numac=2004009246 (accessed Aug. 20, 2012)

[257] Article 5 of the Law on Cooperation with the International Criminal Court and the International Criminal Court of 29 March 2004

[258] Article 6 ibid

required to comply with the conditions which the Court includes in the execution of the request. Supporting documents, if they are not written in one of the working languages of the Court pursuant to Article 50 of the Statute, must be accompanied by a translation into one of these languages[259]. It contains provisions that clearly specify how the judicial authorities work with the ICC.

Thus, Burundi can learn from this Belgian law while adapting to its characteristics to be able to cooperate fully with the ICC.

Section II. Ratification of the APIC

The Agreement on Privileges and Immunities - an agreement under Article 48 of the Rome Statute - guarantees privileges and immunities which, in a large part, are similar to those enjoyed by UN bodies and other international organizations, and requires ratification by at least 10 states to enter into force, pursuant to Article 35 of the Rome Statute. Although Article 48 of the Rome Statute addresses the issue of privileges and immunities in general, the Agreement on the Privileges and Immunities further defines these protections and obligations incumbent on States Parties.

The agreement was prepared by the Preparatory Commission of the ICC and was adopted by the Assembly of States Parties (ASP) September 9, 2002, and collected 62 signatures before the closing date of June 30th. All states that have ratified the Rome Statute or not, are encouraged to ratify or accede to the Agreement. By 27th September, 2011, 69 states including, 12 of which are African, had already ratified the agreement[260]. Besides guaranteeing the Court privileges and immunities as is the case for international organizations the Agreement provides for the following protections:

- Representatives of State Parties to the Assembly and its subsidiary organs and representatives of intergovernmental organizations (Art. 13);
- The State representatives participating in the proceedings of the Court (Art. 14);
- Judges, Prosecutor, Deputy Prosecutors and the Registrar (Art. 15);
- The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry (Art. 16);
- The locally recruited Personnel are not covered by the Agreement (Art. 17);
- The Counsel and assistants to the Defence counsel (Art. 18);
- The witnesses (Art. 19);
- Victims (Art. 20);
- Experts (Art. 21) and
- Any other person whose presence at the seat of the Court is required (Art. 22).

It is essential that the Government of Burundi ratifies the APIC so that the activities of the ICC on the ground (surveys, research of evidence, questioning suspects) are carried out with all the guarantees of independence, security and confidentiality.

[259] Article 7 ibid

[260] On 3 July 2007, the Democratic Republic of Congo formally ratified the Agreement on Privileges and Immunities of the ICC (APIC). DRC is the eighth African countries to have ratified the Agreement on Privileges and Immunities of the ICC after Benin (24 January 2006), Burkina Faso (10 October 2005), Lesotho (16 September 2005), Liberia (September 16, 2005), Mali (July 08, 2004), Namibia (29 January 2004) and the Central African Republic (06 October 2006).

Section III. Right to reparation and protection of victims and witnesses

The implementation of the ICC Statute by Burundi not only means that Burundi must adopt legislation allowing it to prosecute international crimes, but also provide reparations to the victims of these crimes.

Article 75 of the Rome Statute of the ICC which deals with reparation for victims of international crimes provides that: "*The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.*"

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

> If necessary, the Court may order that the award for reparations be made through the Trust Fund provided for in Article 79. (...) "[261]. The funds referred to in Article 79, is a fund for victims, created during the year[262], by the decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court and of families of such victims. This fund is important because it also operates in case of indigence of the convicted; as in the case of Thomas Lubanga, the International Criminal Court (ICC) ordered, Tuesday, August 8th, reparation of war crimes for which the former head of Congolese militia, Thomas Lubanga, was sentenced to fourteen years in prison[263].

The Burundian law in turn recognizes that victims are entitled to compensation. Nevertheless victims are likely not to receive compensation to which they are entitled because of the indigence of the perpetrators. To remedy this, it is necessary that the Government of Burundi put in place a compensation fund of victims of these crimes like that of ICC .

Article 68 of the Rome Statute entitled: "Protection of the victims and witnesses and their participation in the proceedings" provides that: "*1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.*" "*2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or*

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[261] Article 75 of the ICC Statute.

[262] Article 79 of the ICC Statute: "FUND FOR VICTIMS"
1. A fund is established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court and their families.
2. The Court may order that the proceeds of fines and other confiscated property be paid into the fund.
3. The fund is managed according to the principles established by the Assembly of States Parties. "

[263] ICC orders compensation for victims of Lubanga's crimes in the DRC, available on the website http://www.lemonde.fr/afrique/article/2012/08/07/la-cpi-ordonne-reparation-pour-les-victimes-des-crimes-de-lubanga-en-rdc_1743436_3212.html (accessed August 15, 2012.

a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness."[264]

Burundian law is currently short of the requirements of the Rome Statute in this area. Indeed, this subject is covered by a single paragraph of article124 of the CPC which states: "(...) *From the opening of the hearing, the presiding judge should announce whether the latter is public or not* (...)" However, Burundian judicial practice shows the judge's discretion to assess the opportunity to declare the hearing in camera, either on his own initiative or that of the public prosecutor, the lawyer of the victim or the victim himself particularly on the subject of rape, a hearing involving a minor, or a divorce case that affects the security of the state.

Given that Burundi, by ratifying the Rome Statute, is committed to comply with its domestic law to the requirements of the Convention, it is urgent and essential that the legislature incorporates into the Criminal Procedure Code provisions to protect victims and witnesses, in general, and particularly, those of international crimes. These include measures of physical protection, access to legal advice, counseling, special measures to assist vulnerable persons (children, victims of sexual violence) provisions regarding confidentiality and anonymity if necessary.

Chap. III: REPRESSION OF INTERNATIONAL CRIMES BY THE BURUNDIAN COURTS

Burundian courts have not yet become accustomed to punish international crimes whereas in practice opportunities abound. So are there any recorded cases of extrajudicial executions by the United Nations:

"The Security Council of the UN has documented dozens of cases of extrajudicial killings in Burundi in the last two years: 16 having taken place at the end of 2010 and 61 in 2011. For its part, the American organization "Human Rights Watch" reported hundreds of cases during the same period. According to UN reports, the vast majority of victims are militants or former Hutu fighters who belonged to the National Liberation Forces (Forces nationales de libération), which surrendered their weapons in 2009 to join the government. Their executioners were believed to be members of the police, the army, the Burundian intelligence services or the Youth League of the NCDD-FDD (National Council for the Defence of Democracy-Forces for the Defence of Democracy), the ruling party, that was Hutu-dominated. "[265]

However, the government denied their existence when On 22 August 2012, the Attorney General of the Republic of Burundi, Valentin BAGORIKUNDA, released the findings of an *ad hoc* committee of inquiry, which had come into being a month before. It "*could not find any cases of extrajudicial killings, under the internationally recognized definition of this crime,*"[266] what shocked Western ambassadors based in Bujumbura; of which one anonymously said: "*We were not expecting great revelations, but this is too much,*" and according to the Ambassador of the European Union in Burundi, Stephane de Loecker, the findings of the inquiry also have no value to eyes of the Ambassador of the European Union in Burundi who stressed that the international community, only imports "*the documented cases by the United Nations Office. "*[267]

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[264] Article 68 of the ICC Statute.

[265] See in this article by Jeune Afrique: "BURUNDI: UN condemns extrajudicial executions, the denial of power irritates the international community" on the website: http://www.jeuneafrique.com/Article/ARTJAWEB20121002165136/ (accessed 18/10/2012).

[266] Ibid

[267] Ibid

This is equally the case for the Gatumba massacre of 18 September 2011 in which: *"Thirty-six persons were killed in the night of Sunday to Monday in an attack on a bar in Gatumba near Bujumbura, marking a further escalation in violence in recent months which the specter of civil war in Burundi,"*[268] that the Government of Burundi had attributed to NLF while the accused and the media pointed fingers at some senior members of the Police and National intelligence Service[269]. There was a trial that some have called a travesty of justice because the court of first instance of Bujumbura refused the request of the defense counsel to call to bar the officers suspected of masterminding the massacre and the lawyers left the court room before the indictment of the Prosecutor.

Burundian courts must preside over these cases independently and impartially even if this means staying above the political bickering favoring the interests of victims and justice; just like the Congolese military courts that have already taken a step in the right direction in their practice.

DRC has already started the implementation of the Rome Statute of the ICC. This is the case of the military of the 9th FARDC-AFDRC battalion which, based in the localities of Songomboyo, had claimed their salaries balances; misappropriated according to them by their superiors. They rebelled by taking the local population as their target on 21st December 2003 and committed two rounds of mass rape, including on the women of some senior army officers.

The military court delivered March 7, 2006, an interlocutory ruling acknowledging the application of the Rome Statute and April 12, 2006, 7 of the 12 defendants were sentenced to life imprisonment for crimes against humanity and other offenses of a military nature while the other five defendants were acquitted;

On June 7, 2006, the Appeal Judgment confirmed the decision taken in the first degree for six defendants and acquitted the last and was allocated to 43 plaintiffs, a total of $ 165,317 by way of damages and interest, a sum that must be paid jointly by convicts and the Congolese State, the convicts had initiated a procedure for cassation but for lack of having obtained the appointment of a lawyer at the Supreme court of Justice, the implementation phase was initiated;[270]

CONCLUSION

Under this article, we find that Burundi has made the first step in the right direction by adopting laws incorporating satisfactorily offenses and the general principles of the Rome Statute of the ICC. But just like Patrick Baudouin, when he said about the ICC that, the road does not stop in Rome[271], it is essential that Burundi continues its journey and makes efforts to do a full implementation of the ICC Statute in order to be a key player in the fight against impunity for international crimes. Burundi must:

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[268] See in this article RNW, the international space station in the Netherlands: The attack of a bar near Bujumbura killed 36 people on 20 September 2011 on the website: http://www.rnw.nl/afrique/article/lattaque-dun-bar-pr%C3%A8s-de-bujumbura-fait-36-morts

[269] See related article: Burundi: denial of justice in the trial of Gatumba massacre http://www.gahuza.com/burundi-news/64-politique/1658-burundi-deni-de-justice-au-proces-du-massacre-de-gatumba.html

[270] Master B. NTAKOBAJIRA, Components on the treatment of international crimes, characteristics of the DRC, Presentation at the Regional Workshop for Lawyers without Borders on the system of the Rome Statute and the International Criminal Court, Bujumbura 30-31 July 2012.

[271] Patrick Baudouin, International Criminal Court: "The road does not end in Rome" Position Report 3: Analysis of the Statute of the ICC, International Federation for Human Rights, No. 266, November 1998.

- Provide for, and properly detail, the responsibility of the military superiors because their accountability is a prerequisite for the prevention of international crimes.
- Establish the High Court of Justice in such a manner that all citizens are equal before the law and to try the President, the two Vice Presidents, and the Speakers of the two chambers, if anything should happen; even if we do not hope that they commit international crimes.
- Ratify the APIC to protect ICC officials in the exercise of their functions.
- Review the Criminal Procedure Code to formalize the collaboration and cooperation between the ICC and the Burundian courts, provide legal provisions protecting victims and witnesses. - Provide for a compensation fund for victims.
- Conduct investigations into recent allegations of international crimes and start exercising its supremacy in the prosecution of international crimes.
- Incorporate international criminal law in the curricula and especially in the defense and security bodies so that the fight against impunity is everyone's business.

Burundi would not be able to do it alone, and that is why friendly countries, international partners, the ICC, international donors are called to support or even encourage them to fulfill the obligations it took upon ratification of the Statute.

With this humble paper, we must not claim to have exhausted all the matters, this is a sketch that other researchers will surely enrich and contribute to advancing the fight against impunity in Burundi, a source of justice, peace and sustainable development.

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THE PROBLEM OF BURUNDI'S INTEGRATION IN MANY SUB-REGIONAL INTERNATIONAL ORGANIZATIONS

By **Désiré NGABONZIZA***

INTRODUCTION

In their daily operations, States, sometimes, need to partner in order to achieve the goals they cannot achieve individually or they hardly would achieve in isolation. In the current language of the law, we call these groups or associations of States "international organizations"[272]. These are diverse in terms of their composition and competence. Some international organizations bring together States scattered all over the world: such an organization is described as universal or organization of a universal character[273]. Others, on the contrary, bring together States located on the same continent; these are, thus, regional international organizations. Still others bring together States located on some part of a continent. They are then classified as sub-regional organizations.

Burundi, like other countries, is a member of many international universal, regional or sub-regional organizations. In this paper, we would like to analyze the impact of membership in such organizations. But already, it is worth noting that the fact of belonging to such organizations is of obvious interest for the country. In the absence of such an interest, the state cannot engage in these associative relationships, of cooperation and partnership since it is known, for a fact, that states are at all times motivated by the pursuit of various interests[274]. But, While the state gains by belonging to various organizations, we should not ignore the fact that membership in such organizations also has a number of obligations that must be met at all costs[275], otherwise, the receiving State faces sanctions that can go up to its exclusion from the organization. Our work therefore seeks to analyze the situation in which Burundi finds itself in integrating into many sub-regional organizations.

The geographical situation of Burundi has prompted, in fact, that it belongs to organizations of states of East Africa, Southern Africa and even Central Africa. But the question one is entitled to ask is whether it actually takes advantage of all these organizations. Moreover, a country like Burundi classified by the various reports as bottom of the list of countries in the world in terms of GDP[276], which, in addition to the aid received from the donor community, could not afford to belong too many international organizations. Instead, one needs to make an informed choice to see to what organization(s) to belong to for their best interests.

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272 COMBACAU (J.) et SUR (S.), Droit International Public, 7ème éd., Montchrestien, Paris, 2006, p.214

273 DUPUY (P.-M.), Droit International Public, 8ème éd., Dalloz, Paris, 2006, 498p.

274 DREYFUS (S.), *Droit des relations internationales. Eléments de droit international public*, Cujas, Paris, 1992, p. 136

275 For example, the arrears of Burundi in October 2010 to the Lake Tanganyika Authority amounted to U.S. $ 122,686 (see the report of the fourth regular meeting of the Conference of Ministers of the Lake Tanganyika Authority held in Lusaka November 26, 2010, p.7)

276 See Report of 2011 IMF GDP, Burundi occupies the 184th spot of 185 countries surveyed

In our analysis, we will, first, make an inventory of sub-regional organizations to which Burundi belongs by carefully clarifying, each time, the objectives or mission of each one of them. This inventory will also take account of the geographical situation of the Member States of these organizations. As a second step, we will critically analyze the situation, before concluding.

I. Burundi and sub-regional international organizations

Sub-regional **international organizations**, of which Burundi is a member, pursue different objectives. We can nevertheless try to group them into three main categories: those pursuing a safety objective, those responsible for environmental protection and, finally, those that pursue a goal of economic integration.
It should be noted, however, that it is not always easy to say precisely the objective of this or that organization. It should also be noted that the objectives of certain sub-regional organizations, sometimes, overlap.

A. *Sub-regional international organizations having a safety objective.*

Under this section, we will see the objectives of only one sub-regional organization, namely the International Conference on the Great Lakes Region (ICGLR; acronym) because it was born precisely on the context of the global war that had characterized the Great Lakes region of Africa during the 1990s. We will overlook the other organizations having integrated in their objectives this aspect since nearly all of the sub-regional IOs, we will have to see; almost all have a security component in their goals. It should not be otherwise because we know that integration cannot exist without security.

♦ *The International Conference on the Great Lakes Region (ICGLR)*

It was created in 2000 under the leadership of the United Nations Secretariat and the African Union at a conference held in Nairobi, Kenya. It was born out of a desire to avoid conflict in a region shaken in the 1990s by a series of bloody wars which culminated in the 1994 genocide in Rwanda. It is the result of a growing awareness of the sub-regional dimension of these conflicts and the need to implement joint initiatives to promote peace and sustainable development in the region. This is reflected through its program summarized through the following points[277]:

- Peace and security
- Democracy and Good Governance
- Economic Development and Regional Integration
- Social and economic issues

In addition, as part of its program on cross-cutting issues, the ICGLR addresses issues related to gender, the environment, human rights as well as HIV / AIDS. The actions of the ICGLR are based on two principles namely ownership of the process by the countries of the Great Lakes Region and partnership with stakeholders especially the Group of Friends and Special Envoys who provide financial, diplomatic, technical and policy support.

[277] Information from the official website of the organization www.cirgl.org (accessed 20/07/2013)

The States and the member organizations of the Group of Friends and Special Envoys are Austria, Belgium, Canada, China, Denmark, European Union, Finland, France, Gabon, Germany and Greece. The other members are the Holy See, Ireland, Italy, Japan, Kuwait, Luxembourg, the Netherlands, Nigeria, Norway, Portugal, Russia, South Africa, the Spain, Sweden, Switzerland, the United Kingdom and the United States of America. The group is co-chaired by Canada and the Netherlands[278].

Eleven states are members of the organization namely Angola, Burundi, Central African Republic, Republic of Congo, DRC, Kenya, Uganda, Rwanda, Sudan, Tanzania and Zambia. Its headquarters is located in Bujumbura, Burundi.

B. Sub-regional organizations of defense and protection of the environment

1. Organization of the Kagera Basin OBK ()

The Kagera River is the largest tributary of Lake Victoria and is a tributary of the Nile Basin. Four countries are partially located in the Kagera Basin: Burundi, Rwanda, Tanzania and Uganda.

The organization of the Kagera Basin was created in 1977 by an agreement signed in Rusumo in Tanzania on 24/08/1977 and entered into force on 05/02/1978 under a UNDP initiative, but was dissolved in 2004[279]. It had as its objectives, notably, exploitation of electrical energy in the pelvic region, fishing, agriculture, mining, creation of industries and tourism.

After dissolution of the OBK, key stakeholders in the Kagera Basin are currently: the Nile Basin Initiative (*l'Initiative du Bassin du Nil: IBN*) through the Action Program for the Equatorial Lakes (Nile Equatorial Lakes Subsidiary Action Program: NELSAP) and the Lake Victoria Basin Authority.

With regard to Burundi, the objectives pursued through the OBK overlap with those of the Nile Basin Initiative through the above-mentioned program[280].

1. Lake Tanganyika Authority (LTA)[281]

Its objective is to ensure the protection and conservation of biological diversity and the sustainable use of natural resources of Lake Tanganyika and its environment based on an integrated management and cooperation between Member States, in this case, the states bordering lake Tanganyika: Burundi, the DRC, Tanzania and Zambia.

1. Nile Basin Initiative (l'Initiative du Bassin du Nil: en français)

It is composed of 10 countries: Burundi, DRC, Egypt, Eritrea, Ethiopia, Kenya, Rwanda, Sudan, Tanzania and Uganda.

When the organization was founded on 22nd February 1999[282], its aim was to peacefully resolve some major issues about the sharing of the Nile waters. For example, would Egypt

[278] All this information is drawn from the website of the organization: www.cirgl.org (accessed 27/07/2013)

[279] It should be noted that at this point Burundi was also a member of the KBO and NBI.

[280] For more information about this program, see below about the Nile Basin Initiative (NBI), p.6

[281] We apologize to our readers for not being able to find much information about this organization. Our research does not allow us to have more information. It would have been interesting to analyze the results already achieved by the organization in relation to the means used.

[282] Information from the official website of the organization www.nilebasin.org (accessed 20/07/2013).

agree to reduce its quota of resources to enable the implementation of economic projects up-front[283]? Could Ethiopia use some of the water of the Blue Nile to develop its agriculture? Through this initiative, the Nile riparian states engaged a process that could eventually lead to the revision of the 1959 agreement (which constitutes to this day the only legal source of the Nile watershed) which grants the lion's share of the Nile waters to Egypt and a lesser area to Sudan.

Since 1999, the Nile Basin Initiative (NBI) has provided an institutional basis for cooperation between the states of the Nile Basin based on a shared vision that is «to achieve sustainable socio-economic development through the equitable utilization of common resources of the Nile.[284]"

Thanks to strong international support and success in attracting funding, the NBI has evolved rapidly in recent years and is now at the stage of preparation and implementation of major projects.

Many of these projects represent an unprecedented opportunity to develop the river waters and the basin environment in order to maximize the benefits available to all countries. This could advance the socio-economic developments of the Nile Basin countries while helping to reduce conflict and insecurity[285].

The main objectives of the NBI are:
- To target eradication of poverty and promoting economic integration;
- To develop water resources of the Nile Basin in a sustainable and equitable manner in order to ensure prosperity, security and peace for all its peoples;
- To ensure efficient water management and the optimal use of resources;
- To ensure cooperation and joint action between the riparian countries, seeking win-win benefits.

To achieve these objectives, the NBI has established a «Strategic Action Program» (SAP), which results in two types of programs:
1) ***A Shared Vision Program*** (Un programme sur la vision partagée: in French). There is a planned program across the entire basin, which aims to strengthen cooperation and capacities and to establish a climate of trust between all countries[286];
2) Programs relating to two sub-basins (Subsidiary Action Program, SAP). The first concerns the countries on ***the East of the Nile*** on the one hand (Eastern Nile Subsidiary Action Program, ENSAP; acronym). It covers Egypt, Ethiopia and Sudan. The coordinator of the program is based in Addis Ababa. There is, secondly, a program that covers the countries of the ***Great Lakes of the Equatorial Nile*** (Nile Equatorial Lakes Subsidiary Action Program, NELSAP; acronym). This includes Burundi, DRC, Rwanda, Sudan, Tanzania and Uganda. The coordinator of the program is based in Kigali, Rwanda. The program covers investments in the energy, trade, fisheries, agriculture[287].

[283] It should be noted that at the time we put on paper this article, a smoldering conflict was brewing between Ethiopia and Egypt about a huge dam built by Ethiopia on the Nile
[284] Information found on the official website of the organization: www.nilebasin.org (accessed 27/07/2013)
[285] Ibid
[286] Information from the official website of the organization: www.nilebasin.org (accessed 27/07/2013)
[287] Information from the official website of the organization: www.nilebasin.org (accessed 27/07/2013)

Current projects include significant plans for watershed management in the highlands of Eastern Nile, production and transfer of energy, including the construction of new hydroelectric dams as well under the initiative of the NELSAP of ENSAP, the watershed management tools, the development of irrigation and drainage as well as flood control projects within ENSAP[288].

C. *Sub-regional international organizations pursuing economic integration*

1. Economic Community of Central African States (ECCAS)

It is composed of the following countries: Angola, Burundi, Cameroon, Congo, Gabon, Equatorial Guinea, CAR, DRC, Sao Tome and Principe and Chad. Rwanda withdrew in 2007[289]. Justifying the withdrawal, Rwandan officials said that the country already belonged to the CEPGL, COMESA and EAC and that «it is almost always the same countries that end up dealing with the same problems whereas it is expensive for the country"[290].

It was created by the Treaty signed on 20 October 1983 in Libreville and came into force on 18 December 1984. On its inception, it set for itself the task of conducting the process of cooperation and integration in Central Africa. Subsequently, ECCAS established at the summit in Malabo in 1999, four priority objectives namely[291]:

The component of crisis prevention and conflict is becoming more and more important, in accordance with the architecture of African peace. ECCAS, on these questions, is the spokesperson for Central Africa of the AU as is ECOWAS in West Africa for example. ECCAS, whose areas of expertise overlap with those of the CEMAC, now, tends to give priority to security issues[292].

2. Economic Community of the Great Lakes Countries (ECGLC)

Created on 20 September 1976 the ECGLC is a sub-regional international organization of three states bordering the Great Lakes Region of Africa: Burundi, Rwanda, Zaire (now Democratic Republic of Congo, DRC acronym). It has its headquarters in Gisenyi in Rwanda. CEPGL's main objectives are to ensure the security of Member States and the people of the region, including securing borders of the Member States to develop and promote the creation of activities of common interest to achieve the creation of an area of shared prosperity, to secure and facilitate trade and the movement of people and goods, to promote close cooperation in various fields in particular the social, scientific, cultural, judicial, political, military, energy, transport and telecommunications fields[293].

This community operated until 1996. The first war experienced by the DRC in October 1996, preceded by the war that broke out in Burundi since October 1993 (and that would last several years) and the genocide against Tutsis in Rwanda in 1994, created moments of cessation of activities of the ECGLC.

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[288] Information from the official website of the organization: www.nilebasin.org (accessed 27/07/2013)
[289] See article TshitengeLubabuM.K. published on: www.jeuneafrique.com11th June 2007
[290] About the Rwandan Minister of Foreign Affairs to the Brazzaville conference 6th June 2007
[291] African Union Minimum Integration Program, Commission of the African Union Department of Economic Affairs, Addis Ababa, 2010, p.19
[292] Ibid p. 25
[293] RUTSINDINTWARANE (E.), Les facteurs d'intégration du Rwanda à la Communauté de l'Afrique de l'Est, Institut d'études politiques de Toulouse, mémoire de Maîtrise, 2009, p.17

This situation of insecurity, certainly in combination with other factors, such as membership in several other regional groupings for example, led to poor results in terms of integration. It was not until the intervention of the former Belgian Deputy Prime Minister and Minister of Foreign Affairs Louis Michel that a revival of the CEPGL was envisaged in 2004. At this time the Belgian authorities met the foreign ministers of the three member countries at the Egmont Palace in Brussels[294]. The objective of the meeting was to discuss how to revive the CEPGL. In 2008, it was decided a revival of CEPGL, confirmed in 2010 following a meeting between the presidents of the three countries.

3. Common Market for Eastern and Southern Africa (COMESA)

It was created in 1993 to replace the Preferential Trade Area (PTA) which was established in Lusaka, Zambia in 1981. Originally, it was designed to create a large market in Eastern and Southern Africa and bring about better economic cooperation and enhanced social integration, with ultimately the creation of an economic community. COMESA has set for itself even more ambitious targets than the former PTA[295]: it aims to create a fully integrated market on the free movement of goods, services, capital, labor and people with a mission to promote regional integration through trade development and investment. As an illustration, its strategic plan for 2007-2010 identifies five strategic priority areas namely:

- Peace, security, democracy and good governance;
- The consolidation of policies for the consolidation of regional integration;
- The development of infrastructure to promote trade and investment
- The creation of investment opportunities in the COMESA region;
- The multilateral trade negotiations.

The member states are Burundi, Congo, Djibouti, Egypt, Eritrea, Ethiopia, Libya, Madagascar, Malawi, Mauritius Island, Uganda, DRC, Rwanda, the Seychelles, Sudan, Swaziland, Comoros, Zambia and Zimbabwe. Lesotho, Mozambique, Namibia and Tanzania, who were members, have, since then, left the organization.

By virtue of achievements, it is necessary to report a satisfactory degree of economic integration. Indeed, there has been a creation of a free trade area in 2000 (14 of 19 members have joined). The process of establishing a customs union was launched June 8, 2009 at the Summit of Heads of States and Governments in Victoria Falls (Zimbabwe). A monetary union is expected by 2025[296].

1. East African Community, (EAC)[297]

The East African Community is a sub-regional international organization of five countries: Burundi, Kenya, Uganda, Rwanda and Tanzania. It was originally founded in 1967 and was disbanded in 1977 before being recreated in July 7th, 2000.

Its founding treaty was signed in Arusha on 30 November 1999 and came into force on 7 July 2000. The EAC is one of the regional economic communities[298].

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[294] Ibid

[295] Information drawn from the official website of COMESA www.comesa.int , accessed July 25, 2013

[296] Information drawn from the official website of COMESA www.comesa.int , accessed July 25, 2013

[297] Note that the Burundian intellectuals commonly use the English acronym even if part from the French doctrine prefers the French acronym CAE (see in particular the terminology used in the document of the AU, below). We will use any acronym, English or French.

[298] Note that this is a language that is not sanctioned by public international law. Indeed, the regional organization

In its founding Act, the AU recognized six sub-regional international organisations, namely ECCAS (Economic Community of Central Africa), COMESA, IGAD (Intergovernmental Authority on Development), SADC, ECOWAS (Economic Community of West African States), AMU(Arab Maghreb Union)[299].

The EAC aims to expand and strengthen cooperation between the partner states, particularly in the political, economic and social fields, and, in so doing, for their mutual benefit. To this end, the EAC countries established a Customs Union in 2005[300] and was to move towards the establishment of a common market by 2010 and a monetary union in 2012 and finally into a political federation of East Africa.

In 2008, after negotiations with the Southern African Development Community and the Common Market for Eastern and Southern Africa, the Commonwealth of East Africa granted an expansion of the market of free trade, including the countries of three organizations. During its eighth summit on 30 November 2006, the EAC admitted in its midst Burundi and Rwanda which officially became members on 18 June 2007[301].

The headquarters of the organization is located in Arusha, Tanzania.

Joining this space represents a major asset for Burundi. We can say, as an indication, with its adherence, the country has seen its export opportunities mechanically expanded to a market of 120 million potential consumers against 8 million previously. Because of the customs union created in 2005, all products can move cheaply in the other four countries of the economic space. Moreover, Burundi, a landlocked country benefits tremendously from the ports of Mombasa and Dar-es-Salaam; from the Airport of Nairobi, without forgetting Rwandan, Kenyan, Tanzanian and Ugandan traffic way, that have been serving Burundi for a long time[302].

To this must be added major development projects of common infrastructure at the Community's level[303]. The various projects have made it possible to achieve a development that would be difficult to achieve if the individual states were acting in isolation and by scattered ranks.

But membership is not always going smoothly and operators of small businesses fear, especially, to see their companies disappear due to competition from larger companies that are better structured and more established.

Another recurring problem tied to the size of companies is the lack of capital whereas the most powerful partners, with Kenya leading, can take advantage of multinationals with subsidiaries in all countries of the sub-region[304].

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concept is reserved for organizations of states at the continental level. The term that should be used here is sub-regional organization (see also above in the introduction)

299 Constitutive Act of the African Union, adopted on 11 July 2000, Article 3, paragraph l

300 African Union, Minimum Integration Program, Commission of the African Union, Department of Economic Affairs, Addis Ababa, 2010, p.24

301 RUTSINDINTWARANE (E.), Les facteurs d'intégration du Rwanda à la Communauté de l'Afrique de l'Est, Institut d'études politiques de Toulouse, mémoire de Maîtrise, 2009, consulté en ligne le 28/07/2013

302 Observatory of Government Action (OAG), the impact of the accession of the East AfricanCommunity Burundi, Bujumbura, April 2009, p.31

303 See on this subject NEPAD-OCDE pour l'investissement en Afrique : Communauté d'Afrique de l'Est : panorama des projets régionaux d'infrastructures routières, 2008, p.3

304 Econie NIJIMBERE, patron de l'imprimerie Mister Minute Service, in Le Magazine IWACU, Les voix du Burundi n°6,

II. Integration of Burundi to various sub-regional International Organizations: critical evaluation

Burundi's membership in several sub-regional international organizations is, for the country, a double-edged sword. It has positive aspects, but also a number of challenges.

With respect to benefits, in terms of its geographical location, the country gains by integrating in different international organizations. But we must recognize that some of these international organizations are more active than others. Therefore, to be more rational, the country must make a wise choice for better management of its scarce resources. It is in its interest to choose membership in the organization or organizations that is / are most active and to be able to boost its development.

The country should not be afraid to leave the sub-regional international organizations that are not of great interest to her. Examples abound, as we have already noted, in the case of Rwanda which officially left ECCAS in 2007; and it is not the only one. We have seen other countries: Tanzania, Mozambique, Namibia and Lesotho withdraw from COMESA.

We believe, as regards Burundi; as a poor and highly indebted country, it should significantly limit its participation in the various international organizations as long as the participation involves expenses against her. As an illustration, at the end of October 2010, Burundi had not yet complied with its contributions to the Lake Tanganyika Authority for an amount of U.S. $ 122,686[305]. We recommend a study to analyze the most effective international organizations that are of interest to the population and leave the others altogether from which the country derives little or nothing in that regard. We must add to this the fact that a majority of these sub-regional organizations are composed of the same country and therefore it is the same issues that that are analyzed.

For our part, we have had the opportunity to emphasize that the objectives pursued by certain international organizations in which Burundi participates, then, cut across[306] where that participation involves costs in terms of contributions. This is what leads us to propose sub-regional international organizations from which the country should, in our opinion, withdraw. Our proposal will refer to major issues we have mentioned, namely; the field of security, the area of economic integration and the environment.

In the security field, we believe that the country could cease its participation; especially in the ECGLC, without drawbacks. In fact, not only is it virtually inoperative for some time, but, in addition, the objectives which the CEPGL continues to pursue are found in the ICGLR or the EAC. In addition, the ICGLR is one of the partners of the CEPGL[307]. And in our opinion, it should participate in this large ensemble that is the ICGLR. It is even more true that all member countries of the ECGLC are also members of the ICGLR and the two organizations have almost the same partners, who are, specifically for CEPGL: the European Union, the African Development Bank, the United Nations high Commissioner for Refugees, the International Conference on the Great Lakes Region, the United Nations

Mai 2012, p.36

[305] Report of the fourth regular meeting of the Conference of Ministers of the Lake Tanganyika Authority in Lusaka November 26, 2010, p.5

[306] As an example, almost all the sub-regional organizations surveyed have a security aspect, which is in fact understandable. Indeed, integration cannot be considered without security.

[307] Information drawn from the ECGLC website: http / / www.cepgl-cepgl.org (accessed 28/07/2013)

Commission for Africa, the Francophone University Agency and the French Cooperation[308]. With few exceptions, these same partners are also those of ICGLR[309].

At the level of economic integration, we would suggest to the decision makers of Burundi to leave some organizations and only retain accession to the EAC and COMESA. Thus, Burundi would withdraw from the ECCAS, ECGLC (as we have just mentioned). Indeed, ECCAS is composed almost exclusively of the States of Central Africa that are geographically remote from Burundi. We must also add to this the fact that they do not have much contact with her. On the contrary, the EAC is composed of direct neighbors of Burundi and contribute greatly to its opening. These are also states with many joint development projects[310] with Burundi.

In the field of environmental protection, the Lake Tanganyika Authority is the sub-regional international organization for us that particular interests Burundi. As we had the opportunity to see, Burundi is currently involved in two other organizations in this field (the Lake Tanganyika Authority and the Nile Basin Initiative). After the disappearance of the KBO, the objectives pursued by it once are now found through projects under the Nile Basin Initiative. However, these objectives are covered today by the East African Community. Thus, in order to limit the country's participation in sub-regional international organizations, EAC could take the place of the NBI in this area, without disadvantages.

Conclusion

At the end of our study on the problem of Burundi's adhesion to several sub-regional organizations, we noticed that Burundi is a member of many organizations with diverse goals. Unfortunately, they sometimes overlap. This is what makes us believe that the country would benefit from well-focused organizations to which it adheres and avoid unnecessary expenses.

We have suggested that Burundi remains solely a member of the following sub-regional organizations:

- ICGLR in the field of security;
- The East African Community and COMESA in the field of economic integration;
- The Lake Tanganyika Authority in the field of protection and defense of the environment.

In total, Burundi would remain a member of four sub-regional international organizations. We believe that in this way it would save some money.

[308] Information drawn from the site ECGLC: http / / www.cepgl-cepgl.org (accessed 28/07/2013)
[309] See partners of ICGLR on its official website: http / / www.cirgl.org (accessed 28/07/2013)
[310] See in particular on this subject the road infrastructure projects in the EAC NEPAD-OECD Africa Investment Initiative: East African Community: overview of regional road infrastructure projects, 2008, p.6

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