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[...]

The Charter of National Unity, recognising the existence and relevance of ethnic groups, but, at the same time, stressing the need for unity and arguing against divisionism, was adopted in February 1991 by referendum and laid the foundations of the Constitution of 13 March 1992. In the meantime, the November 1991 events had taken place. We will deal with some of the aspects of the Constitution, notably insofar as they relate to political reconciliation, in the analysis below.

The adoption of the Charter of National Unity continues to be officially commemorated on a yearly basis.

Sub-section 4.3.3. Legal status of the Charter of National Unity

The legal status of the Charter of National Unity requires some specific attention. The draft Charter itself noted that it was an ‘irrevocable pact’: “*Aucun régime, aucune institution, aucune loi, aucune disposition de quelque nature que ce soit n’est habilité à l’abroger ni à s’y soustraire. (...) Tout Murundi, présent ou à venir qui ira à l’encontre de la présente Charte se sera rendu coupable d’un acte de trahison à l’endroit de la Nation et du peuple burundais*”. The President, in his above-mentioned address, stressed that the Charter is above the law: “*la Charte de l’Unité sera au-dessus des lois. La Constitution, les lois et les règlements devront strictement s’y conformer. Aucun texte contraire à la Charte ne sera accepté. En plus, la Charte de l’Unité sera un pacte irrévocable. Aucun régime, aucune institution ne pourra la changer, ni l’abroger*”³⁶³. This is a highly remarkable attempt at legal engineering. Adopted by referendum, the provisions of the Charter award themselves a “supra-constitutional” nature. It is hard to believe, given Burundi’s history with how law can be instrumentalised for political purposes (see, i.a., the subsequent amnesty legislation), that the drafters of the Charter, and the President himself, seriously believed that this supra-Constitution could

³⁶³ *Discours du Président de la République à l’occasion de la Publication du Projet de la Charte de l’Unité, op. cit., 7.*

prevent a future instrumentalisation of the law for political ends other than (and possibly contrary to) the ones held in the Charter. Furthermore, from a legal perspective, both the proclaimed supra-constitutional status of the Charter, in combination with the fact that it could never be revised, as well as the vague wording of the Charter, in combination with the obligations it imposes (e.g. requiring all political parties to conform to it), were highly problematic.³⁶⁴

In order to understand the (intended) legal status of the Charter as part of the country's fundamental law, some reference should be made to the 'revolutionary' nature of the Third Republic. Although – politically speaking, as mentioned above – the coming to power of Pierre Buyoya and the Military Committee of National Salvation (CMSN) was initially seen as a mere "palace coup"³⁶⁵, in legal terms, there was a clear rupture with the previous constitutional order of the Second Republic. Under Micombero (the First Republic) it had taken until 1974 before the first Constitution of the Republic of Burundi was adopted.³⁶⁶ This Constitution of 11 July 1974 was suspended with the coming to power of Jean-Baptiste Bagaza in 1976, through a declaration of the Revolutionary Supreme Council.³⁶⁷ The Constitution of the Second Republic was adopted by referendum on 18 November 1981³⁶⁸ and promulgated on 20 November 1981.³⁶⁹ Article 81 annulled the Constitution of 11 July 1974. A similar rupture marked the establishment of the Third Republic. The Constitution of 20 November 1981 was suspended – and the Bagaza government dismissed - by a declaration of the CMSN on 3 September 1987. A new Constitution, annulling (through its article 189) the Constitution of 20 November 1981, was not adopted until 13 March 1992. Thus, the Charter was drafted and adopted in a period of constitutional void. During that period,

³⁶⁴ See also F. Reyntjens, "L'ingénierie de l'unité nationale. Quelques singularités de la constitution burundaise de 1992", *Politique Africaine*, N° 47, October 1992, 146.

³⁶⁵ This is also the term used by Lemarchand (see R. Lemarchand, *op. cit.*, 117), who rightly notes that, even politically, the political regime was soon marked by discontinuity and an important number of policy changes.

³⁶⁶ Before the Republic was proclaimed (on 28 November 1966), Burundi had a 'Constitution of the Kingdom of Burundi', adopted by the National Assembly in October 1962 and retroactively entering into force as of the 1 July 1962. This Constitution was suspended in July 1966, with the coming to power of Prince Charles Ndizeye, some four months before the proclamation of the Republic (*Arrêté royal n° 001/2 of 8 July 1966 portant suspension de la Constitution du Royaume du Burundi, B.O.B.*, N° 9/66, 1 September 1966). In February 1967, a technical commission was set up to draft a new Constitution for Burundi (*Décret présidentiel N° 1/24 du 7 février 1967 instituant une Commission technique chargée d'élaborer le projet de Constitution de la République, B.O.B.*, N° 3/67, 1 March 1967, 88). The new Constitution was adopted on 11 July 1974 (*Constitution de la République du Burundi, B.O.B.*, 1974, N° 8/74, 1 August 1974, 211).

³⁶⁷ *Déclaration du Président du Conseil Suprême Révolutionnaire Le Colonel Bagaza Jean-Baptiste, B.O.B.*, N° 10-12, 1976, 207-209.

³⁶⁸ *Décret-loi N° 1/18 du 20 octobre 1981 portant organisation du référendum constitutionnel, B.O.B.*, N° 2/85, 1985, 19.

³⁶⁹ *Décret-loi N° 1/23 du 20 novembre 1981 portant promulgation de la Constitution de la République du Burundi, B.O.B.*, N° 9-12/81, 1981, 407.

legislative power was exercised by the President of the Republic through law decrees (*décret-loi*).³⁷⁰

The Charter was first adopted – as a political document - at the extra-ordinary Uprona congress in December 1990. In view of the Charter’s adoption as part of Burundi’s legislation, a preliminary legal reform was carried out. The Electoral Code³⁷¹ was amended by law decree on 26 December 1990³⁷² in order to prepare for the organisation of the referendum. Article 163 was amended as follows: “*Le référendum est l’un des modes d’expression de la souveraineté du peuple. Il doit ou peut y être recouru, selon les distinctions opérées aux deux articles suivants*”. Article 164 provided for two possible scenarios in which a referendum could be called: to approve the constitution and to approve legislation that ratifies international conventions. A new article 164bis was adopted: “*Le président de la République peut, après consultation du Gouvernement, décider de soumettre à l’approbation du Peuple tout projet de texte législatif ou de texte politique d’intérêt général susceptible, l’un ou l’autre, d’avoir des répercussions profondes sur la vie et l’avenir de la Nation ou sur le fonctionnement des institutions de la République*”. In accordance with Article 164ter, a referendum was called by presidential decree of 31 December 1990.³⁷³ On 5 February 1991, the referendum was held. Its result, 89.21% of the citizens participating answering positively, was confirmed by the Constitutional Chamber of the Supreme Court. The Charter as approved by referendum was adopted as law through the law decree N° 1/002 of 9 February 1991 (*Décret-loi N° 1/002 du 9 février 1991 portant Charte de l’Unité nationale*). The only article of that law decree reads as follows: “*Prend acte de l’adoption de la Charte de l’Unité Nationale dont le texte original est annexé au présent décret-loi*”. Remarkably, the law decree was not published in the B.O.B.

³⁷⁰ See Article 1 of the Decision of the CMSN of 9 September 1987 *portant désignation du Président de la République* (B.O.B., N° 11, 1987, 345); see also *Décret-loi N° 1/001 du 27 octobre 1987 portant organisation des pouvoirs législatif et réglementaire*, B.O.B., 1988, N° 7/88, 154-155 annulled and replaced by *Décret-loi N° 1/31 du 24 octobre 1988 sur l’organisation des pouvoirs législatif et réglementaire*, B.O.B., 1988, N° 11/88, 260. There was a historical precedent with the coming to power of President Micombero. Shortly after the proclamation of the Republic, Micombero had decreed that full legislative power was to be exercised by the President, after consultative advice by the ‘Commission of Legislation’ (*Décret-loi n° 1/6 du 19 décembre 1966 relatif à l’organisation des pouvoirs législatif et réglementaire*, B.O.B., N° 1/67, January 1967, 4). Quite similarly, immediately after coming to power, President Bagaza had also awarded himself full legislative powers (*Décret-loi N° 1/186 du 26 novembre 1976 portant organisation des pouvoirs législatif et réglementaire*, B.O.B., N° 2/77, 1 February 1977, 39).

³⁷¹ *Décret-loi N° 1/25 du 1^{er} septembre 1982 portant code électoral*, B.O.B., 1984, 239.

³⁷² *Décret-loi N° 1/040/90 du 26 décembre 1990 modifiant certaines dispositions du Décret-Loi N° 1/25 du 1^{er} septembre 1982 portant code électoral*, B.O.B., 1 April 1991, 79-80.

³⁷³ *Décret N° 100/177 du 31 décembre 1990 portant convocation des électeurs pour le Référendum sur le projet de la Charte de l’Unité Nationale*, B.O.B., 1 April 1991, 82-83.

In its initial report to the Human Rights Committee (see above and below), the Burundian government described the Charter as follows: “This Charter, which is a form of covenant by which the people of Burundi have bound themselves to consolidate their unity once and for all, is a Burundian reference for human rights”,³⁷⁴.

We can summarise the debate about the legal status of the Charter on the basis of the following elements. (1) The Charter has been legally adopted as a *décret-loi*, but awarding itself the legal value of a ‘supra-Constitution’ for all future generations. (2) This was done after the review of the Electoral Code, modified for the purpose of the adoption of the Charter by referendum and specifically allowing the President to submit “any draft law or any political text of general interest” to a popular referendum. (3) Contrary to earlier or later Constitutions, it was not proclaimed as having the intended legal value it awarded itself; the law decree of 9 February 1991 merely ‘took note’ of its adoption.³⁷⁵ We may therefore conclude that, in legal terms, despite its own provisions, the Charter had the legal status of a *décret-loi* but constituted an important component of the preparatory works of the Constitution of 13 Mars 1992 and that - together with the report of the Constitutional Commission that was established immediately after the adoption of the Charter³⁷⁶ - it provided important guidance to the interpretation of that Constitution. This is in line with the second pre-ambular paragraph of the 1992 Constitution, which explicitly referred to the Charter: “*Réaffirmant notre foi dans l’idéal d’unité nationale conformément à la Charte de l’unité nationale du 5 février 1991*”.

Finally, however, it should be noted that, roughly one year after its adoption, some provisions of the Charter were given constitutional status through articles 10, 42, 55 and 70 of the Constitution of 13 March 1992³⁷⁷. As far as human rights were concerned, “*Les droits et les devoirs proclamés et garantis par la Déclaration universelle des droits de l’homme, les Pactes internationaux relatifs aux droits de l’homme, la Charte africaine des droits de l’homme et des peuples et la Charte de l’unité nationale font partie intégrante de la présente Constitution*” (article 10). In relation to the functioning of political parties, “*Les partis politiques sont tenus de se conformer à la Charte de l’unité nationale et aux principes*

³⁷⁴ *Official Records of the Human Rights Committee 1992/93. Volume II*, 1997, CCPR/12/Add.1, 15.

³⁷⁵ Compare with the only article of the *Décret-loi N° 1/06 du 13 mars 1992 portant promulgation de la Constitution de la République du Burundi* : “*Promulgue la Loi dont le texte est annexé au présent Décret-Loi et qui devient la Constitution de la République du Burundi à dater de ce jour*” (B.O.B., N° 4/92, 1 April 1992, 95).

³⁷⁶ *Décret N° 100/039 du 21 mars 1991 portant création de la Commission Constitutionnelle* and *Décret N° 100/040 du 21 mars 1991 portant nomination des membres de la Commission Constitutionnelle* (B.O.B., N° 7/91, 1 July 1991, 164-165). In its report, the Commission itself repeatedly referred to the Charter.

³⁷⁷ B.O.B., 1 April 1992. The Constitution itself had been adopted by a referendum on 9 March 1992 (*Décret-loi N° 100/012 du 12 février 1992 portant convocation des électeurs pour le Référendum sur le Projet de Constitution de la République du Burundi*, B.O.B., N° 7/92, 1 July 1992, 230-231).

énoncés ci-dessus, au cours de leur fonctionnement” (article 55 in fine). The President of the Republic had to see to it that the Charter was respected: “*Le Président de la République, Chef de l’Etat, incarne l’unité nationale, veille au respect de la Charte de l’unité nationale et de la Constitution (...)*” (article 70). More generally “*Chaque Burundais a le devoir de préserver et de renforcer l’unité nationale conformément à la Charte de l’unité nationale*” (article 42).³⁷⁸

The issue of the legal status of the Charter was also raised by members of the Human Rights Committee when considering Burundi’s initial report in October 1992, i.e. after the proclamation of the 1992 Constitution and after Burundi’s ratification of the ICCPR. The answer by Mr. Birihanyuma, president of the Supreme Court and member of the Burundian delegation, did not give decisive clarity on the issue: “With regard to the relationship between the Charter of National Unity and the Constitution, it should be mentioned that as the Charter was not accompanied by any legal or regulatory sanctions, it was not really comparable to the Constitution, which declared any act contrary to its provisions to be null and void. In contrast, at the moral and political level, the Charter had primacy over the law. The Charter conformed fully to the Covenant as it was based essentially on the principle set forth in article 20 of the Covenant which prohibited any propaganda for war or advocacy of national, racial or religious hatred or of discrimination or violence”³⁷⁹.

The Constitution of 18 March 2005 referred on a number of occasions to the Charter. In article 64, the duty of every Burundian to preserve and strengthen national unity as laid down in the Charter is reaffirmed (cfr. article 42 of the Constitution of 1992). Candidates for the presidential elections are required to state their adherence to the Charter (art. 97). Finally, when taking office, the president, the vice-presidents and the members of government are requested to take the oath, solemnly swearing to respect, i.a., the Charter of National Unity (articles 106, 127 and 133).³⁸⁰

³⁷⁸ The same provisions were included in the *Décret-loi N° 1/001/96 du 13 septembre 1996, portant organisation du système institutionnel de transition*, adopted after the (second) coup d’Etat by Pierre Buyoya on 25 July 1996 (see in more detail below).

³⁷⁹ *Official Records of the Human Rights Committee 1992/93, Volume I*, 1996, CCPR/12, 42.

³⁸⁰ The socio-political importance of the Charter is furthermore reaffirmed through the celebration of its anniversary on 9 February. See, e.g., E. Butoyi, “Le seizième anniversaire de la Charte de l’Unité Nationale”, www.burundi.gov.bi/spip.php?article52 (last visited on 16 May 2007).