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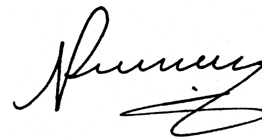
CNDD'S APPLICATION ON THE VIOLATIONS OF THE ARUSHA PEACE AND RECONCILIATION AGREEMENT FOR BURUNDI

SUBMITTED TO:

THE IMPLEMENTATION MONITORING COMMITTEE

APRIL 2002

Hon. Léonard NYANGOMA
Président du CNDD



Considérant qu'il est essentiel que les droits de l'homme soient protégés par un régime de droit pour que l'homme ne soit pas contraint, en suprême recours, à la révolte contre la tyrannie et à l'oppression. Déclaration Universelle des Droits de l'Homme.

CNDD

v.

UPRONA, FRODEBU, GOVERNMENT AND TRANSITIONAL NATIONAL ASSEMBLY

PART I: GENERAL INTRODUCTION

1. On November 17 2001, the National Council for the Defense of Democracy (hereafter the CNDD), signatory party of the Arusha Peace and Reconciliation Agreement for Burundi (hereafter the Agreement), made public a Memorandum on the obvious and serious violations of which this agreement was the subject of. Its objective was to draw the attention of the Implementation Monitoring Committee of the Agreement of Arusha (hereafter IMC), a body charged with the implementation of the Agreement, in order for the IMC to find appropriate mechanisms to put an end to these violations of the Agreement.

2. In its conclusion, the CNDD noted the urgency to convene and hold, as soon as possible, a General Assembly of the signatories in accordance with article 1, point 2, a) and b) of the introductory part of the Agreement (Chapeau) in order to solve this problem as well as all other questions unsolved before the signature of the Agreement, in particular those relating to the security for all, the integration of the proposals of the regional Summit of Heads of State, the question of the reservations etc.

3. Although IMC was not officially seized of these violations, it received a copy of it. However, this body charged to follow up and ensure the implementation of the Agreement did not express any concern with these violations up to this day.

4. Since the publication of the aforesaid document, other serious breaches of the Agreement have been consistently and illegitimately carried against this fundamental text, so that one is faced with systematic violations of the Agreement which certainly and dangerously compromise its integrity as well as its political and social ideal that it incarnates for the Burundi people.

5. As the conventional procedure of amendment to which the CNDD has proposed to have recourse has not retained the attention of the IMC, the CNDD has decided to lodge this application to the competent authority so that these violations of the agreement can cease and remedies can be applied to the consequences stemming from the violations.

PART II: LITIGIOUS ISSUES AND LEGAL ARGUMENTATION

6. The applicant (the CNDD), signatory party to the Agreement, submits to the IMC an application directed against the FRODEBU, the UPRONA, the National Assembly and the Government for the violations of the Agreement as described below. Additionally, the CNDD asks the IMC to demonstrate perspicacity to avoid compromising itself in the violations of the Agreement or being party to such violations.

7. The present application is founded on art. 9 of the regulations of the Implementation Monitoring Committee as regards the settlement of disputes, which states:

"Any signatory party can bring up with the Committee any disagreement by written application addressed to the President of the Committee. The request must indicate the object of the disagreement and the parties concerned. It must be accompanied by a written pleading. The President of the Committee immediately communicates the application to all the signatories of the Agreement''.

8. The application is primarily justified by the grave and systematic nature of these violations as well as CNDD's concern to see the Agreement respected because it represents a fundamental legal text on which are based the hopes of the Burundi people which seeks a more just, fairer, and more secure society.

9. At the origin of this application are the following violations of the Agreement:

· Adoption of a so called constitution of the transition

· Irregularities in the installation of the institutions of transition

· Failures attributable to the institutions of transition

1. Adoption of a self-styled text called "constitution of transition''

10. In October 2001, the National Assembly, signatory party adopts **a self-styled** constitution of transition which was promulgated on October 28, 2001. The applicant party will argue that the adoption of such a text of constitutional rank is a maneuver that is as unconstitutional as it is inopportune.

A. Unconstitutionality of the text so called "constitution of transition''

11. As stated in its preamble (paragraph 10), the constitution of transition is supposed to be the fundamental text which governs the transition period. Its 1st article is even more explicit: " The present Constitution of Transition of the Republic of Burundi governs the work of the institutions of the Republic of Burundi beginning with the installation of the Government of transition until the entry into force of the Constitution post-transition''.

12. In so doing, the aforementioned text goes against both the spirit and the letter of the provisions of the Agreement of peace. In fact, it explicitly repeals the accord. Indeed, under the provisions of Chapter II, Protocol II, it is envisaged constitutional arrangements, which must govern the transitional period. In this respect, art. 15 point 2 leaves no possible confusion. It prescribes: "The constitutional provisions governing the powers, duties and the functioning of the transitional Executive, the transitional Legislative and the Judiciary, as well as the rights and duties of citizens and political parties and organizations, shall be as set forth hereunder and, where this text is silent, in the Constitution of the Republic of Burundi of 13 March 1992' '.

13. In the understanding of the applicant party, the spirit and letter of this provision clearly establishes that the transitional period must be governed by the Peace Agreement and, in the event it is silent, by the Constitution of 1992. It should be noted, for whatever purpose it might serve, that the legal supremacy of the Agreement is affirmed in art. 15 point 2 *in fine* which states that " when there is any conflict between that Constitution and the Agreement, the provisions of the Agreement shall prevail''. This constitutional superiority of the Agreement in the Burundi legal ordering is still reaffirmed in art. 22 point 2, a) under the terms of which the National Assembly should adopt " the present protocol as a supreme law without any amendments to the substance of the Agreement''.

14. In addition, the aforementioned constitution was adopted by an incompetent body. Indeed, as an outgoing institution, the National Assembly saw itself entrusted with a legislative competence very clearly defined and delimited to the care taking of daily business pending the installation of the Parliament of transition to which the full legislative power belongs for the transitional period. Art. 22 point 2 determines the competence of this outgoing assembly. It stipulates that:

"*By its signature, the National Assembly agrees, within four weeks, to:*
a) Adopt the present Protocol as the supreme law without any amendment to the substance of the Agreement;
b) Repeal the provisions of any legislation which prevent free political activity, or which would hinder the implementation of the present Protocol;
c) Pending the installation of a transitional Government adopt such legislation as is necessary for the granting of temporary immunity against prosecution for politically motivated crimes committed prior to the signature of the Agreement''.

15. The applicant positively noted that the outgoing assembly conformed, albeit with delay, with the obligation rising from the item a) by adopting the law n°1/017 on December 1, 2000 dealing with the adoption of the Arusha Peace and Reconciliation Agreement for Burundi. However, instead of continuing on the same impetus to conform to the other prescriptions stated in art. 22, point 2, this institution exceeded its constitutional powers recognized to it by the Agreement by adopting the constitutional text accused in this application.

B. Absence of opportunity

16. Besides its manifest illegality, the adoption of the constitution of transition is inappropriate. The lack of its opportunity lies in the fact that the legal architecture of the transition is prescribed in the current fundamental law in Burundi, namely the Agreement of peace, which reflects a significant political consensus between various Burundi political protagonists, signatories of the Agreement. To allow a signatory party, in this particular case the National Assembly, to modify on her own the terms of this instrument without due regard to the suitable legal channels would create a bad legal precedent likely to lead to anarchy which would compromise the very essence and the political ideal entrenched in the Agreement.

17. It is the CNDD's view that there were are no valid political and/or legal reasons to justify the adoption of such a law of constitutional rank. In the absence of such grounds, the

"constitution of transition" poorly masks a deliberated initiative by some signatory parties to short-circuit the legal regime enshrined in the Agreement for the transitional period.

18. In addition, if reasons for a valid and legitimate amendment of the Agreement had existed, which is not the case, it is the applicant's contention that there was and still is a legal option for this purpose under the terms of art. 1 point 2 b) which stipulates that any provision on of the Agreement of the Protocols can be amended, as envisaged with article 21 of Protocol II or, while pending the installation of the National Assembly of transition, with the approval of the nine tenth of the Parties. Art. 21 stipulates: ''*Changes may be made to the transitional arrangements and the text of the Agreement with the consent of the nine-tenths of the members of the National Assembly of transition*''. Instead of taking guidance from the Agreement, the National Assembly hastened, with the informal support of the two majority parties in this institution, namely the FRODEBU and the UPRONA, and took the initiative to elaborate and adopt a constitution, which altogether is both illegal and inopportune.

19. The fact of circumventing the provisions of Chapter II, Prot. II with their constitutional value clearly constitutes a serious violation of the Agreement and Constitution of 1992. As well, it demonstrates with sufficiency a deliberate intent of the National Assembly to withdraw from its obligations originating from the Agreement. It is important to point out that this outgoing assembly was dominated by a large monolithic political majority of FRODEBU and UPRONA, two signatories parts which have demonstrated a reckless disregard of the Agreement by violating it since the previous day of its signature[1]. These two political parties are thus accomplices in the violation of the Agreement; the National Assembly is the principal author.

C. A constitution against fundamental rights and freedoms

20. The applicant disputes the very principle of a constitution for the transitional period for the very reason that constitutional principles are envisaged with the Agreement to govern this period and because of the preeminence of the Peace Agreement of peace. Consequently, the CNDD considers it meaningless and irrelevant to document all the innumerable provisions of this illegal constitution, which are contrary to the Accord[2]. However, with an aim of solidifying the case, the CNDD raises, as a purely illustrative matter, a provision of the constitution, which is manifestly in obvious contradiction with Chapter II of Protocol II specifying the constitutional arrangements of transition. It refers, in this case to art. 263, which stipulates: "*Pending the improvement of the conditions of safety in the country, the parties and political movements are not authorized to organize demonstrations, gatherings and public meetings. Only meetings of leaders at the village, commune, province and nation levels are authorized* ''.

[1] For a non-exhaustive analysis of the violations these two organizations are responsible for, see our Memorandum of November 17, 2001.

[2] A list of the incompatible provisions can be made available for the purpose of this request if the IMC deems it essential.

21. This provision is a significant impediment to the exercise of political freedom for the political organizations and the citizens of Burundi. The Agreement cannot simultaneously prohibit and permit the same thing! Indeed, under art. 22, point 2 b) Prot. II, the National Assembly had the obligation to *''repeal the provisions of any legislation which prevent free political activity, or which would hinder the implementation of the present Protocol''*. However, instead of repealing the laws and regulations incompatible with the exercise of political freedom, the National Assembly chose to adopt a text of which it was neither politically nor legally justified to adopt which explicitly and indefinitely imposes an extremely grave limitation to political freedom.

22. The Agreement of peace or, failing this, the Constitution of 1992, includes provisions which allow the exercise of the fundamental rights and freedoms by the Burundi citizenry. Thus a legal framework relating to the political rights is provided for in particular with the art.14, Prot. II for the sole purpose of allowing democracy in Burundi to blossom. This was impossible under previous laws. For instance, art. 60 of the 1998 constitutional Act of transition which legitimized Buyoya's second coup d'Etat suspended the exercise of political freedom for an undetermined period. Unfortunately, art. 263 of the 'constitution of transition' attacked in this application is nothing more than a reincarnation of this art. 60 which limits the exercise of political freedom to the leadership levels. That shows clearly that the originators of this constitution did not yet change their state of mind to conform to the Agreement.

23. This provision (Article 263) gives rise to a very serious prejudice to the applicant and the Burundi people as a whole. Indeed, the current Interior and Public Security Minister has, on several occasions, prevented certain signatories and participating parties of which the CNDD, the FROLINA and the PALIPEHUTU to undertake any political activity arguing that these organizations have not yet been registered! At the time of his tour of Karusi in last March, the President of the Republic relayed his minister and amplified his threatening remarks towards these political parties. The applicant reminds these leaders to understand the meaning and the spirit of the *Pledge by participating parties*, annexed to the Agreement of which it is an integral part. As a signatory party of this *Pledge* and as a party participating in the institutions of transition, at least where it was associated, the CNDD and its members expect nothing less than to enjoy, as regards political freedom, the same rights and duties originating from the Agreement for all the participating political parties.

24. In the opinion of the applicant, there is no doubt that the gatherings or political meetings constitute an ideal framework for the leaders of a political organization, in particular those of the opposition, to present an alternative to the population in order to enable the people to freely choose among competing visions of society that which best meet their legitimate aspirations and which will allow them to fulfill their advancement and development. For this reason, to prohibit the organization of such forums for an undetermined period of time is tantamount to imposing grave and unfounded restrictions not only on the concerned political organizations but, and even more directly on the people who are denied the opportunity to understand the different visions for the Burundi society offered by the various political organizations and to decide if there is anything better than what is being offered at the moment. The provision goes against the democratic values and perpetuates the dictatorial system as it prohibits meaningful consultation with the people.

25. The government did not show, beyond any reasonable doubt, that public demonstrations and meetings would be likely to disturb peace and security of the population. If this was to be the case, the CNDD has serious doubts that it is so, there are legal mechanisms which are envisaged by the Agreement and other relevant laws to prevent such a situation and, if necessary, to undertake penal sanctions of the acts.

26. Some political movements and parties, the CNDD in particular, never had the possibility of addressing the people directly because of the restrictions imposed on political freedom by the last regimes. However, the current institutions of transition do not want to come out of this logic. In addition, they are dominated by two parties, the UPRONA and the FRODEBU which, in fact have an advantage over the other political organizations since the people representing these institutions advance the cause of their parties to the detriment of others. The next democratic elections which must take place during the transition period demand for an equal opportunity for all the parties and movements. Six months have already elapsed; the applicant is seriously concerned by the fact that the parties, except the UPRONA and the FRODEBU which resort to the means of the State at their disposal, will not have time necessary to contact their members in order to prepare for these elections. Maintaining the constitution would be tantamount to handing an uncontested victory to the two political organizations dominating the current transition. This would be contrary to the elementary principles of the international and national law dealing with transparency, freedom and equal opportunity in any electoral system.

27. The adoption of the constitution of transition is thus unconstitutional in the sense that it derogates from the provisions of the fundamental law of Burundi, which is the Arusha peace and reconciliation Agreement for Burundi. It is thus a politically unacceptable and legally unsupportable coup d'État. This “constitution” is prejudicial with the signatory parties, in any case with the CNDD, insofar as the institutions of transition refer to the aforementioned constitution to limit the political activity of this organization.

2. Irregularities in the establishment of the institutions of transition

28. The irregularities in the establishment of the institutions of transition were noted on the formation and composition levels of the Government, the Senate and other public services.

A. Absence of consultation in the formation of the Government

29. The President and the Vice-president appointed by the Mediation violated the Agreement by naming the executive of transition without preliminary consultation with all the heads of the signatory parties members of the National Assembly of Transition. If this consultation took place, it was in the back of the CNDD since this organization was not consulted. That constitutes a violation of the art.15, Prot. II, point 14. Moreover, the appointed President and the Vice-president did not submit to the IMC the composition of the Government before its nomination. Regrettably, the Committee chose not to denounce such an act despite that it was contrary to the provisions of the Agreement. That is a violation of the art.22, point 4 of Prot. II.

Parties responsible for the violation: Government (President and Vice-president)

B. The quasi-monolithic composition of the Senate

30. Under art.15, Prot. II, point 3 a), the Senate is set up by the President of the Republic and the National Assembly Bureau while taking care to respect the political, ethnic and regional balances. In comparison with the current composition of the Burundi higher chamber, the FRODEBU and the UPRONA cut themselves a lion's share with more than 95% of the seats of the Senate. Several parties signatories and participants, the CNDD included, are not represented. Worse still, the mechanism through which the Bureau of the Senate was installed is an obvious violation of art. 15, Prot. II, subparagraph 3 E).

Parties responsible for the violation: Government (President) and National Assembly
Accomplices: UPRONA and FRODEBU

C. Nominations for senior positions of the State and the other services

31. The various nominations to positions of responsibility recently provided for such as immigration services and security services were put forward without any consultation whatsoever with the signatories. The nominees are FRODEBU members and officers of the current governmental army, in other words, the FRODEBU and the UPRONA. It is the same for the nominations for the senior officers and managers for various banks and other financial institutions (BRB, BNDE, BANCOBU, and SOBUGEA). The two parties nominated their members without the knowledge and with considerable harm to other participating parties. This constitutes a breach to the general principles of the consultation and the balance, which must be preponderant in any decision by any government of national unity. These principles are stated in art. 15, point 16, Prot. II which stipulates that: "The *transitional Executive shall take its decisions and otherwise function in accordance with the spirit embodied in the concept of a Government of national unity (...). It shall also take into account the need to reflect ethnic, religious, political and gender balance in its decisions and appointments''.*

Parties responsible for the violation: Government (President, Vice-president)

Accomplices: UPRONA and FRODEBU

3. Serious failures of the Government of transition

32. The Government did not cooperate with some signatory parties by refusing their members, among other things, travel document.

Violation of the art.22, point 6, a).

Parties responsible for the violation: Government

33. The Government never made an inventory of all the assets of the State exceeding the equivalent of 250 $US held by each ministry. The Government was held to deposit a copy of the inventory with the IMC as agreed to in the peace accord.

Violation of the art.22, point 6, a) Prot. II.

Parties responsible for the violation: Government

34. Refusal by the Government of Transition to set up the National Commission of Rehabilitation of *Sinistrés* (CNRS) in accordance with art. 3 a) Prot. IV. The Government violated this article by setting up or by maintaining a body of repatriation of the refugees which does not include the representatives of the signatories as agreed to in the Agreement. CNRS has as a mandate to organize and coordinate, with the international organizations and the countries of asylum, the repatriation of the refugees and the return of the disaster victims. The applicant party is astonished by the eagerness of the current Government to want to repatriate the refugees living in the camps in Tanzania before the setting up of this commission.

Violations of article 3, a) Protocol IV and of item 12 of the Appendix V.

Parties responsible for the violation: Government, UNHCR

35. No representation of the refugees: The representatives of the refugees were not associated in the tripartite commission (HCR, Government, and Tanzania).

Violation of the art.3, c) Prot. IV

Parties responsible for the violation: Government, UNHCR

36. Disregard of the calendar of the implementation of the agreement: The institutions of transition failed to implement the Agreement in accordance with the Appendix V. Regrettably the IMC did not properly oversee the respect of the calendar of the implementation of the Agreement. This attitude consolidates the institutions of transition in their beliefs that they are supported in their violations of the Agreement. As an example of serious omissions, it is sufficient to note the absence of realization of the following activities:

· The establishment of the constitutional court which would help the IMC to ensure the respect and the supremacy of the Agreement (violation of art. 15, point 19 b), art. 17, point 7 *in fine* of Prot. II and Appendix V, point 40);

. The dismantling of the regroupment camps (Appendix V, point 29),

· The nomination of the Lands sub-commission (Appendix V, point 41),

· The program of special assistance for the vulnerable groups (Appendix V, point 42),

· The International judicial Commission of inquiry (Appendix V, point 45),

· The Truth and reconciliation Commission (Appendix V, point 57).

Parties responsible for the violation: National Assembly and Government

PART III: DECISIONS REQUESTED AND RECOMMENDATIONS

37. The CNDD, applicant party:

Considering the Arusha Peace and Reconciliation Agreement for Burundi, especially in its Chapter II of Protocol II relating to constitutional arrangements for the transition period;

Considering the rules and regulations of the IMC as regards settlement of the disputes, especially in its Article 8 and 9;

Always guided by its legal approach as well as the legitimate aspirations of the Burundi people for democratic governance characterized by a rule of law where the respect of the fundamental rights and freedoms predominates;

Respectfully asks the IMC:

· To declare the request admissible, in its form as well as in its content;

· To declare unconstitutional and inopportune the text so called "constitution of transition" and thus reaffirms the legal supremacy of the Agreement in Burundi;

· To take an executable resolution confirming the equality, in rights and duties, of the parties and political organizations signatories of the Agreement and participants in the institutions of transition;

· To take a resolution intimating the institutions of transition, in fact the Government, to respect the exercise of the civil and political rights guaranteed by the Agreement and other international legal instruments that Burundi already ratified;

· To declare null and void decisions taken by the Government without consultations and to recommend to the Government to take into account, in any nomination considered, the principle of the representativeness and the political balances;

· To take general resolutions intimating the institutions of transition to scrupulously respect the calendar of implementation of the Agreement;

· To recommend to the Government to immediately set up a constitutional Court in accordance with art. 17, point 7 of Prot.II;

· To set up a technical multipartite commission charged with the harmonization of the terms of the Agreement and those of the Constitution of 1992 in order to determine exactly the non covered fields by the Agreement as well as the complementary provisions concerned with the Constitution of 1992.

PART IV: FINAL PROVISIONS

38. Pending resolution of the matters in this request, the applicant affirms that it is not bound by this unconstitutional " constitution''. Its attitudes and its actions will be guided only by the Peace Agreement, the only fundamental law of reference for the transitional period and, in silence of this one, the Constitution of 1992.

39. Lastly, the CNDD reserves the right to contribute any additional material to any legal question raised in this request.

AND JUSTICE WILL BE SERVED