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Workshop Report: Access to Justice in Burundi: The Contribution of Non-state Dispute Resolution Mechanisms in Enhancing Access to Justice in Burundi

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On 19 September 2018, a Workshop on *The Contribution of Non-state Dispute Resolution Mechanisms in Enhancing Access to Justice in Burundi* was held at the Arnold Bergstraesser-Institut at the University of Freiburg. A dozen of scholars, mostly from Burundi attended the Workshop. The workshop was founded by Philip Schwarz Initiative of Alexander von Humboldt Foundation in the framework of a research fellowship granted to the author of this report who is currently carrying out a research project on the following topic: Access to Justice Beyond the State Court: A Solution to the Crisis of Justice in Burundi?

The keynote speakers were Dr *Didace Kiganahe*, Dr *Aimé-Parfait Niyonkuru* and Dr *Bernard Ntahiraja*, three Burundian academics with a strong research and professional background as well as recognized expertise in the field of access to justice. The workshop was opened with words of welcome by Dr *Andreas Mehler*, Professor of Political Science at Freiburg University and director of the Arnold Bergstraesser Institute, who further chaired the workshop. The three presentations, each 30 minutes in length, were followed by a lively discussion and exchange of ideas and suggestions concerning both the need and the potential of involving non-state dispute resolution mechanisms and process in addressing the problem of access to justice in Burundi.

Significantly, the workshop was arranged when the contemporary comparative legal literature shows growing attention given to non-state and other Alternative Dispute Resolution mechanisms as credible avenues to complement state courts to improve access to justice. It was also convened when both multilateral and bilateral development agencies as well international non-government organizations increasingly suggest and/or acknowledge that non-state justice mechanisms and processes are likely to be much more accessible than formal mechanisms and to have the potential to provide quick, relatively inexpensive and culturally relevant remedies.

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Accordingly, programmes that focus on engaging with non-state actors and processes as a strategy to ensure or enhance access to justice have much more chance to receive technical and financial support from donors than programmes suggesting approaches that consider the delivery of justice as a monopoly of the state courts.

Dr *Aimé-Parfait Niyonkuru* presented on "Legal Pluralism and Access to Justice: The Undervalued Role of Informal Justice Structures and the Customary Law in Access to Justice in Burundi." He offered an insight into Burundi's legal system. He first recalled that Burundi is characterised by a legal pluralism from at least two perspectives: normative and institutional. From a normative perspective, he argued that an official law (written law as in the legal code) coexists with an unofficial law (living law or law-in-action). While the written law is applied by state courts, the unwritten law governs informal justice processes. Interestingly, the state law itself recognises some bodies of customary law (customary land rights, inheritance, matrimonial regimes and bequests, among others). From an institutional perspective, Dr *Niyonkuru* observed that the dual justice system is reflected in the coexistence of formal and informal justice institutions and processes. He explained that informal justice institutions operate in parallel with the formal state court justice system and supplement it in such a manner that at least three quarters of Burundians still rely on informal justice, a system which has become a *de facto* court of first instance in most civil matters (dispute over customary land rights, inheritance, and other family issues, etc.). According to the speaker, this reality has, however, been ignored in the justice sector reforms, as a result of a narrow approach to access to justice that neglects the pluralistic nature of the Burundi legal and judicial system. He argued that an analysis of normative and institutional reforms aimed at improving access to justice initiated over the last decades – and more generally since independence in 1962 – shows that Burundian policymakers and lawmakers have been focusing on state-centred approaches, envisaging the delivery of justice as a monopoly of state courts, which is far from being the case. He suggested that a comprehensive approach to access to justice needs to take into account the pluralistic nature of Burundi's legal culture – both historically and today – and should view the establishment of linkages between formal and informal justice sectors and their strengthening as one of the major thrusts of their reform. In this respect, he noted that the main challenge is to create bridges between formal and informal justice. According to Dr *Niyonkuru*, the inclusion of informal justice institutions and processes would lead to a more comprehensive approach towards building a strategy for access to justice likely to cater to the needs of the population. Elaborating his argument for a comprehensive approach to access to justice, *Niyonkuru* explained that given the Burundian context, a successful strategy for better access to justice should not neglect both the importance of the day-to-day social practice of customary law and the contribution of informal justice institutions in providing access to justice for the poor and disadvantaged. Besides, rather than state courts, these institutions are perceived as more legitimate by a great majority of Burundians, including the educated. For the speaker, as far as the relationship between formal and informal justice institutions and processes is concerned, two important issues need to be considered. The first issue deals with both the legal

status of non-state justice institutions and their relationship with the state justice system. The second issue assuming that non-state justice institutions are granted legal recognition – consists in making those institutions, their practices and processes comply with human rights and international standards relating to access to justice. The legal recognition of non-state justice institutions could significantly boost their output, as an increased number of people would thereafter resort to these now formally recognised justice providers in addition to the state courts, in their quest for justice. Regarding the second issue, *Niyonkuru* suggested that the law should establish institutional and procedural mechanisms for links between the state courts and non-state justice institutions.

The second presentation was given by Dr *Didace Kiganahe* on the following topic: "Making Non-State Justice Comply with Human Rights Standards. Is the Challenge Surmountable in Today's Burundi?". Dr *Kiganahe's* speech focused on the Burundian customary institution of *Bashingantahe.*[1] He explained that this secular institution continues to play a significant role in settling disputes, most of which arise in the neighbourhood, although it lacks legal standing and legal texts. While non-state justice institutions – of which the *Bashingantahe* is by far the most popular – are widely viewed by many as the most likely way of achieving an outcome that satisfies their sense of justice, the question of adherence to international human rights standards remains one of the major challenges of the use of non-state justice mechanisms and processes. For indeed, informal justice processes are likely to uphold rather than to challenge attitudes and patterns of discrimination deeply embedded in customs and to neglect principles of procedural fairness. As far as Burundi is concerned, informal justice relies on non-codified customary laws and traditions, some of which embed gender-based discriminations and violations of children's rights and those of vulnerable and marginalised groups (e.g. the *Batwa* indigenous community). A review of customary norms and informal justice processes in Burundi shows common practices that are inconsistent with national laws and international human rights standards. Thus, while Burundi's successive post-independence constitutions proclaim the equality of all Burundians in addition to the incorporation of a Bill of Rights since the 1992 Constitution, informal dispute resolution processes continue to rely on customs as a source of authority, allowing discrimination against some groups. Examples are the male primogeniture rule (*privilège de masculinité*) that hinders female children from inheriting their father's property; the privilege of the elder son (*le droit d'aînesse*) that empowers the first-born male to inherit more than his younger brothers; the exclusion of the surviving spouse or her remote position with respect to the order of inheritance; remaining discrimination against extramarital children,

1 Quite untranslatable into foreign languages, the word "*Bashingantahe*" (*Umushingantahe* in singular) is a Burundian compound word with roots in two words: "*gushinga*" (to plant or to fix) and "*intahe*" (a stick from the ficus tree). Literally translated, it means "the gesture of planting or fixing a stick into the ground." In its proper and original sense, the *Bashingantahe* refers to a customary and precolonial institution of "wise men", whose main role was – and still is – to manage and resolve conflicts and disputes that arise in the community, through processes based on traditional techniques of conflict resolution consisting of negotiation, mediation, reconciliation and arbitration.

improperly called illegitimate children (*enfants naturels*) – all these practices find their origins in Burundian customary law and are in contradiction with international human rights norms and standards. In concluding his speech, Dr *Kiganahe* suggested that state policies and strategies that aim to improve access to justice through informal means seriously consider the need to enhance informal justice providers' skills in the field of human rights, through a continuum of learning and training programmes.

The last but not least presentation was given by Dr *Bernard Ntahiraja*, lecturer at the University of Burundi and Attorney at the Burundi Bar Association. The topic was the following: "Should non-state justice have a place in the Burundian criminal justice? What would be the impact in people's access to justice?". Dr *Ntahiraja* warned that today's Burundian criminal justice system is almost exclusively in the hands of state institutions. He, however, argued that private actors can only play a role in the implementation of certain court decisions, especially with regard to the sentence of works of public interest and to institutional placement in juvenile justice. He explained that empirical studies have however highlighted that, for a number of reasons, state criminal justice institutions are of a limited access. He argued that this creates a huge gap between the demand and supply of criminal justice. He explained that a scrutiny of the working environment and practices of state institutions also makes it clear that access to the *institution* and access to *justice* are far from being synonymous. Dr *Ntahiraja* explored the possibility for non-state justice to fill in the gap. Drawing from the history of criminal justice in Burundi (especially the pre-colonial period) and from comparative criminal law he identified a number of favoring factors of an increased role of non-state criminal justice. These factors include the historical legitimacy of the institution of *Bashingantahe* and of the kind of justice it renders. He also discussed areas of concern if non-state justice had to play an adjudicatory function in criminal matters. According to Dr *Ntahiraja*, these areas include the challenges of respecting human rights (especially fair trial rights) in a non-state setting as well as the appropriateness of non-punitive justice in cases of grave criminality (like murder and sexual violence). Dr *Ntahiraja* remarked that the identified challenges can however be overcome. This would require going beyond Burundian traditional justice and taking inspiration from non-state justice mechanisms already tried elsewhere. Penal mediation (*médiation pénale*) – conceptually different from victim-offender mediation – is one of them. This would also require a constitutional and legal framework indicating the material and temporal scope of the adopted mechanism(s) as well as its (their) relationships with formal criminal justice.

The main conclusion that emerged from the workshop was that non-state justice mechanisms and processes can play an important role in enhancing access to justice as a valuable complement to the state court justice. Accordingly, participants suggested a comprehensive strategy of access to justice that views the state courts and Alternative Dispute Resolution mechanisms, including non-state institutions and their processes, as complementary rather than exclusionary.