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No short cuts to Peace in Burundi – plural governance and legal pluralism as triggers for violence and state collapse

The impact of legal pluralism and plural governance in war torn societies is still under-researched. While writers on humanitarian law or international law usually apply a state centric approach and remain widely caught within the UN terminology, thinkers on legal pluralism and plural governance largely focus on questions either relating to the limited capacities of the political power centre to penetrate the social, legal and political relationships in society and/or on the legal and political competition between different institutions with different sources of legitimacy. This way, many challenging insights into unintended consequences, different normative and political orderings may provoke in society, are captured. This perspective gets however a particular turn in war torn societies, where the political and legal legitimacy of the political power centre is already undermined by former dissolution processes such as gross human rights violations or organised crimes against humanity. In such constellations, legal pluralism and plural governance may also remain nourished by social and political conflicts outside of the immediately visible. Both phenomena may then comply with their role as historical witnesses, as they institutionally encapsulate cruel experiences of the past and trigger this way new, dangerous and unforeseen dynamics into current power conflicts. Therefore, both analytical concepts can also be used as door openers for a deeper understanding of the composition of the social cohesion, which keeps a society together or may explain their falling apart.

With this paper, I want to focus on the legal and political history of Burundi, since at least April 2015 again in the cross lines of a further political dissolution process. I assume that this case provides a telling example of how plural governance and legal pluralism express a history of remembered and lived violence and endanger future processes of state building and the promotion of the rule of law.

As recently as 4 years ago, the country was considered a success story in peacebuilding circles, but since April 2015 Burundi is back in the spotlight of the world's media and the agenda of the United Nations Security Council. Together with the African Union and the East African Development Community, the UN and the EU are trying to prevent the rise of a new civil war in the region, already marked by the endemic wars in Eastern DRC and the terrible experiences with the genocide in Rwanda and the earlier ethnic massacres in Burundi. How did success so quickly turn into failure?

1

Thierry Vircoulon from the International Crisis Group (2015) speaks of a deconstruction of peace from the above and blames President Nkurunziza and his militarised entourage as well as the guarantors of the Arusha Peace Agreement who according to him lacked sufficient support for this important piece of negotiation. With regards to the present government, he identifies three stages of escalation:

- "The first phase culminated 2014 in a dispute around electoral preparations. Government and opposition disagreed on almost everything, from the composition of the local electoral commissions to the acceptance of political parties, the time schedule and manner for voter registrations, and stripping herewith the legitimacy from the start" (2015:1).

- The second phase involved street protests against Nkurunziza's pursuit of a third term as president, with which he openly violated the term limitation for presidents of the Arusha Peace Agreement. "Demonstrations in the capital Bujumbura quickly turned violent, with confrontations between government and a coalition of political opposition, civil society organizations, and the Catholic Church. A failed coup radicalized all stakeholders" (same) and the subsequent elections turned into a particular piece of theatre as their result already circulated in some embassies before the elections finally were held.

- The third and ongoing phase of the current crisis - armed confrontation - corresponds with the third term mandate granted to Nkurunziza and entails a climate of violence, fear, socio-economic decline and anew deepening social fractures.

By using ethnically-charged rhetoric and demonstrating an obvious desire to bring the democratic consensus of the Arusha Peace Agreement to an end, the regime has ruptured its relations with parts of the population and with almost the entire Euro-American donor community. Some 400'000 Burundians have fled, including a significant portion of the political and economic establishment and civil society activists. The break-down entailed a loss of Burundi's most dynamic citizens and exposed growing divisions between the regime

and the army, the capital city Bujumbura and the Tutsi community. Nkurunziza is riding across the country and is no longer residing nor in Bujumbura nor in his hometown Ngozi. Currently, a dictatorial atmosphere has anew captured the country and both, the president and the population are living in fear. The economic decline is dramatic and Burundi is now one of the poorest country in the world (World Bank Report 2018).

At a first glance, this conflict reduces long and hard-fought peace-building efforts to almost nothing. The Arusha Peace Agreement was the result of a four year negotiation process, which seemingly ended Burundi's earlier civil war from 1993 to 2000. It took even eight years to convince all armed groups to lay down their weapons and accept a democratic political system. The Arusha Peace Agreement, which now is objected by the actual ruler, encompasses regulations for the limitation of presidential terms to two in number and regulations relating to the political relationships between the two major ethno-political interest-groups, the Abahutu and the Abatutsi. I call the Abahutu and Abatutsi "ethno-political interest- groups", because the main matter of dispute concerns questions of the monopolisation of political power by distinct interest groups within these larger segments of society. Further details follow later.

The Arusha Peace Agreement further outlines procedures of how to deal with Burundi's historical truth and of how to regulate the access to land and goods. Amongst others, it envisaged the forming of an international criminal tribunal, a Truth and Reconciliation Commission and the forming of a Commission with judicial authority on Lands and Goods. Between 2005 and 2015, this agreement formed a shaky basis of a new social and political consensus among a population, long deeply fractured along ethno-political, regional and economic lines.

2

The Arusha Peace Agreement constitutes in fact a very telling cusp in the history of Burundi and remains not only a masterpiece for Burundi's reconstructions phase, but also for the understanding of Burundi's new fragmentation. For improving the understanding of this telling cusp, I propose linking the analysis of the agreement firstly to project law as this concept allows a deeper understanding of the multifaceted ways, the international development community tried to bring the Agreement to a successful end.

As regards size, directives and degree of specification, four principal strands merge in this peace agreement: a) International law, in particular the international humanitarian law and the human rights treaties as outlined in the Civil and Political Rights or in the Economic, Social and Cultural Rights; b) "Good Governance"-and Rule of Law frameworks as outlined in the Rio Declaration (1992), the Cotonou Agreement (2000) or the Stockholm Initiative on Disarmament, Demobilization and Reintegration; in addition, the agreement borrows c)

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some elements of Burundi's former structure of the state and its subsequent Constitutions and d) it is based upon commonly developed problem understandings of Burundi's cruel political history, as shared by its signatory parties.

In accordance, the Agreement is subdivided in 5 Protocols: Protocol I starts with a brief description of the "Nature of the Burundi Conflict", the "problems of Genocide and exclusions" and it includes a first brief description of "their solutions". Protocol II is dedicated to "Democracy and Good Governance" issues and contains some essential descriptions on the composition of the executive branch and the number of presidential terms. Protocol III deals with Peace and Security issues and specifies the institutional responsibilities for the "nature of the Burundi conflict", Protocol IV focuses upon the reconstruction and development topics and contains a number of statements of the rehabilitation and resettlement programme for refugees and militiamen and Protocol V finally outlines the implementation procedures and the role of the guarantors.

For designing corresponding international development programmes and projects, this Agreement is particularly rich. Its logic fits perfectly with the various UN treaties and bodies to which also OECD's Development Assistance Committee belongs; it specifies a great number of sectoral problems relating to the five protocols, which have to be solved by the technical means of development assistance; it outlines the relevant political partner structures that have to be set up together with the Burundian Government; and it defines a common time-line for the implementation procedures and a supervision structure. Technically, this agreement allowed thus the set up of large reconstruction programmes including substantial budget aid. Until the elections of 2015, encompassing development assistance has amongst others been granted by the UN and its sub-organisations, the US, the World Bank, IMF, and the European Union in cooperation with its various bilateral development agencies of the European continent as well as by many powerful international NGOs, Regional Organisations and the African Union.

With the widening of the scope for development assistance in the early 1990ies towards a more political understanding and the decision to actively promote good governance, democracy and the rule of law, several important traps rised at the horizon: First, primarily political problems such as a weak degree of power-sharing or the lack of public participation are usually linked to distinct human rights standards or the negotiated Millennium Development Goals in order to justify such interventions.

Then, they are translated into technical or organizational problems so that they can be addressed by managerial means. It remains however often cryptical how such technical solutions should then be re-inserted into the political process as long as for instance no credible political feedback structure is established and as long as the political arena is

marked by a missing consensus on the compliance with international human rights standards, ongoing disputes between the political parties on the political future and as long as distinct forms of economic or social exclusion are politically intended by those in power. It matters thus to have a deeper look into the Arusha Peace Agreement and to focus on the ways, the "Nature of the Burundi Conflict" is described and how this description is linked to the "problems of Genocide and exclusions" in order to identify the possible strands of social cohesion or social dissolution.

3

The description of the "Nature of the Burundi Conflict" is subdivided in three periods of time, the pre-colonial phase, when Burundi was a kind of sacred kingdom, the time during the German and Belgian occupation from 1896-1962 and the time period after independency until the conclusion of the peace negotiations in 2000.

For the pre-colonial time, the Agreement refers to a definition of culture which comes close to the one once outlined by Edward B. Taylor and it stresses in Article 1, subsection 1, that *"all the ethnic groups inhabiting Burundi owed allegiance to the same monarch,* Umwami*, believed in the same god,* Imana*, had the same culture and the same language,* Kirundi*, and lived together in the same territory. Notwithstanding the migratory movements that accompanied the settlement of the various groups (...), everyone recognized themselves as Murundi"* (2000:14-15). Subsection 2-4 explain the significance of distinct terms that underpinned the former ruling system such as the role of the Bashingantahe (pre-colonial judges), or the various facets of the pre-colonial clientele structure.

Article 2 is dedicated to the colonial period and it highlights the ways of how Germany and especially Belgium managed to destroy the essential power structures of the former kingdom and to impose *"a caricatured, racist vision of Burundian society"* based on morphological criteria and to bring about ethnical hatred among the Abatutsi, Abahutu and Abatwa. *"On the eve of independence the colonizer, sensing that its power was threatened, intensified divisionist tactics and orchestrated socio-political struggles. However, the charismatic leadership of Prince Louis Rwagasoré and his colleagues made it possible for Burundi to avoid political confrontation based on ethnic considerations and enabled it to attain independence in peace and national harmony"* (Article 2, subsection 6, 2000:15).

But what then happened remains very foggy. Article 3 of Protocol I speaks of different regimes, which succeeded each other and during which *"a number of constant phenomena (...) have given rise to the conflict that has persisted up to the present time: massive and deliberate killings, widespread violence and exclusion have taken place during this period"* (2000:15-16). In twisted terms the Agreement manages to speak about the existence of

genocides without connecting them to concrete events, political decisions or responsibilities such as for instance the judicial history of land management nor to link this type of mass killings to the existence of so-called 'ethnic units' or ethnicity as power ideology. Subsection 2 of the same protocol simply adds further that *"(...) views differ as to the interpretation of these phenomena and their influence on the current political, economic and socio-cultural situation in Burundi, as well as of their impact on the conflict"* (2000:16).

This type of statement fits perfectly with the long history of tabooing controversial discourse universes in Burundi, which are relating to an uncounted number of political struggles and have marked the political history since almost its first days of national independence to a nightmare. They widely covered (and still continue to cover) the political interests of those in power, though the control of political power has meanwhile for several times changed its hands, sometimes even dramatically. Since Burundi's independency, this discourse order of conflict denial goes along with regularly returning mass killings, such as those from 1965, 1969, from 1972 to 1974, 1988, 1991, from 1993 to 2005, just to mention the most important which in total caused about 500'000 dead bodies or even more. And since April 2015, new forms of politically motivated killings along a drop counter system are now under way. Given the cryptic language with which the Peace Agreement deals with this human and political tragedy, the sandy grounds on which it stands on become obvious. With regards to the core-conflicts, the negotiating parties simply agreed on their disagreement.

4

Not surprisingly though, many different and partly disconnected discourse universes remained alive. They relate to different life experiences in the past, belong to different social communities and their destiny, adhere to different schemes of explanation and express different political intentions and interests. In her book on the ways of life in the Tanzanian refugee camps, Liisa Malkki (1995) describes precisely how differently those, who fled the subsequent massacres perceived Burundi's national history and how their personal testimonies had been changed into new historical myths about umuhutu and/or umututsi-identity, which, due to their social and political isolation in the camps, encapsulated and merged with new political visions and their corresponding normative systems. Amongst others, she reports from taxation difficulties in the Mishamo camp where the refugee population blamed all Tanzanian tax officers as abatutsi, because only abatutsi would collect alleged illegal taxes. Earlier and problematic experiences with Burundian bureaucrats were thus projected on the new constellation and helped cementing the required "hutu-identity" in order to justify their ongoing stay in the camps. Similar observations can be made after asylum seeker processes in Euro-America, where the candidates have to prove their personal threat, in most cases linked to problematic experiences with their own ethno-political identity as persecuted umuhutu or umututsi in their home country. Such judicial

processes often cement an already problematic social identity as its stressing helps justifying the asylum seekers reasons and forms the grounds for a new social identity in the asylum country. Any hint to the ambivalence of this narrow identity container could thus be considered as a personal threat. In the aftermath of the starting peace process, such disconnected discourse universes gained a lot of political and legal power, as most of all refugees from many different host countries (Belgium, Canada, DR Congo, France, Rwanda, South Africa, Switzerland, Tanzania to mention just a few), who escaped at different time periods and under different political constellations, decided to return back to Burundi. There they hoped launching a new career and often clashed with those, who remained in-country, and who meanwhile occupied their lands and goods, no matter which ethno-political identity is at play.

For large parts of the urban and rural population paradoxically, the Arusha Peace Agreement was not that much blamed for its sandy grounds on which it is built on, as most Burundians are very familiar with cryptic language and twisted terms. Especially the urban middle class, abahutu and abatutsi alike, welcomed enthusiastically the donor intervention, all the more as this also implicated the injection of huge amounts of money, the creation of new jobs and a multifaceted access to international communities. The Agreement was thus rather regarded as a kind of guiding star, precisely because of its technicality that makes seemingly things feasible and describes likewise a possible way out.

The Burundian Government had however another political agenda and decided to strip the Peace Agreement from its essentialities. Driven by a rather revanchist vision targeted against the supporters of the former tutsi military regimes, it undercut step by step the peaceful integration of hutu militiamen into the tutsi-led state security services by establishing parallel chains of command and later a new militia, called "imbonerakuré", in order to discreetly shift the balance of power to the dominant hutu party CNDD-FDD and in this way maintain politic and ethnic control; the institutionalised ethno-political power-sharing system, established by the Arusha Peace Agreement, remained thus completely divorced from a radicalised hutu-party reverting to its historical roots as rebel leaders of the civil war period. With regards to the original intend to set up an international criminal court, government managed to belittle its possible impact and step by step to transform it into a simple "Commission on Truth and Reconciliation". This Commission has no judicial mandate and limits its focus on Human Rights violations until the year 2000. In line with the still dominant discourse order of conflict denial, Government is arguing that *"judicial investigations (and especially those after 2000/MW) could reactivate burning wounds and lead to political turmoil".*

Under tight time pressure from the influx of returning refugees, Government set up however a National Commission on Lands and Goods (CNTB), who has to deal with hundreds of

thousands of land claims related to several waves of expropriation, carried out by the colonial power Belgium and the subsequent tutsi-led military regimes during and after the many ethnic massacres. To return to the land of origin constitutes not only an important economic resource but also a major identity marker, as to return even after 40 years of absence means in Burundi to return to the property of the own kin-group. Restitution of course is therefore essential, but amid land tensions due to an uncontrolled demographic growth and the scarcity of available arable lands, the current politics tends to give advantage to repatriated citizens, in most cases abahutu and fierce supporters of the current regime to the detriment of current land owners, who were not all complicit in land thefts during civil war. To find a way out of this extremely delicate topic is one thing, as it requires a subtle combination of equity, flexibility and diplomacy.

At the same time provides the legal and political history of land management a terrible insight into many root causes of the social and political fragmentation and Burundi's fabric of ongoing hatred. Since colonization, a favoured tool of Burundi's governing class to assure wealth was the judicially authorized right to expropriate any Burundian citizen, regardless of the motives and biographic backgrounds, a right that has been widely exploited against all political opponents and wealthy people of the adversary ethno-political groups, especially during and after the endemic ethnic massacres and genocides. This right, which has left an enormous path of social destruction and mistrust brought Burundi to the brink of falling apart.

The Arusha Peace Agreement, which tried to compensate the lack of common grounds with its technicalities and means of conditionality, visibly failed to find a way out.