



USIPEACE BRIEFING

Building the Rule of Law in Haiti: New Laws for a New Era

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INTRODUCTION

USIP has been working with lawmakers and other reform constituencies in Haiti as they strive to reform Haiti's criminal laws that date back to the early 19th century. In March 2009, USIP commissioned two reports that were written by Louis Aucoin, a professor at the Fletcher School at Tufts University, and Hans Joerg Albrecht, the director of the Max Planck Institute of Foreign and International Criminal Law. At the request of Haitian lawmakers, USIP has also provided copies of the Model Codes for Post-Conflict Criminal Justice, a law reform tool developed by USIP's Rule of Law Program to assist in the drafting of new laws. From June 9 to June 11, 2009, USIP co-hosted a "Technical Workshop on the Modernization of the Criminal Code and Criminal Procedure Code" in Port-au-Prince, Haiti with the Haitian government and a number of international donors. The workshop brought together representatives from the Presidential Commission on Law Reform, the legal community and civil society, along with international organizations and donors, to discuss the problems with Haiti's criminal laws and how to improve them.

Vivienne O'Connor, senior rule of law adviser at USIP, and Louis Aucoin presented papers on the conference about the Model Codes for Post-Conflict Criminal Justice and their potential uses in Haiti. The following is a combined summary of the reports commissioned by USIP and the proceedings of the legal reform workshop in Haiti.

RULE OF LAW IN HAITI

Haiti has gone through long periods of repression in the last 50 years. The authoritarian regime of the Duvaliers running for 26 years claimed the lives of close to 40,000 Haitians. The end of the regime did not end repression. In 1991, the Haitian military overthrew Haiti's first democratically elected president, Jean-Bertrand Aristide. In 1994, a U.S.-led intervention restored Aristide to power. In 2004, the U.S. again intervened to help Aristide leave Haiti when rebels threatened Port au Prince. Today, security in Haiti is maintained by a United Nations peacekeeping force, the United Nations Stabilization Mission in Haiti (MINUSTAH), but the security situation remains fragile.¹ Haiti suffers from extreme poverty, official corruption and high levels of crime, including drug trafficking. Drug trafficking affects the whole Caribbean but has particularly serious

¹ Observations of the Inter-American Commission on Human Rights Upon Conclusion of Its April 2007 Visit to Haiti. General Secretariat Organization of American States, Washington 2008, p. 3.

consequences in Haiti because of its weak justice system.² The causes of the malfunctioning of Haiti's criminal justice are the dependency of the judiciary on political and executive powers, poorly trained judges and prosecutors, widespread corruption,³ decades of conflicts, large scale violence, intimidation of judicial staff and witnesses, and the partial destruction of infrastructure, including police stations, courts and prisons.⁴ In addition, the malfunctioning of the justice system is very much linked to the outdated and inadequate criminal laws that apply in Haiti.

HAITI'S CRIMINAL LAWS

Haiti's current criminal laws are the remnants of its former colonial power. As in all former French colonies, Haiti has inherited the five classic "Napoleonic Codes," among them the penal code and the criminal procedure code of 1835. After its independence, Haiti did not opt for the creation of new laws but retained French law and French as the official language used in legislation and the administration of justice. Haiti's criminal law reflects the conditions of 19th century France and is certainly outdated in terms of the realities of Haiti today.

A first major problem with Haiti's criminal laws is that there is a great deal of uncertainty about what the law is. Not all legal actors have copies of the laws but, beyond that, Haiti's criminal laws have been supplemented over the last 150 years or so by a series of laws and decrees that are unknown to many in the legal community. The latter have been passed by the president rather than through the parliament; a lawmaking power that is not conceived of in the Haitian Constitution of 1987.⁵ Decrees cover topics such as rape,⁶ the organization of the judiciary⁷ and the police.⁸ Further uncertainty abounds because the penal and procedure codes have significant gaps and, in places, internal inconsistencies. These gaps, particularly in areas like arrest and detention, have granted broad discretion to police and other justice actors which has at times been abused.

² Observations of the Inter-American Commission on Human Rights Upon Conclusion of Its April 2007 Visit to Haiti. General Secretariat Organization of American States, Washington 2008, p. 4.

³ Observations of the Inter-American Commission on Human Rights Upon Conclusion of Its April 2007 Visit to Haiti. General Secretariat Organization of American States, Washington 2008, p. 4.

⁴ Mobekk, E.: MINUSTAH: DDR and Police, Judicial and Correctional Reform in Haiti Recommendations for Change. ActionAid Haiti, London 2006, p. 16.

⁵ For further discussion on this point, see Louis Auoin "Haiti's Constitutional Crisis" 17 Boston University International Law Journal 115, 123.

⁶ Décret modifiant le régime des Aggressions Sexuelles et éliminant en la matière les Discriminations contre la Femme», Le Moniteur, Jeudi 11 Août, 2005.

⁷ Décret du 22 août 1995 relatif à l'organisation judiciaire.

⁸ Looi du 29 novembre 1994 portant creation, organization et fonctionnement de la police nationale.

Other gaps include the regulation of appeals of cases from lower courts, application of penalties and the role of the victim in the criminal proceedings.

Second, Haiti's criminal laws predate the development of international human rights instruments and therefore do not contain these fundamental guarantees. Haiti's constitutional reform process that culminated in the 1987 constitution included a catalog of human rights, but these rights have not been systematically reflected in Haiti's criminal code. Certain criminal offenses actively violate the rights of the ordinary Haitian human rights such as freedom of speech and freedom of association. For example, it is a criminal offense for religious ministers to criticize the state in written materials or to exchange information with foreign powers on issues of religion. Freedom of association is also restricted under Haitian law.⁹ Twenty persons or more who gather to discuss religion, politics and literary issues without official permission of the government are committing a criminal offense.¹⁰

As well as their failure to protect the rights of all Haitians, the criminal laws do not adequately protect particular groups such as women on issues like rape and domestic violence. Nor do they protect the human rights of children who come into contact with the justice system.

Third, Haiti's laws, being so old, do not address more "modern" crime problems that occur in many countries, such as organized crime; corruption-related offenses; trafficking in persons, children and body parts; cybercrime; terrorist-related offenses; acts of torture; international crimes such as genocide, crimes against humanity and war crimes; offenses against vulnerable groups such as hate speech; and crimes against children such as child neglect or child pornography.

Also in need of modernization are the penalties attached to the existing criminal offenses, as they reflect 19th century thinking on crime and punishment and include outmoded penalties such as forced labor.¹¹ In addition, modern-day methods of investigating crime are not included in the criminal law as they did not exist at the time of

⁹ Code Pénal, Article 162 – 164.

¹⁰ Code Pénal, Article 236.

¹¹ There have been some changes introduced through the "Décret du 7 avril 1982 harmonisant la Législation pénale en vigueur avec les Conventions Internationales signées et ratifiées par le Gouvernement Haïtien" as well as through the abolition of the death penalty.

drafting. Evidence of crimes is usually based on confessions and methods of criminal investigation such as taking of DNA samples in murder or rape cases or the use of surveillance for organized crime cases are not covered by Haitian law. Also important, but not provided for in the Haitian laws, is the protection of victims and witnesses. Because of the absence of witness protection measures and other investigative measures in Haitian laws, the tools that the investigating authority can employ to combat impunity for serious crimes is very limited.

Fourth, there is a general feeling among Haitian legal and NGO communities that the roles and responsibilities of the various judicial institutions need to be re-examined regarding how effectively they are serving the interests of Haiti and its population. They have suggested obliterating certain institutions like the *juge d'instruction* – the investigating magistrate. Another contentious issue is whether the obligation on the prosecutor to prosecute every case should be retained or whether the prosecutor should have discretion to not prosecute certain cases or divert them away from the justice system (e.g., through mediation or arbitration). With the limited capacity of the Haitian justice system, some are asking whether it is a realistic requirement that every crime allegation be thoroughly investigated.

Finally, and beyond legal technicalities, another significant problem is how Haitians view the law. For most people, laws are seen as unfair and working only for the benefit of the rich and powerful, not the poor and the ordinary citizens of Haiti.

MODERNIZATION AND IMPROVEMENT OF HAITI'S CRIMINAL LAWS

The problems with Haiti's criminal laws are clear and have been known for many years. In the past, there have been several failed attempts to reform the criminal laws; however, none of these attempts went very far. According to those who have been involved in those efforts, something is different now and there are great hopes that this current process will be a success.

One of the distinctions with this effort is that the law reform process has received high level political support from the president, the prime minister, the parliament, and from within the justice system, the legal community and civil society. International actors as well as Haitian lawyers and politicians have stressed the fact that a comprehensive

overhaul of the legal and institutional framework is necessary and is long overdue. In addition to representatives from civil society and the legal community, lawmakers involved in reform efforts are committed to making substantial changes to the law in order to modernize it and to ensure it complies with Haiti's international human rights obligations. The expressed intent of those involved in the criminal law reform process is to work to change the views of the population about the justice system, improve their relationship with it, and crucially, ensure that the justice system serves all the people of Haiti (rather than just the rich and powerful).

Recently, a working group, established by President Rene Preval, and a code reform commission, established by the Ministry of Justice, are leading criminal law reform efforts in Haiti. A criminal law reform strategy has been developed and is already being implemented. An assessment and inventory of the existing laws have been conducted. Large scale, countrywide consultations with civil society and the population have taken place over the past two years through an entity called the Working Group on Justice Reform to ascertain their needs and expectations of new laws. The drafting process has just begun and the new laws will carefully be drafted over the coming years. There are plans to conduct further national consultations on new draft laws so that all the citizens of Haiti can participate in the process. The benefits of such a participatory approach are manifold: the population will feel included and more invested in the new laws, which will give the laws greater acceptability and public legitimacy.

International organizations such as the United Nations (through MINUSTAH and the United Nations Development Programme in Haiti) and the Organization of American States, bilateral donors like the U.S. Agency for International Development and organizations including USIP, the International Institute for Democracy and Electoral Assistance (IDEA) and the International Senior Lawyers Project are working collaboratively to support the law reform process. The June conference that took place in Haiti on the modernization of the criminal law and procedure in Haiti brought together experts from France, Argentina, Senegal, Canada, the Dominican Republic, Chile and the United States, many of whom have worked in many other law reform process in the hemisphere, including Bolivia, Venezuela, Peru, Guatemala, El Salvador and Honduras, and elsewhere throughout the world in East Timor, Afghanistan, Liberia and Cambodia.

International assistance providers will continue to constructively engage with and support those involved in the criminal law reform process in Haiti.

THE MODEL CODES FOR POST-CONFLICT CRIMINAL JUSTICE: A REFORM TOOL

USIP's work in Haiti began through an inquiry from Haiti about the Model Codes for Post-Conflict Criminal Justice and a request for these publications as a reference tool to assist in the law reform process.¹² The desire for a reference tool to use in the reform process is not new. Back in 2001, the U.N.'s Brahimi Report -- the "Report of the Panel on U.N. Peace Operations" based on experiences in Kosovo, East Timor and Cambodia -- acknowledged the immense challenges inherent in post-conflict criminal law reform and called for the development of a law reform resource.

The Model Codes for Post-Conflict Criminal Justice -- consisting of a model criminal code; a model code of criminal procedure; a model detention act, and a model police powers act -- are such a resource for those engaged in the law reform process in Haiti and elsewhere. The codes can be used to create, overhaul, update or plug gaps in the existing criminal laws. The Model Codes Project is a culmination of a seven-year project spearheaded by USIP and the Irish Centre for Human Rights, in collaboration with the U.N. Office of the High Commissioner for Human Rights and the U.N. Office on Drugs and Crime. Close to 300 individuals -- lawyers, prosecutors, judges, police, military personnel, NGO officials and academics -- from around the world were involved in drafting the model codes. The codes draw upon many legal traditions from around the world, thus making them widely relevant to a variety of post-conflict states.

Haiti will not be the first locale in which the model codes have been employed by law reformers. The codes have been used in the context of criminal law reform efforts in Liberia, Sudan and Afghanistan, where USIP worked with Afghan and international members of the country's Criminal Law Committee to review drafts of its new criminal procedure law.¹³

Currently, the codes are being used as a resource in Burma/Thai refugee camps, as camp officials and international assistance providers draft a criminal law framework to

¹² For more information on the Model Codes for Post-Conflict Criminal Justice Project, see: <http://www.usip.org/programs/initiatives/model-codes-post-conflict-justice>

¹³ For more information on the use of the model codes in Afghanistan, see: <http://www.usip.org/ruleoflaw/projects/countries/afghanistan.html#criminal>

regulate the conduct of the camps. Outside of the conflict context, the model codes have been used as a resource by the Law Reform Commission in Romania and by civil society in Tajikistan, as they lobby the government for reform of certain criminal laws.

For Haiti, or any other country using the model codes, they are not meant to be prescriptive but rather act as a source of inspiration or a starting point for discussions around new criminal laws. Specifically, the model codes could assist drafters in inculcating international human rights standards into criminal law and procedure and in the drafting of “modern” criminal offenses including organized crime, trafficking in persons, drug trafficking, terrorist acts and corruption (a high priority area for the Haitian government). The model codes also provide sample provisions on criminal investigation tools including witness protection, search of property and the taking of DNA samples and other areas of criminal law and procedure that are missing from the Haitian codes such as the role of victims, arrest and detention, penalty provisions and appeals. Finally, the model codes come with accompanying commentaries that document the debates and discussions around the drafting of each provision during the development of the model codes publications. This provides a form of “legislative history” and the description could be useful to the Haitian drafters as they begin their own debates and discussions on criminal law and procedure.

CONCLUSION

There are promising signs that Haiti’s criminal laws, and by necessity its criminal justice system, will undergo huge transformations in the coming years. It is anticipated that new criminal laws could be passed by 2011, whereupon a two-year period of training and institution-building would take place prior to the laws coming into effect in 2013. Criminal law reform is no easy task but with political will, dedication and commitment by reform actors and the assistance of the international community, it can be successful. Law reform is certainly not the silver bullet for realizing the rule of law in Haiti. In order to be effective, the law needs to be implemented and properly applied and the reasons why it has not been applied in the past should be researched and analyzed. There is an old Haitian saying that “law is paper; bayonettes are steel,” but as Talleyrand said “one can do a lot of things with bayonettes, but one cannot sit on them.”

Stable power is dependent on legitimacy, acceptance and on laws that are widely agreed upon. New criminal laws will herald in a new era where criminal laws protect rights instead of violating them, serve all the people of Haiti, including the poor, vulnerable and marginalized, rather than just the rich and powerful, and upon which respect for the law and the legitimacy of the justice system can be built.

ABOUT THE AUTHORS

This *USIPeace Briefing* was written by Vivienne O'Connor, a senior adviser in the Rule of Law Center of Innovation at the United States Institute of Peace, Hans Joerg Albrecht, director of the Max Planck Institute of Foreign and International Criminal Law, and Louis Aucoin, professor at the Fletcher School at Tufts University. The views expressed here are not necessarily those of USIP, which does not advocate specific policies.

ABOUT THE RULE OF LAW CENTER OF INNOVATION

The Rule of Law Center of Innovation conducts research, identifies best practices, conducts training and develops new tools for policymakers and practitioners working to promote the rule of law. The program is based on the premise that adherence to the rule of law entails far more than the mechanical application of laws and establishment of formal institutions. The center takes on an active role in shaping the field and in advancing the rule of law in fragile and post-conflict societies. Colette Rausch is the acting director of the Rule of Law Center of Innovation at the U.S. Institute of Peace.

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