BINGHAM CENTRE FOR THE RULE OF LAW

LEGAL AID AND RULE OF LAW EFFECTIVENESS IN FRAGILE STATES: LESSONS FROM A LARGE-SCALE LEGAL ASSISTANCE PROJECT FOR PRE-TRIAL DETAINEES IN BURUNDI

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Bingham Centre for the Rule of Law

Global Rule of Law Exchange Papers

March 2016

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About the author

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About the practice notes

The Global Rule of Law Exchange ('the Exchange') is a project of the Bingham Centre for the Rule of Law in London supported by law firm Jones Day. The Exchange aims to address key challenges posed by global development and its relationship to the rule of law. It will consider the place of the rule of law in emerging economies, including on issues such as access to justice, administrative justice and corruption. It will also examine the relationship between formal and informal legal systems and the measurement of success in rule of law interventions.

The Exchange also aims to explore and contribute to the evidence-base on the relationship between development and the rule of law. The Exchange launched a call for practice notes in May 2015 to this end. Among other things, these short documents (around 3,000 words) aim to provide new ideas, identify research gaps and discuss what works and what does not in rule of law interventions. The full list of practice notes touch on a wide array of topics, including corruption, access to justice, legal aid, prison systems and international justice mechanisms, and the impact and measurement of rule of law reforms. The list of published practice notes can be accessed online: http://binghamcentre.biicl.org/ruleoflawexchange/research-to-practice

There are two categories of practice notes in the series: **'Comments'** capture those that analyse a discrete rule of law issue or theme (e.g. access to justice) and **'Field Notes'** tend to be papers that present a new approach or framework to studying rule of law and/or provide new evidence (sometimes drawing on the author's own research).

'Legal aid and rule of law effectiveness in fragile states: lessons from a large-scale legal assistance project for pre-trial detainees in Burundi'

FIELD NOTES

1. Rule of law challenges & the need for evidence-based knowledge

Effective justice and rule of law are central components of development in fragile contexts. The World Bank, as many other major aid actors, has been influential in building the evidence-base and literature on the rule of law, and has also funded many development programmes in this area. This was underpinned by a 'legal turn in late development theory,' which mainly consisted of initiating and supporting national legal reform programmes targeting official institutions.[1] There were many challenges, as implemented programmes faced (i) a lack of access to legal institutions for large segments of the population, especially poor and marginalised people, and (ii) the contested legitimacy among the population toward institutions involved in conflicts that affected them. [2] Justice reform actors, both national and international, lack the knowledge to address these challenges. Thomas Carothers points out that they work on a disturbingly thin basis of knowledge at every level, especially in relation to "how the change in the rule of law occurs, and what the real effects are of changes that are produced."[3] Moreover, evidence shows that legal aid plays an important role in pre-trial detention in fragile contexts.[4] This evaluation underlines an under-studied aspect, which is that putting the emphasis on compliance with the law without directly addressing political and social blockages, might not be sufficient to improve rule of law effectiveness.

2. Justice sector reform in Burundi

Burundi started a comprehensive justice reform process in the mid-2000s, following the peace and democratisation process initiated by the Arusha agreement. After over a decade of civil war (1993-2005), the justice system suffered from a lack of legitimacy and appeared unable to handle the overwhelming challenges of the post-conflict context. Thus, modernising the criminal justice system was a main priority. The reform – which is ongoing - includes adopting a new Penal Code (2009) & Criminal Procedure Code (2013), conducting an in-depth baseline of justice practices, judges training and coaching, and enhancing the control of the

[1] T Krever, 'The Legal Turn in Late Development Theory : The Rule of Law and the World Bank's Development Model The Legal Turn in Late Development Theory : The Rule of Law and the World Bank ' s Development Model' (2011) 52(1) Harvard International Law Journal 34

[2] UNDP, *Annual report on human development* (2000). K Samuels, 'Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt' (2006) Social Development Papers, Washington, D.C

[3] T Carothers, 'Promoting the rule of law abroad, The problem of Knowledge' (2003) (34) Carnegie endowment for international peace, Rule of law series

[4] J Sandefur and B Siddiqi, 'Delivering Justice to the Poor: Theory and Experimental Evidence from Liberia' (2013).

courts by the Justice Inspector Office. However, the Ministry of Justice and its funders had not planned to develop legal assistance for people facing justice, even though the right to counsel is considered a fundamental human right. According to the Lilongwe Declaration on accessing legal aid in African criminal systems, governments "have the primary responsibility to recognize and support [...] the provision of and access to legal aid for persons in the criminal justice system."[5]

3. The right to counsel and the criminal justice system

The right to counsel for every person in the Burundian justice system exists only in theory. According to Burundian law, only lawyers who are members of the bar association can represent people in court. Neither paralegals nor jurists, people who hold a law degree but who have not passed the bar, qualify as legal counsel. Data from 2013 suggests that the number of bar association members in all of Burundi is of 315, including only 117 senior lawyers who have over two year's work experience.[6] Over 95 percent of these lawyers work in the capital Bujumbura. They travel to the provinces to work on a case in return for an extra fee, which is unaffordable for most Burundians. Only around one in five Burundians can find a lawyer in their province, and only a small segment of those who can access a lawyer can afford the legal fees. As a result, an overwhelming majority of the population that must interact with the justice system, and particularly with the criminal justice system, does not actually have access to the right to counsel.[7]

However, this situation, like many aspects of the dysfunctional justice system in Burundi, is, in fact, not the result of the Burundian internal conflict (1993-2005). In the early 1990s and before, there were not more than a few dozen members of the bar in Burundi, working mainly on business issues or cases involving state agencies.[8] As a result of Burundi's adoption of a colonial-style criminal system and proceedings upon independence, people can be arrested, prosecuted and condemned without any support from a lawyer. Developing access to justice in general and assistance for those involved in the justice system has never been a priority, for neither the judiciary nor the bar association. Thus, this key component of a judicial system has never existed in practice in Burundi.

The absence of legal assistance has caused serious infringements on the individual's right to the presumption of their innocence, which is part of the right to a fair trial. This key principle of criminal systems is guaranteed by the Burundian legislation: 'all persons shall be presumed innocent until proven guilty in the course of a public trial during which their right to a proper defence has been appropriately safeguarded'.[9] In accordance with the principle of presumption of innocence and to the Criminal Procedure Code regarding pre-trial detention,

[5] Penal Reform International, *The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa* (2004)
[6] Ordre des Avocats du Burundi, *Grand Tableau* and *Petit Tableau*, shown publicly in June 2013. Of note, there is less than 1 lawyer for 20,000 people in Burundi. In DRC there is 1 lawyer for 7,444 people; in Belgium there is 1 lawyer for 666 people. ASF website < www.asf.be/action/field-offices/> accessed 23 august 2015
[7] In 2008, more than 97 per cent suited in a criminal case weren't assisted by a lawyer. J Moriceau, 'Etude Sur Le Fonctionnement de La Chaîne Pénale Au Burundi' (2011) Avocats Sans Frontières.
[8] R Galand, *Étude de l'impact du projet : « Faciliter l ' accès à la justice des victimes et des prévenus de la crise de 1993 en vue de promouvoir la réconciliation »* (ASF 2006)
[9] Constitution de la République du Burundi 2005, Article 40

'liberty is the principle and detention is the exception'.[10] However, the gap between law and practice regarding presumption of innocence is tremendous. Recent statistics from the prison system confirm that the incarceration of people waiting for judgment is not the exception but is common practice in Burundi. In December 2012, 62.4 percent of the Burundian prison population was made up of individuals under preventive detention.[11] Besides, prisons overcrowding remains a constant problem in Burundi, with occupancy rates often exceeding 100 percent, like at Mpimba prison, Burundi's main prison, which was, at the aforementioned date, facing a 275 percent occupancy rate.[12]

4. ASF Project: legal aid for pre-trial detainees

A. Overview

Avocats Sans Frontières (ASF) has been working to improve access to justice in Burundi since 1999, through the implementation of free legal aid service delivery programmes. This includes increasing legal awareness, giving advice and representation of detainees in criminal cases. In 2007, ASF began assisting people in vulnerable situations (especially women and children) by providing litigation in pre-trial cases. This specific litigation allows the judge to either approve the pre-trial detention decided by the public prosecution office or to release the prisoner until judgment is passed.[13] In 2010, ASF and the Burundian National Bar Association established a pilot project of systematic assistance for pre-trial detainees in one prison. The project was extended to three prisons in 2012, and ended in 2014. From the project's beginning, every pre-trial prisoner in a targeted prison received legal assistance from a lawyer for pre-trial detention litigation. ASF supported the lawyers by covering basic funds, providing legal training on criminal law and proceedings, and facilitating their relationship with the judiciary. This assistance included the possibility to appeal a decision to maintain the detainee's detention. Because of limited human resources and funding constraints, the project was limited to pre-trial litigation.

The project rationale was based on three pillars:

(I) The right to counsel is guaranteed for every person facing justice. As this right is not realised in many fragile contexts, programme designers prioritised legal assistance for people facing criminal justice, especially pre-trial detainees. ASF considers that every person placed in detention is in a vulnerable situation. Thus, in line with international instruments, including the Lilongwe Declaration, ASF decided to systematically provide assistance to each and every pre-trial detainee rather than handpicking the beneficiaries.

(II) In Burundi, most pre-trial detentions are illegal due to procedural irregularities, according to a recent report.[14] The aim of the project was to end these irregularities

[10] Criminal procedure code 2013, Article 110
[11] Ministère de la Justice du Burundi, *Annuaire statistique de la justice au Burundi 2013* (2014)
[12] In December 2012, there were 2707 detainees in Mpimba prison, more than 40% of detainees in Burundi. Ministère de la Justice du Burundi, *ibid*
[13] This litigation is different from the substance of the case, in which the court decide if the accused is guilty and what the punishment is.
[14] J Moriceau, 'Etude sur le fonctionnement de la chaîne pénale au Burundi' (2011)

and put rights at the core of the criminal system. Beyond the assistance of individual beneficiaries, the aim of the large-scale assistance approach was to strengthen the capacity of lawyers to influence the judiciary. The presence of well-trained lawyers at every phase of pre-trial detention litigation was thought to contribute to a spill-over effect towards improving judiciary practices and increasing respect for the presumption of innocence and other human rights.

(III) Pre-trial detention in Burundi is almost systematically increasing prison overcrowding. Incidentally, assistance from lawyers aims to release a large segment of pre-trial prisoners, thus contributing to reducing prison overcrowding.

B. The project's theory of change

The theory of change behind this systematic approach was based on ASF's experience prior to implementing the project. ASF had observed various dysfunctional practices during pre-trial detention: non-observance of custody time limits, systematic pre-trial detention for minor offenses, failure to comply with litigation proceedings, and others.

Firstly, lawyers would monitor proceeding compliance, point out procedural errors, and appeal unlawful decisions. With the systematic assistance of every pre-trial detainee, ASF would maximise this influence and bring pressure to bear on the judiciary. Through constructive confrontation between lawyers and judges, the project aimed to i) improve justice practices ii) foster respect for and actual realisation of the rights of pre-trial detainees, and iii_ reduce procedural irregularities. This change in practice was meant to continue after the end of the project.

Secondly, ASF aimed to develop the scope of the lawyers' assistance. ASF support is limited to pre-trial detention litigation, whereas detainees might need assistance for other aspects of their case. ASF and the bar association would both encourage lawyers to extend their assistance to the trial, mostly on a pro bono basis. The programme mechanism would allow for direct collaboration between young and committed lawyers and people who need legal services. This would enable lawyers to develop their clientele and professional experience, as well as develop the scope of pro bono assistance in Burundi.

Thirdly, at a macro level, the project aimed to prepare the future implementation of a large scale legal aid system. The project was the first of its kind in Burundi. Its objective was to learn from first-hand experience of systematic assistance and to discuss its utility for the rule of law with all justice actors.

5. Methodology

This paper is the result of a synthesis of an impact evaluation, conducted between February and May 2015. This evaluation was carried out in four provinces, including three provinces directly impacted by the project (Bubanza, Ngozi, Gitega) and one that was not (Rutana).[15]

[15] Courts in charge of criminal cases are *Tribunal de Grande Instance* (TGI). There is one TGI, as well as one prison, in each province targeted in the evaluation. Thus, the province level appeared suitable to gather program outcomes.

There are various data sources. The main sources are 50 semi-directive interviews with justice system actors, ASF partners, and beneficiaries, carried out by evaluators, conducted in the four targeted provinces. At a secondary level, project databases that include information on beneficiaries and their legal cases are also used as sources of information, together with data from the Ministry of Justice and other justice development programmes.

This mainly qualitative methodology enables the identification and explanation of in-depth mechanisms of influence and changes in stakeholders' practices. The methodology also has clear limitations. The use of qualitative data highlights complex patterns of change and evolution over time. It is, however, not possible to provide precise quantitative data on the project impact.

6. Results

A. Legal and social empowerment of detainees

According to all justice actors, the project led to the beneficiaries' empowerment and their increased awareness of proceedings. Prior to the ASF treatment, '*most detainees were ignoring the proceedings, and feared members of the judiciary*.'[16] As a result, they were unable to defend themselves. A member of the judiciary reported that '*when I asked an accused person to explain his version of the case, he answered that he has nothing to say, and that he believes the judges would make a good decision for him*.'[17] In a criminal procedure, the accused party – generally represented by his or her lawyer – has to respond to victim or public prosecutor accusations. If there is no assistance, the detainee risks being condemned without being heard by the court. In the absence of any legal assistance, the detainee will most likely be condemned without being heard by the court. The assistance of lawyers allows pre-trial detainees to be aware of major aspects of the procedure and to be legally empowered to deal with their case. All services delivered contribute to this empowerment, and especially awareness sessions, personal advice and informal contacts with the lawyer or ASF staff. A prime example illustrates this change in detainees' behaviour: after the end of the project, a large proportion of detainees refused to appear in court without a lawyer, recognizing the need for being represented at hearings and perceiving themselves as rights bearers.

B. The acknowledgment of right to counsel among judiciary

Before the project's implementation, judges and public prosecutors rarely faced lawyers defending a party at a hearing, and never for pre-trial detention litigation. The lawyers and judicial actors interviewed acknowledged that the acceptance of a lawyer's assistance was not easy and took time: '*In 2010, when numerous lawyers arrived to assist detainees, we didn't know what their objective was. Many judges thought they came to spy on us*.'[18] Partly due to this perception, lawyers faced many obstructions from judicial actors: '*At the beginning [of the project], the court didn't allow us to consult our client's file. We were not able to assist detainees properly*.'[19] While the right to counsel is recognised by law, many legal actors were

[16] Prison governor, interviewed in March 2015.
[17] Deputy court president, interviewed in March 2015.
[18] Deputy court president, interviewed in March 2015.
[19] Lawyer committed in ASF legal aid project, interviewed in April 2015.

unwilling to recognise it in practice. After negotiations among lawyers, ASF and judicial actors, as well as the day-to-day collaboration between lawyers and judicial actors at hearings, lawyers were progressively able to assist detainees. Some judges also recognised that lawyers have an important role in ensuring the proper functioning of proceedings. During and between hearings, they linked detainees with the judiciary to ensure mutual understanding: '*Since lawyers assist detainees, it is easier for us to manage pre-trial detention litigation. They respond to our questions on the behalf of detainees and explain to them the proceeding stages and rationale*.'[20] This perception is in line with the positive effect of the assistance on beneficiaries' empowerment.

After one year, 89 pre-trial detainees assisted by a lawyer have been released, 26% of pre-trial detainees in Bubanza prison. The rate of pre-trial detainees in this prison decreased from 67 to 47%, due to the presence of lawyers.[21] These results are consistent with an impact evaluation of a paralegal programme conducted in Sierra Leone.[22]

C. Lack of control and accountability of the judiciary

Do lawyers assisting detainees effectively influence legal decisions? The reality remains more complex. Judges are still reluctant to acknowledge this. '*Lawyers provide support to the detainees. Their assistance doesn't change anything about our mission or our decisions',* a judge said, reflecting a widely shared opinion among judicial actors. This perception illustrates the resistance of judicial actors towards external monitoring or control. Internal official control and inspection of courts and provincial prosecution office by justice administration continues to be weak in Burundi. Without close official control and direction, public prosecutors and judges are in a dominant position at each step of criminal procedure. This environment is not favourable to listening to a lawyer's ideas and legal arguments. Both lawyers and judicial actors suggested that one could organise activities to foster mutual collaboration and influence among lawyers and judicial actors, including legal trainings and workshops. In such activities, no one is in a dominant position, and participants might have a more open mindset to discuss new ideas and develop formal and informal relationships between different actors.

D. The role of political interference

Beyond the dysfunctional aspects of the criminal system, many observers stress the lack of independence of the judiciary: because official control of judges and prosecutors is weak, interference by other key public players – politicians, military, police – is common.[23] If a powerful politician intervenes in a case against a detainee, the assistance of lawyers is likely to be useless: lawyers have a limited influencing capacity over judges. As we saw with the arbitrary imprisonment of hundreds of political opponents during 2015 electoral period, political and military power holders are still strongly influencing the judicial process. The project also had limited leverage on corruption practices, which remained a pervasive issue.

[20] Public prosecutor, interviewed in March 2015.
[21] Avocats sans Frontières, *Rapport annuel du projet assistance judiciaire en détention préventive au Burundi* (2011).
[22] J Sandefur, B Siddiqi, A Varvaloucas, 'Impact Evaluation of Timap for Justice' s Criminal Justice Project' (2012) Centre for the Study of African Economies 1–10
[23] P Uvin, 'A brief discussion of donor support to local governance in Burundi' (2005) *unpublished report*

Adopting a legal approach does not allow invisible practices in the justice forum to be addressed.

7. Discussion

The evaluation herein provides useful information on the effect of a legal aid project on a criminal justice system, by demonstrating its importance for empowering beneficiaries who had previously been mainly passive during proceedings. Judges began to respect other judicial actors – especially lawyers and the people accused – and began to comply with the international standards of the right to a fair trial. This led to crucial outcomes, such as the release of a large segment of detainees, a key project objective. However, the theory of change showed important limitations in the project's implementation, hindering possible positive spill-over effects. Largely dedicated to the legal aspects of lawyers' representation role at public hearings, it neglected the pursuit of an in-depth understanding of how the judiciary works. Political interference on the judiciary jeopardised positive effects.

This evaluation shows that adopting a legal/technical approach and putting the emphasis on compliance with the law in a sector so close to politics might not be sufficient to improve rule of law effectiveness. Even if the ASF theory of change seemed to be adapted to the criminal system and official rules, the gap between law and practice deeply affected judicial practices and rule of law effectiveness. Thomas Carothers notes that the rule of law support sector should include more than just lawyers and/or that lawyers expand their approach beyond the strict realm of law.[24] Thus, key recommendations for legal aid actors would be to focus on

- Fostering the understanding of local dynamics and power relations, not only among the judiciary, which is critical for reducing political interferences and
- Developing a working relationship between lawyers and other legal actors 'outside the courtroom'
- Ensuring that lawyers allow beneficiaries to play a core role in handling their own case by involving them in the definition of their defence strategy.

[24] T Carothers, 'Promoting the rule of law abroad, The problem of Knowledge' (2003) 34(34) Carnegie endowment for international peace, Rule of law series

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About this document

Citation: This document should be cited as: J Moriceau, 'Legal Aid and Rule of Law Effectiveness in Fragile States: Lesson from a large-scale legal assistance project for pre-trial detainees in Burundi', Global Rule of Law Exchange Practice Notes, Bingham Centre for the Rule of Law, London, 2016

Acknowledgment: The Global Rule of Law Exchange is funded by law firm Jones Day.