

Haiti: Justice Reform and the Security Crisis

I. OVERVIEW

Violent and organised crime threatens to overwhelm Haiti. The justice system is weak and dysfunctional, no match for the rising wave of kidnappings, drug and human trafficking, assaults and rapes. If the efforts of the last three years to establish the rule of law and a stable democracy are to bear fruit urgent action is needed. Above all the Haitian government must demonstrate genuine political will to master the problem. But the international community also has a major support role. The immediate need is to establish, staff and equip two special courts, one a domestic criminal chamber to handle major crimes, the other a hybrid Haitian/international tribunal to deal with cases of transnational, organised crime that the country can not tackle on its own.

Crime has surged since courthouses and prisons were looted and many of them destroyed in the lead-up to former President Aristide's departure in March 2004. The judiciary is encumbered by incompetence and corruption, partly due to inadequate pay, infrastructure and logistical support. The legal code is antiquated, barely modified since Napoleon bequeathed it to the one-time French colony, judges are not independent, case management is poor, and indigent defendants rarely have counsel. The state is able to guarantee neither the security of its citizens nor the rights of defendants. When arrests are made, the system is virtually incapable of conducting trials. Prisons become more crowded, and street crime escalates daily, while court procedures move at a snail's pace. The results are prolonged pre-trial detention – some 96 per cent of the inmates of the National Penitentiary have not been tried – lack of due process and near total absence of public confidence in the criminal justice system.

In the optimistic days after the democratically elected Aristide returned from exile in 1994, donors poured more than \$43 million into justice reform. By 2000, when Aristide was re-elected, they had withdrawn almost all such support because they were convinced the government lacked political will. Aid has begun to flow again since Aristide's ouster but the obstacles are the same. The UN Mission in Haiti (MINUSTAH)

and the new Préval government want to build a new justice system but corruption remains pervasive, including within the police and the judiciary. Organised crime has put down roots, and urban gangs have yet to be disbanded.

Haitians and internationals need to take a sober look at past failings and devise, fund and implement a comprehensive rule-of-law strategy. Police reform will not succeed without parallel court reform. Building a criminal justice system that is sustainable requires a dual track effort: short-term actions to cope with the current crime wave and longer-term institution building.

In *the short term*, i.e., in 2007, the government and parliament need to:

- enact into law a code of ethics for judges and an independent judicial council to enforce its provisions against corrupt judges;
- authorise a special serious crimes court chamber with a vetted corps of judges, prosecutors and defence counsel and permit plea-bargaining with appropriate oversight; and
- provide witness protection and better pay for judges;

while donors and MINUSTAH should coordinate with the ministry of justice's national strategy and provide trainers and funding for infrastructure, witness protection, forensic capabilities and legal aid.

In *the longer term*, the government and parliament need to:

- amend the constitution to establish a more rational and effective procedure for appointing higher-level judges;
- modernise the code of criminal procedure, establish a permanent panel to review cases of lengthy pre-trial detention and expand the use of fast-track procedures for prosecution of relatively minor crimes; and
- build civil society support for justice reform;

while donors and MINUSTAH should ensure their programs extend for at least five years and, together with the government and other members of the Caribbean Community and Common Market (Caricom), should create a hybrid court with Haitian and other judges and personnel from the region to try transnational crime cases.

II. DYSFUNCTIONAL JUSTICE AND FAILED INTERVENTIONS

The dysfunctional state of Haiti's justice system has impeded implementation of democratic reforms since the collapse of the Duvalier dictatorship. In spite of robust international efforts for six years following Aristide's 1994 restoration, little lasting progress has been made, and there has even been regression in some areas. The lack of political will of successive Haitian governments has been the major factor but donor approaches have also suffered from flawed methodology.¹

A. DYSFUNCTIONAL JUSTICE

1. Judicial incompetence

The lack of training and skills of lawyers and judges has been one of the most persistent problems. In spite of a 1995 decree requiring all judges to have either a *licence en droit* (the equivalent of a Bachelor's degree in law) or a diploma from the National Magistrates School, years of political appointments by the ministry of justice mean that many on the bench have no legal education or training at all, others lack a secondary education, and some are even illiterate.² The National Magistrates School required by Article 176 of the

1990 Constitution was only established in 1995.³ After graduating three classes, it ceased functioning in 2004.⁴

This lack of qualifications contributes to a myriad of failings, starting with the *juge de paix* (the justice of the peace), the lowest ranking judge⁵ in the system, with jurisdiction over minor civil and criminal matters in the smallest administrative subdivision, the commune. He or she has the closest contact with the population, handles 80 per cent of all cases outside of Port-au-Prince⁶ and exercises the dual function under the Code of Criminal Procedure of judge and judicial police. In serious cases, the *juge de paix* often makes the arrest and prepares the initial police file. These files are notoriously poorly prepared, resulting in a low conviction rate which contributes to the current crime wave. He or she also sets the criminal charge when an arrested person is first brought to court, supposedly within 48 hours. Apart from due process concerns, this means suspects in serious crimes are often improperly charged.⁷

2. Poor case management

The persistent case backlog and prolonged pre-trial detention of suspects can be traced at least in part to poor case management.⁸ Haiti has never had a uniform system for registering cases. Different forms are used in different courts. Even where a registry is maintained, it is not associated with a system of case tracking as in most judicial systems, and some judicial authorities fail even to see the significance of the process.⁹ This is compounded by the absence of any linkage between the rudimentary systems maintained by the judiciary and the nation-wide database on detainees that is uniformly maintained by correctional

¹ "Rule of Law Tools for Post-conflict States – Mapping the Justice Sector", UN High Commissioner for Human Rights, 2006, at www.ohchr.org. This report also states "reports of grave misconduct by United Nations peacekeepers – military, police and civilians – undermine efforts to build the rule of law". Media reports of instances of abuse, including that by the BBC on 30 November 2006, at <http://news.bbc.co.uk/2/hi/americas/6159923.stm>, however few in relation to the number of peacekeepers, require investigation, reporting of findings and follow up by the UN in home countries.

² "Haiti: Failed Justice or the Rule of Law? Challenges for Haiti and the International Community", Organization of American States Inter-American Commission on Human Rights, p. 62.

³ However, no regulatory framework defining its status and functioning was ever passed by the parliament.

⁴ Crisis Group interview, January 2007.

⁵ The judicial system includes a Supreme Court, five regional courts of appeal, fourteen first instance courts and between 170 and 180 *juge de paix* courts. "Haiti: Failed Justice...", op. cit., pp. 30-31.

⁶ "Social Resilience and State Fragility in Haiti, A Country Social Analysis", World Bank, 27 April 2006, para. 3.57.

⁷ Article 26 of the constitution sets the 48-hour requirement. The *juge de paix* is well known for abusing the charge of "association de malfaiteurs" (organised crime) and in some cases for charging defendants for crimes not in the Criminal Code. See discussion below. Crisis Group interview, UN Development Programme (UNDP) official, November 2006.

⁸ "Pre-trial Detention in Haiti", National Centre for State Courts (NCSC), 15 May 2006.

⁹ "Haiti Rule of Law Assessment", NCSC internal report, August 2004.

authorities across the country.¹⁰ Consequently, prison officials are not alerted to important court dates, and the penal system is all too frequently a black hole in which cases are lost.¹¹ Haiti also has never had a criminal records system. When suspects are arrested, there is no way of knowing whether they have a prior criminal record or are wanted on charges in another jurisdiction.¹²

Prosecutors, who are considered magistrates as in most Napoleonic systems, contribute to the backlog by improperly categorising cases.¹³ In Haiti, as in France, criminal offences are divided into three categories: *crime*, *délit*, and *contravention*.¹⁴ The first involves what would be considered felonies in common law countries, the third misdemeanours.¹⁵ *Délits* are offences involving a sentence of more than six months, only some of which would be considered felonies.¹⁶ The distinction is significant since *délits* should be investigated by prosecutors and tried before a criminal chamber of the first instance, unlike *crimes*, which are investigated by investigating magistrates and tried in a special court, the *Cour d'Assises*.¹⁷

It is a long-standing abuse that prosecutors, to whom all criminal cases are initially referred, assign the vast majority to an investigating magistrate regardless of whether they involve *crimes* or *délits*.¹⁸ The latter, who handles serious offences, including kidnapping, drug trafficking and organised crime, makes an independent analysis of the file and may return a case that is properly a *délit*. However, the poor procedure and the fear both prosecutors and magistrates have of being accused of corruption if they dismiss cases, results in lengthy delays.

These problems of backlog and delay are compounded by the failure to satisfy the requirement of a jury trial

in the *Cour d'Assises* for offences, classified as “crimes”, which can be considered violent or political. The Code of Criminal Procedure only requires the convening of two jury sessions a year but in practice there has rarely ever been more than one; in the recent past, there were no jury trials at all for several years.¹⁹ In 2005 and 2006 only ten to twelve cases were tried by jury in each session.²⁰ As of November 2006, there were an estimated 2,000 inmates in the National Penitentiary in Port-au-Prince whose cases required jury trials.²¹

3. Prolonged pre-trial detention

Many of the failings described above have contributed to prolonged pre-trial detention. This is a problem in all prisons²² although it is most acute in the National Penitentiary, where the number of pre-trial detainees is apparently even higher than the usual 80 to 85 per cent of inmates.²³ The most recent data indicates that upwards of 96 per cent of its inmates are in pre-trial detention.²⁴ Many hundreds more are detained, some for brief periods, in police holding cells. Furthermore, perhaps 100 inmates in the National Penitentiary have no document to prove they have served their sentence so the penitentiary administration continues to detain them.²⁵

4. Inadequate pay for judges

Judges have been consistently under-paid, but the international community has declined to act for fear that higher salaries could not be sustained. *Juges de paix* typically have been paid between \$200 and less than \$400 a month, first instance judges between \$400 and \$500.²⁶ At times, judges have earned less

¹⁰ Crisis Group interview, UNDP, November 2006.

¹¹ Crisis Group interview, Philippe Lamarche, NCSC, November 2006.

¹² Crisis Group interview, Judicial Police official, 6 November 2006.

¹³ Crisis Group interview, August 2006.

¹⁴ John Bell, *Principles of French Law* (Oxford, 1998).

¹⁵ Most common law countries have only these two categories of crimes. In the U.S., felonies are crimes punishable by more than one year in prison or death and misdemeanours are crimes punishable by less than a year in prison.

¹⁶ John Bell, *op. cit.*

¹⁷ In practice the *Cour d'Assises* is a reorganised first instance court, with its *doyen* (oldest member) as judge. See the Code of Criminal Instruction, http://www.oas.org/juridico/mla/fr/hti/fr_hti_mla_instruction.html.

¹⁸ Aucoin, Exumé, Lowenthal and Rishikof, “Assessment of the Justice Sector in Haiti”, Development Associates, 1997.

¹⁹ Crisis Group interview, November 2006.

²⁰ In 2006, these were in Port-au-Prince, Les Cayes and Jérémie, Crisis Group interviews, November 2006, January 2007.

²¹ Crisis Group interview, UNDP, November 2006. The prison population in the country was 4,623, including 2,944 in the National Penitentiary.

²² According to MINUSTAH and the International Committee of the Red Cross (ICRC), there are seventeen prisons, not including those destroyed in Gonaïves, Aquin and Petit-Goâve.

²³ “Haiti: Failed Justice...”, *op. cit.*, p. 68; “Social Resilience and State Fragility”, *op. cit.*, para 3.59; Crisis Group interview, UNDP, November 2006.

²⁴ UNDP records as of October 2006. Other sources give 83 per cent for prisons (not counting police holding cells, where many hundreds more prisoners may be held, even if mostly for short periods), Crisis Group interview, January 2007.

²⁵ Crisis Group interview, January 2007.

²⁶ Crisis Group interview, *Cour de Cassation* (Supreme Court) judge, 7 November 2006.

than police. Their economic and educational status has consistently been much lower than that of lawyers, producing animosity between the two professions. It has not been uncommon for judges to go for months without pay, a condition that contributes to making them vulnerable to corruption and intimidation.²⁷

5. Inadequate infrastructure and logistical support

Courthouses and correctional facilities are in dismal condition. Canada made a major contribution to the improvement of infrastructure in the mid-1990s by funding construction of fourteen first instance courthouses and prosecutors offices.²⁸ However, in the destruction associated with the civil uprising in 2004, many were severely damaged; all prisons were looted and in a few cases totally destroyed.²⁹ The vast majority of sites which house *juges de paix* are dilapidated, one-room structures with no sanitary facilities.³⁰

Judges at all levels receive minimal logistical support, lacking even typewriters, pens, pencils, paper and file cabinets. They often pay for the necessities themselves or rely on borrowed equipment and donated supplies.³¹ Between 1994 and 2000, the U.S. Agency for International Development (USAID) and the justice department gave some logistical support, including supplies, to courts and prosecutors but except for Canada, donors refrained from helping with infrastructure, again out of concern for sustainability.³² Finally, although one was started in the 1990's, Haiti has never had a truly functioning forensic laboratory. Criminal prosecutions often fail for lack of forensic evidence.³³

6. Lack of judicial independence

Perhaps no aspect of the justice system's dysfunction has received more attention than the lack of judicial independence.³⁴ The executive has continually

interfered in cases, resulting in "telephone justice".³⁵ As noted above, poverty has also made judges particularly vulnerable to corruption, helping account for the popular belief that justice in both civil and criminal cases is determined most often by a party's capacity to pay bribes.³⁶ Moreover, outcomes of important criminal cases are sometimes affected by the lack of security for both judges and witnesses, who are intimidated by parties well known to make good on their threats.³⁷

Haitian and international actors have tried to respond to the lack of judicial independence and corruption by reinforcing the *Conseil Supérieur de la Magistrature* (the Judicial Council) and attempting to operationalise the Judicial Inspection Unit (JIU) in the ministry of justice. The *Cour de Cassation* (Supreme Court) is required by two 1920s laws to sit as a special chamber to decide cases relating to disciplining the judiciary.³⁸

Both Haitians and internationals have called for reform of the judicial council to bring it in line with those in France and Latin America, where they are composed of officials responsible for the appointment, evaluation, promotion and discipline of judges and independent of all three branches of government. In those countries, the institution is designed to insulate the judiciary from undue executive influence³⁹ but it has never really functioned in Haiti, where all tasks associated with judicial councils in other civil law countries have been performed by the justice ministry, with obvious opportunity for executive meddling.⁴⁰ Moreover, the JIU, which in some countries acts in tandem with the judicial council to evaluate and discipline judges, has never been effective.

7. Antiquated codes

As in all former French colonies, Haiti has inherited the five classic Napoleonic Codes.⁴¹ The penal and criminal procedure codes are almost unchanged from

²⁷ Ibid.

²⁸ "Any Further Aid to Haitian Justice System Should be Linked to Performance-Related Conditions", U.S. Government Accounting Office, October 2000, p. 23.

²⁹ Crisis Group interview, MINUSTAH, November 2006.

³⁰ Daniel Jean, secretary of state for justice, explained to Crisis Group that the state does not own most of these structures; 145 of the 183 of these courts throughout the country are in rented properties.

³¹ Crisis Group interview, investigating magistrate, Port-au-Prince, November 2006.

³² "Rule of Law Assessment", op. cit.

³³ Crisis Group interview, November 2006.

³⁴ "State of the Judiciary Report", International Foundation for Electoral Systems (IFES), April 2004; "Proposed Program Of

Action to Strengthen the Rule of Law: Government of Haiti", UN Office on Drugs and Crime (UNODC)/MINUSTAH, October 2006; "The Challenge of Judicial Independence in Haiti: Theory and Practice", USAID, 2000.

³⁵ Crisis Group interview, September 2006.

³⁶ Crisis Group Latin America/Caribbean Briefing N°12, *Haiti: Security and the Reintegration of the State*, 30 October 2006, p.10.

³⁷ "Haiti: Failed Justice...", op. cit., pp. 50, 60-61.

³⁸ "The Challenge of Judicial Independence", op. cit.

³⁹ Linn Hammergren, "Do Judicial Councils Further Judicial Reform? Lessons Learned", Carnegie Paper, no. 28, June 2002.

⁴⁰ "The Challenge of Judicial Independence", op. cit.

⁴¹ Merryman, Clark and Haley, *The Civil Law Tradition: Europe, Latin America, and East Asia* (Michie, 1994).

the early 1800s,⁴² unlike in other civil law countries where they have been significantly adjusted to the modern era.⁴³ The antiquated provisions are yet another factor contributing to the lamentable state of justice. The laborious and time-consuming manner which the Code of Criminal Procedure⁴⁴ prescribes for categorising offences and assigning investigation responsibility has already been discussed.

The Code of Criminal Procedure does not provide for plea-bargaining.⁴⁵ It has presented a challenge for civil law systems everywhere since that legal tradition cannot conceive of justice being meted out through procedural mechanisms negotiated by the parties. Traditionally there was no such thing as a guilty plea since judges make the ultimate determinations of guilt or innocence, independent of the procedural postures of the parties.⁴⁶ Nevertheless, nearly all civil law systems have had to find ways to admit plea-bargaining so as to adapt to the modern realities of rising crime and the attendant case backlog.

The majority of judicial actors in Haiti acknowledge the importance of plea-bargaining⁴⁷ but nothing has been done to amend the Code to make it legal. Its absence is an obstacle to successful prosecution of higher-ups or rogue police whom gang members might be induced to identify. The matter is urgent since gang members have begun to turn themselves in as part MINUSTAH's program for disarmament, demobilisation and reintegration (DDR).⁴⁸

To avoid abusive and arbitrary practices, the Napoleonic Code of Criminal Procedure limited the arrest power of prosecutors and police to urgent circumstances (*flagrance*), such as when the accused was caught in the act of committing a crime.⁴⁹ Investigation of other serious crimes was to be done by investigating magistrates, with arrests made pursuant to warrants they issued. France and other civil law countries have modified their codes, giving

police authority to conduct preliminary investigations in serious cases. Investigating magistrates frequently assign tasks to the judicial police through an official, written delegation (*commission rogatoire*).⁵⁰ In Haiti, however, the code is unchanged. Police and prosecutors have no arrest authority except in cases of *flagrance*; investigating magistrates must pursue serious cases without their assistance. Because magistrates often receive cases weeks after the offence has been committed, the opportunity to collect evidence is minimised or lost entirely.

8. Lack of defence counsel

Haiti has never guaranteed counsel for indigent criminal defendants, and the vast majority of the population is unable to afford legal services.⁵¹ In theory, bar associations are expected to provide pro bono counsel in criminal cases. However, they do not exist in many areas, and where they do, services have been ad hoc and their quality mostly inadequate.⁵² Beginning in 1994, donors provided some legal services in some courts but this largely ended with the general withdrawal of international support in 2000.⁵³

B. FAILED INTERVENTIONS

Substantial international justice and security assistance actually began in 1993 and was concentrated during the first Prével presidency, with only limited cooperation between 2001 and 2004. Until 2001, donors spent \$43 million on aid to the justice sector, \$27 million of which came from the U.S. Administration of Justice (AOJ) Program. During the same period, more than \$65 million was spent on reforming the police. Most of the justice assistance consisted of training and logistical support, technical help and legal services.⁵⁴

USAID administered the AOJ Program through contractors (principally Checchi, Inc.), paralleled by direct support from the Department of Justice's Office of Overseas Prosecutorial Development and Training (OPDAT). The AOJ Program implemented a rudimentary case registration system in 83 *juge de paix* courts, set up judicial mentoring in 23 such courts and gave

⁴² "Haiti: Failed Justice...", op. cit.

⁴³ John Bell, op. cit. In most civil law jurisdictions, arrest and investigation powers of the police have been increased and procedures established to allow delegation of responsibility by the investigating magistrate to the police.

⁴⁴ The Code of Criminal Procedure retains the title used in post-revolutionary France (*Code d'Instruction Criminelle*).

⁴⁵ Crisis Group interview, prosecutor, Port-au-Prince, 8 November 2006.

⁴⁶ Merrymaan, Clark and Haley, op. cit.

⁴⁷ Crisis Group interview, *Cour de Cassation* (Supreme Court) judge, 7 November 2006.

⁴⁸ Crisis Group Briefing, *Security and the Reintegration of the State*, op. cit., p. 13.

⁴⁹ Merrymaan, Clark and Haley, op. cit.

⁵⁰ John Bell, op. cit.

⁵¹ "Social Resilience and State Fragility", op. cit., para 3.57.

⁵² Aucoin, Exumé, Lowenthal and Rishikof, op. cit., pp 41-43; also, Aucoin, "Assessment of USAID's Program of Legal Assistance to Indigent Prisoners in Haiti Administered by Checchi and Company, Consulting, Inc.", USAID/Haiti, August 1999.

⁵³ "Any Further Aid", op. cit.

⁵⁴ Ibid.

grants to twelve NGOs, four bar associations and three law schools in six of seven “model” jurisdictions.⁵⁵ It also offered education to paralegals, created a limited civic education program, gave technical and logistical help to the Magistrates School and prepared draft laws on independence of the judiciary.

Other donors were also engaged, including France, particularly with the Magistrates School, Canada, the OAS and the UN. Most donors active in the justice field were also involved in establishing the *Bureau de Contrôle de la Détention Préventive* (BUCODEP), which involved setting up a courtroom in the National Penitentiary. As part of that program, staff reviewed prison records to identify cases of prolonged pre-trial detention, which were then referred to the appropriate courts with a request to set trial dates at the BUCODEP facility.⁵⁶

OPDAT set up a case-tracking program in the prosecutor’s offices in the seven “model” jurisdictions. It also offered short-term training to judges, prosecutors and police at the Magistrates School, until the justice ministry ordered it ended on the grounds that judges should only be trained after all had been vetted and the incompetent and corrupt ones removed. Subsequently, OPDAT funded salaries for the school’s faculty and staff and worked with the French and the UN Development Programme (UNDP) to prepare the curriculum for the first graduating class. Not long after, OPDAT ended its support of the school, although French support continued until the school closed in 2004.⁵⁷

Under the AOJ legal services program, law students and paralegals provided legal representation to indigent defendants in *juge de paix* courts with little or no supervision, and lawyers were paid to provide services in the first instance courts. The quality of those services was not monitored and drew criticism. A Belgian NGO (Réseau des Citoyens), in a project taken over and funded by UNDP, offered legal services in Cap-Haïtien, the seventh “model” jurisdiction.⁵⁸ A judicial assistance NGO still functions there with support from the International Legal

Assistance Consortium.⁵⁹ Canada aided case management in the “model” jurisdictions.⁶⁰

In 1997 the ministry of justice established a Law Reform Commission, which received USAID and European Union (EU) advice and technical assistance and presented proposals for reforming the outdated codes to the president at a 1998 international conference.⁶¹ In October 2000, however, the U.S. Government Accounting Office (GAO) concluded that millions of donor dollars had produced little or no progress in the justice and security sectors due to almost total lack of political will in the Haitian government.⁶² It called for terminating the AOJ Program and recommended future aid be given to civil society to build popular demand for justice reform and to government institutions only when performance-based criteria were in place.⁶³ Shortly thereafter the AOJ Program and most other donor aid was ended.

C. LESSONS LEARNED

The previously cited studies and evaluations of the justice reform efforts in the 1990s described the following gaps in concept and implementation that undermined progress, regardless of the degree of political commitment:

- Lack of donor coordination. Several reports analysing international assistance to the justice sector prior to 2000 have cited this as a primary factor leading to failure. Interventions were ad hoc, incoherent and often redundant.⁶⁴ Perhaps nowhere was this more evident than in efforts to help in the writing of laws. Donors prepared inconsistent drafts on reform of the judicial council, the status of the judiciary and the Magistrates School, and not a single law or decree dealing with those subjects was adopted.⁶⁵
- Lack of strategic planning and a holistic approach. This contributed to the problems in donor coordination. Neither the Haitians nor internationals developed a comprehensive or coherent reform strategy in the 1994-2000 period.⁶⁶ Donors emphasised police and prosecutorial reforms

⁵⁵ Ibid.

⁵⁶ “Rule of Law Assessment”, op. cit.

⁵⁷ Between 1997 and 2003, the Magistrates School graduated three classes of judges. Most of the 130 trained either have been removed or have fled the country; 29 graduates, not initially appointed *juges de paix* because of government reluctance, were appointed in 2004. Crisis Group interview, 11 January 2007.

⁵⁸ Aucoin, Exumé, Lowenthal and Rishikof, op. cit., p. 41.

⁵⁹ Crisis Group interview, January 2007.

⁶⁰ “Rule of Law Assessment”, op. cit.

⁶¹ “Haiti: Failed Justice...”, op. cit.

⁶² “Any further Aid”, op. cit.

⁶³ Ibid.

⁶⁴ Jamal Benomar, “Rule of Law Assistance in Haiti: Lessons Learned”, World Bank Conference, 8-12 July 2001.

⁶⁵ “Rule of Law Assessment”, op. cit.

⁶⁶ Ibid.

but mostly ignored the judges, whose incompetence negated improved performance in those areas.⁶⁷

- Donor driven interventions and lack of civil society involvement. Decisions were made without obtaining adequate Haitian acceptance.⁶⁸ Failure to organise supporters of justice reform within and outside of government meant there was little or no local ownership and allowed spoilers to undermine the effort by calling it one designed by “blans” (white foreigners).⁶⁹
- Lack of focus in training and education. Programs at the Magistrates School and in the field failed to emphasise investigation techniques even though poorly conducted investigations and reports by police and *juges de paix* were frequently identified as principal justice sector weaknesses.⁷⁰ Programs at the school frequently emphasised academic matters at the expense of practical training. There were also only limited and short-term efforts to bring judges, prosecutors and police together in training.
- Emphasis on quick fixes. Most donor interventions aimed for results in an unrealistic two years or less.⁷¹
- *Poor design and implementation of case management systems.* The rudimentary systems implemented under the AOJ Program were almost entirely ineffective in lessening backlogs and pre-trial detention periods. Although the OPDAT system in prosecutors’ offices was better designed, lack of integration with the rest of the system negated its effectiveness.⁷²
- Failure to “train the trainers”. Since donors did not prepare local actors to train others, the new case management systems were not sustainable once the donors left.⁷³
- Insufficient material support. Although Canada did much for justice sector infrastructure, little was done to build or repair *juge de paix* courthouses, and donors generally did not contribute to improving the economic status of the judges.

III. TODAY’S CHALLENGES

Given the almost total withdrawal of international support in 2000, except for civil society, it is not surprising there has been little progress in justice reform. However, the impact of intervening events would have been more difficult to predict. The civil strife leading to Aristide’s ouster included destruction of justice sector infrastructure that left Haiti less equipped to cope with an “acute rise in criminality, the proliferation of armed gangs, the uncontrolled drugs and arms trade and the corruption of state institutions, especially the police”.⁷⁴ Crime has become increasingly transnational,⁷⁵ with a tragic impact on daily life. Armed gangs, in part a by-product of the civil strife, routinely kidnap for ransom, and often rape, female victims.⁷⁶ A considerable portion of Colombian cocaine entering the U.S. is transhipped through Haiti.⁷⁷ There is evidence of a higher level of organised crime and allegations that Haitians deported from the U.S. who have served sentences there mastermind some of it. In a recent kidnapping case, there were reports of deportee involvement.

After a government complaint, the U.S. delayed deportation of some 450 before the Haitian elections but returned 743 in 2006. The concern was sufficient for the U.S. to fund, in early 2007, an International Organisation of Migration registration and reinsertion program designed to reduce the likelihood of deportees moving immediately into criminal activity. There are also suggestions for efforts such as halfway houses and orientation of deportees before they leave the U.S.⁷⁸ Rogue police have become part of some

⁷⁴ “Haiti: Failed Justice...”, op. cit., p. 3. “... violent outbreaks, confrontations with armed groups and large demonstrations, which often result in numerous casualties, and frequent acts of murder, rape, kidnapping, public lynching, and abuse, contributing to the crime rate that has been steadily rising for the past two years, and more acutely since January 2005”, p. 33.

⁷⁵ See Crisis Group Briefing, *Security and the Reintegration of the State*, op. cit., p. 6.

⁷⁶ For more on the gangs, see “Haiti: Failed Justice...”, op. cit., and “Proposed Program of Action”, op. cit., p. 3.

⁷⁷ Some 15 per cent according to “Proposed Program of Action”, op. cit., p. 3. U.S. estimates in recent years have ranged from 8 to 14 per cent., “International Narcotics Control Strategy Report, 2006”, Department of State, at <http://www.state.gov/p/inl/rls/nrcrpt/2006/>; Crisis Group interview, Washington, October 2006; Crisis Group Briefing, *Security and the Reintegration of the State*, op. cit., p. 13.

⁷⁸ “Haiti: Failed Justice...”, op. cit.; see also Michèle Oriol, “Population, migration et violence urbaine: la situation sociale d’Haïti en 2005”, Situation économique et sociale d’Haïti en

⁶⁷ “Social Resilience and State Fragility”, op. cit., para 3.50.

⁶⁸ Benomar, op. cit.

⁶⁹ Crisis Group interviews, September 2006.

⁷⁰ Crisis Group interview, November 2006.

⁷¹ Benomar, op. cit.

⁷² Crisis Group interview, UNDP, November 2006.

⁷³ “Rule of Law Assessment”, op. cit.

criminal operations and have been arrested in connection with kidnappings.⁷⁹

The weak justice system is no match for these realities, particularly given that UN-supported police reform is just beginning, and justice reform is at an even less advanced stage.⁸⁰

A. COURTS AND PROCEDURE

1. Case management

There has been a regression in case management. Only remnants of the rudimentary systems established under the AOJ Program remain, while those implemented by OPDAT have been reduced to simple systems of registration.⁸¹ They are not consistent with each other and are of little use since they do not lend themselves to analysis of case flow between the various judicial actors and are not linked to the databases of correctional authorities.⁸² The director of the National Centre for State Courts (NCSC) Judicial Strengthening and Reform Project⁸³ reports that a recent review of fifteen registry books found records that could locate only seventeen files.⁸⁴ Precise figures on case backlogs are virtually impossible to obtain. For example, an investigating magistrate could only estimate he was handling about 100 cases, approximately the same, he said, as most of his colleagues.⁸⁵

2005, UNDP ; Crisis Group interview, Washington, January 2007.

⁷⁹ Crisis Group interview, November 2006.

⁸⁰ Between September 2006 and September 2007, the Haitian Government expects to spend approximately 248 million gourdes (about \$6.37 million) on the judiciary (Judicial Council and Courts), representing less than 0.7 percent of total expenditure. However, the justice ministry budget will be significantly increased: 5.6 billion gourdes, some \$143.5 million, against 2.4 billion gourdes for 2005-2006 ministry expenditures for the Judicial Affairs Directorate, Office of the State Secretary for Judiciary Reform, the Magistrates School and the National Identification Office. The Haitian National Police (HNP) will absorb 80 per cent. Loi de Finances 2006-2007 and Etat d'exécution des dépenses budgétaires par institution et par secteur durant la période allant d'Octobre 2005 à Septembre 2006, Ministry of Economy and Finance website, <http://www.mefhaiti.gouv.ht>.

⁸¹ Crisis Group interview, November 2006

⁸² Crisis Group interview, UNDP, November 2006.

⁸³ This project is funded by USAID/Haiti.

⁸⁴ Crisis Group interview, November 2006.

⁸⁵ Crisis Group interview, investigating judge, November 2006. He complained of being overburdened and attributed

Records of arrests are still non-existent, except for the database the judicial police in Port-au-Prince say they have established. Similar data is not routinely recorded elsewhere in the country, and there are no links between the jurisdictions.⁸⁶ There are also virtually no records of criminal convictions other than what is maintained by correctional authorities, and, again, there are no links between that database and the courts and police.⁸⁷ When arrests are made, there is no system for determining whether the suspect is wanted elsewhere or has a prior record. This helps criminals to move freely about the country and is a significant obstacle to addressing the rise in organised crime.

2. Judicial independence and integrity

Some recent developments fleetingly promised to improve judicial independence. In April 2006 a presidential decree established a judicial council, supplanting the almost inactive institution established in the 1920s,⁸⁸ and judges and prosecutors were named to it. The decree granted much broader powers to the institution,⁸⁹ whose members were to have some say in judicial appointments, and established a Judicial Inspection Unit under it.⁹⁰ However, the decree was revoked by the new minister of justice, René Magloire, whose own draft law was re-examined after consultations with national and international experts and presented to the cabinet in mid-January.

Judicial independence also continues to be hampered by inability to follow the procedure of Article 175 of the 1987 Constitution, under which the president is to appoint first instance courts judges and *juges de paix* from lists of three names per seat submitted by territorial assemblies at the departmental and communal levels respectively. Communal and municipal assemblies are directly elected, while the departmental assemblies are chosen by the communal

delays in the system to backlog and the extreme lack of material and logistical support.

⁸⁶ Crisis Group interview, Judicial Police official, November 2006.

⁸⁷ Crisis Group interview, November 2006.

⁸⁸ "Huit Magistrats pour partir en guerre contre la corruption de l'appareil judiciaire", *Alter Presse*, 10 April 2006.

⁸⁹ It granted the judiciary for the first time budgetary independence and broad administrative powers, while providing, however, only authority to suspend, not remove, judges in cases of serious ethical violations or incompetence.

⁹⁰ Décret Créant Un Organe Dénommé Conseil Supérieur du Pouvoir Judiciaire en Lieu et Place du Conseil Supérieur de la Magistrature, Journal Officiel de la République d'Haïti, 16 January 2006.

and municipal assemblies acting together.⁹¹ The departmental institutions have never been established, so the appointment procedure has never been followed. However, once the results of the 3 December 2006 territorial assembly elections are available, the necessary local assemblies will be in place to permit selection of the departmental assemblies. The constitutional procedure should henceforth be applied.

Nevertheless, while this should prevent undue executive influence, it will not guarantee appointment of competent judges. Other civil law countries protect judicial independence by giving nomination power to judicial councils, with judges as members who are better placed than local assemblies to evaluate qualifications.⁹² There is also a risk the constitutional framework for appointment of judges at local and departmental level could lead to serious tension within communities. Close monitoring and early warning will be required to defuse potential violence.

Judicial discipline is another problem area. The code of ethics developed by the main judges' association (Association Nationale des Magistrats Haïtiens, ANAMAH) has never been enacted into law. Most judges are not aware of its existence, and it is without effect.⁹³ The law in force, which dates from the 1920s, provides limited sanctions. For example, a judge may be removed only if twice suspended.

One positive development has been the creation of two associations of judges, ANAMAH and a second specifically for women.⁹⁴ Such associations have been important sources of support for the bench in other countries, often encouraging efforts by the judiciary to stand up to other branches of government.

3. Police-judiciary relations

Police-judiciary relations, always problematic, are tenuous at best,⁹⁵ with mutual finger pointing in response to allegations of corruption. Police express frustration, claiming that after they forward criminal cases to judicial authorities, they are never called on to take part in a subsequent criminal procedure, and

defendants are most often released.⁹⁶ Judges and prosecutors complain that police preparation of criminal files is as lamentable as ever. They admit to frequent dismissals and release of defendants but attribute this to the poor quality of the files. One prosecutor says the files may contain lengthy narratives but all too often “*il n’y a rien dedans*” (“There is nothing in them”).⁹⁷

Recent scandals in Port-au-Prince are illustrative.⁹⁸ First instance magistrates in the capital went on strike for a month in reaction to an inflammatory speech by the director of police, Mario Andresol, on 18 December 2006 at an officers graduation ceremony.⁹⁹ Separately, a kidnapping suspect arrested by the police appeared before an investigating magistrate, who then questioned him as to where he had obtained the gun found in his possession. Reportedly the Director of the Judicial Police, Michael Lucius, was mentioned by name. He denied any involvement¹⁰⁰ but the judge issued a request that he appear to answer questions. Lucius refused, saying the judge was acting out of personal animosity, and asked, unsuccessfully, that the Supreme Court order the judge to recuse himself. The investigating magistrate then issued an arrest warrant for Lucius, who heads the institution responsible for executing the warrant. The affair, which received much media attention and was debated in parliament,¹⁰¹ has been temporarily resolved: the investigating magistrate has recused himself, and Lucius has stepped down while another investigating magistrate pursues the investigation.¹⁰²

There is still virtually no provision for representation of indigent clients in criminal cases. All pre-2000

⁹¹ Crisis Group interview, Henri Dorléans, former minister of justice, November 2006.

⁹² Linn Hammergren, *op. cit.*

⁹³ This code was developed as part of IFES support to civil society under the USAID project describe above; Crisis Group interview, January 2007.

⁹⁴ “State of the Judiciary Report”, *op. cit.*; “Rule of Law Assessment”, *op. cit.*

⁹⁵ “Conflit Police/Justice. Le RNDDH invite les uns et les autres à respecter la dignité”, press release, 5 January 2007.

⁹⁶ Crisis Group interview, Judicial Police official, Port-au-Prince, November 2006. Some of the frustration stems from the limited role accorded by the antiquated Code of Criminal Procedure, which allows only judges to investigate serious cases. Some officers fail to understand the Code. See also “Conflit Police”, *op. cit.*

⁹⁷ Crisis Group interview, prosecutor, Port-au-Prince, 8 November 2006.

⁹⁸ Three burglaries of the first instance court of Port-au-Prince have been at the centre of infighting between the police and magistrates widely covered by the press. See, for example, “Cambriolage ou pas au parquet de Port-au-Prince: le dossier se complique après l’intervention du ministre de la justice”, Agence Haïtienne de Presse, 11 January 2007.

⁹⁹ “Conflit Police”, *op. cit.* Judges went back to work on 22 January 2007.

¹⁰⁰ Crisis Group interview, November 2006.

¹⁰¹ “Démission officielle du Directeur central de la police judiciaire”, *Alter Presse*, 14 November 2006.

¹⁰² “Affaire de kidnapping: l’ancien DCPJ Michael Lucius entendu par un nouveau juge instructeur”, *Alter Presse*, 12 January 2007.

legal aid programs for such defendants have been ended without replacement. Bar associations in each jurisdiction still offer ad hoc representation but in the vast majority of cases criminal defendants appear without legal counsel.¹⁰³

All these factors contribute to the judiciary's low standing. A recent report on pre-trial detention placed the conviction rate in criminal cases at 3 per cent,¹⁰⁴ while 80 per cent of all files referred to prosecutors are *classés sans suite* (dismissed).¹⁰⁵ Defendants continue to be inappropriately charged under the catch-all of *association de malfaiteurs* (association of evil doers, organised crime);¹⁰⁶ 30 per cent of National Penitentiary inmates are held on that charge, while no other serious crimes account for more than 10 per cent, and all *délits* account for only 28 per cent.¹⁰⁷ Such imprecision bodes poorly for prioritising prosecution of serious crimes.¹⁰⁸

B. CORRUPTION

Corruption is at an all time high in all levels of society. In the most recent Transparency International "Corruption Perceptions Index", Haiti received the worst score of all 163 countries.¹⁰⁹ According to the UN Office on Drugs and Crime's October 2006 report, 90 per cent of entrepreneurs and 60 per cent of households believe corruption has increased in recent years, and 60 per cent of the police are considered corrupt (the chief of the National Police and MINUSTAH place that number closer to 25 per cent).¹¹⁰ Complete vetting of the police force is obviously vital both to remove those who actually are corrupt and to restore public confidence.

Some observers report a new level of organised corruption in the judiciary, saying that police, prosecutors and judges sometimes act jointly in accepting bribes for the release of criminal defendants.¹¹¹ Nevertheless, there has been no action against judicial authorities. According to a 2006 report of the Inter-

American Commission, no judge has ever been prosecuted for corruption. In December 2005, a presidential decree ordered the forced retirement of five members of the Supreme Court but without specifying the grounds, thus leaving unclear whether this was an instance of executive interference in judicial affairs or of corruption at the highest judicial level.¹¹²

C. SECURITY AND WITNESS INTIMIDATION

Threats from parties who want to influence the outcome of criminal trials are not new in Haiti but the rise in criminal gang activity has made matters worse.¹¹³ There is neither a witness protection program nor security in courtrooms.¹¹⁴ In September 2006, an activist, Bruner Esterne, was murdered, apparently to silence an eyewitness to a massacre allegedly perpetrated by armed gangs with the help of rogue police.¹¹⁵ In another example of the atmosphere of intimidation, the trial of Louis Jodel Chamblain was held in a suburb of Port-au-Prince at midnight allegedly out of concern for security, although even more likely to avoid witnesses to the acquittal of the defendant, who had been convicted in absentia for his role in the infamous Raboteau massacre of the early 1990s.¹¹⁶

D. PRISONS

The aid UNDP provided in the 1990s resulted in significant improvements to the sanitary, medical and nutritional conditions of detention. However, the destruction following Aristide's departure was a major setback. While conditions have again improved, particularly in the National Penitentiary, the legacy of that destruction and the insecurity associated with it are palpable both in that prison and in others throughout the country. Virtually all are critically overcrowded. The atmosphere in the National Penitentiary has never been more tense.¹¹⁷ There have been several uprisings and escapes, one of the latter

¹⁰³ Crisis Group interview, November 2006.

¹⁰⁴ "Pre-trial Detention", op. cit. In the U.S. it ranges from 64 per cent to 80 per cent for crimes from drug trafficking to murder.

¹⁰⁵ Crisis Group interview, NCSC, November 2006.

¹⁰⁶ Crisis Group interview, November 2006.

¹⁰⁷ UNDP database, October 2006.

¹⁰⁸ Some authors interpret these statistics differently, as reflecting the development of gang activity, Oriol, op. cit., p. 54.

¹⁰⁹ "Corruption Perceptions Index 2006", Transparency International, November 2006.

¹¹⁰ Crisis Group interview, MINUSTAH, November 2006.

¹¹¹ Crisis Group interview, August 2006.

¹¹² The decree appeared to violate the constitution, since under Article 185, only the Senate can judge members of the Supreme Court. However, the constitution does not indicate the appropriate sanction for crime or impropriety – another example of a situation where there may be no alternative but for the executive to act in the absence of appropriate institutions and procedures.

¹¹³ "Social Resilience and State Fragility", op. cit., para 3.68.

¹¹⁴ Crisis Group interview, NCSC, November 2006.

¹¹⁵ "Haiti: Fear for Safety/Death Threats", Amnesty International, 28 September 2006.

¹¹⁶ "Haiti: Failed Justice...", op. cit.

¹¹⁷ Crisis Group interview, UNDP, November 2006.

involving more than 400 prisoners in May 2005.¹¹⁸ The most recent escape, in December 2006, has helped stimulate overall public debate on insecurity and the justice sector.¹¹⁹

In Gonaïves, Aquin and Petit Goâve, where prisons were totally destroyed, prisoners are now housed in police holding cells whose conditions rival the worst of those in the early 1990s before the international intervention. Adolescents are housed with adults in cells no larger than six square metres, and disease is rampant.

IV. CURRENT REFORM EFFORTS

A. PROGRAMS

Justice Minister Magloire has approved a comprehensive plan¹²⁰ for better coordination of Haitian and international activities. Key goals include building annexes for *juge de paix* courts; creating specialised courts for money laundering, drug trafficking, kidnapping, terrorism and corruption; new judicial positions; at least two jury sessions per year; special units of police, judges and prosecutors; and reduction of pre-trial detention. The plan also seeks better investigation of police abuse and major crimes and reorganisation and strengthening of the ministry's Judicial Inspection Unit (JIU) and of criminal records-keeping. It acknowledges problems between police and the courts and proposes to improve relations through joint training and creation of special units of police, judges and prosecutors. Finally, it calls for laws dealing with the judicial council, the status of magistrates and the Magistrates School, as well as modernisation of the Code of Criminal Procedure and the Penal Code.

The ministry has issued a regulation establishing a commission of judges and prosecutors to review pre-trial detention periodically, which does not, however, envisage retaining the courtroom set up in 2005 in the

National Penitentiary but used only sporadically.¹²¹ As a further part of the strategy for reducing pre-trial detention and accelerating criminal procedure, the ministry has begun implementing a never-used, fast-track procedure under a 1927 law, "*comparution immédiate*" ("immediate appearance"), which can be applied for offences categorised as *délits* under "flagrant" circumstances. It mandates police to prepare an arrest report immediately and bring the suspect before a *juge de paix* for prompt referral for interrogation to the prosecutor, who may bring him or her before the appropriate chamber of the first instance court the same day.¹²² This procedure, which the prosecutor's office in Port-au-Prince has now used for ten or twelve cases, could lessen the procedural bottleneck.¹²³

It is encouraging that much in the ministry's plan has been called for in donor reports on judicial reform. The goal of creating special courts is clearly aimed at the security crisis. If the reforms are to become reality, however, the government will need to demonstrate new political will, donors will need to assist, and financial resources, in accordance with the extended Interim Co-operation Framework (ICF) and the long-term National Development Strategy that is being prepared, will be needed to match the ambitions.¹²⁴

After a long gap, donors are reengaging in the justice sector. Although there was no formal Haitian coordination in 2006, they consulted informally to find common ground. At the same time, the ministry has consulted broadly, with MINUSTAH and others, on its plan, including the draft laws to be sent to the parliament. It took an important step when it presented three of these to the cabinet on 23 January 2007 and received encouragement from the prime

¹²¹ Crisis Group interview, MINUSTAH, November 2006. The regulation provides merely that judges be informed of cases involving prolonged pre-trial detention.

¹²² Loi du 6 mai 1927 sur le flagrant *délit* correctionnel, Bulletin Des Lois & Actes 1927, pp. 81 et. ff.

¹²³ Crisis Group interview with a prosecutor, November 2006.

¹²⁴ Although it envisages significant investment in courts, the 2006-2007 finance law does not mention expenditure for special chambers to deal with serious crimes, Ministry of Economy and Finance website at <http://www.mefhaiti.gouv.ht>. The Interim Cooperation Framework is a donor-supported economic, social and political recovery program. An interim development strategy was approved for two years after Aristide's departure in 2004 and has been extended for another year while the government and donors work on the permanent concept. See remarks by the World Bank country director for Haiti, Caroline Anstey, at the Madrid Donors Conference, November 2006, available at <http://web.worldbank.org>.

¹¹⁸ "Haiti: Failed Justice...", op. cit.

¹¹⁹ "15 détenus dangereux s'évadent en creusant un trou dans une prison", Agence France-Presse, 7 December 2006.

¹²⁰ "Premier Menu Législatif" presented by the Ministry of Justice and Public Security to donors, September 2006; "Plan d'action du Ministère de la Justice et de la Sécurité Publique Dans le Cadre de la Réforme Judiciaire", document shared by NCSC, 2006.

minister and the president to take them to the parliament.¹²⁵

In the framework of ICF training activities for judiciary personnel outside the capital, the U.S. works in Cap-Haïtien and St Marc, France in Les Cayes and Canada in Gonaïves.¹²⁶ The International Organisation of La Francophonie (OIF) has worked jointly with MINUSTAH to organise and provide training to *juges de paix* in provinces where other donors are not present.

Since March 2006, Canada has partly funded a three-year UNDP program up to \$5 million¹²⁷ and, with the European Commission, co-financed a three-year, €6 million program implemented by the OIF to support the justice sector in non-criminal areas. That program, begun in early 2006 but delayed by the need for new laws on the status of magistrates, the judicial council and the Magistrates School, has three areas of concentrations:

- ❑ citizen access to justice, including through training, support to women victims of sexual abuse, legal aid;
- ❑ strengthening of institutions; and
- ❑ circulation of justice-related information, such as by putting the official journal and 100 important Supreme Court judgements on line.

Canada also is giving the ministry money for reconstruction of courthouses, supporting capacity building in the Haitian National Police (HNP), particularly the office of the inspector general, and planning to participate in funding of reconstruction of prison infrastructure.¹²⁸

USAID funded one project in 2001, allocating money to the International Foundation for Electoral Systems (IFES) to encourage demand for justice reform by civil society. ANAMAH and the women's judges association were established with funds from that

grant.¹²⁹ France and Canada also support some NGOs.¹³⁰

USAID signed contracts with NCSC in 2004-2005, to run through 30 September 2007, to restart its judicial sector aid¹³¹ and is now preparing a new design.¹³² Under the current grant, NCSC has funded training in court procedures and case management and stipends, including for defence counsel, so that pre-trial detentions could be reduced by special sessions of the first instance courts during the normal judicial summer vacation. At the first such special session, in 2005, 81 cases were heard, 73 decisions were rendered affecting 117 detainees, 72 individuals were convicted and 45 acquitted. The grant has also funded defence counsel in jury sessions since 2004.¹³³ NCSC is doing case-flow analysis to help with design of more rational and effective case management and has begun working with the two new judiciary committees in both chambers of parliament to build their legal drafting skills in connection with the laws proposed in the justice ministry's plan.

USAID is also giving support to the ministry's Judicial Inspection Unit, the bar, the two associations of judges for legal aid and the Magistrates School for case-management training. As an anti-corruption measure, it is financing civil society court monitoring in every jurisdiction and roving *juges de paix*.¹³⁴

Although MINUSTAH does not have a budget of its own to implement justice programs, it has received funds from such donors as the EU, the Canadian International Development Agency (CIDA) and USAID. Its justice unit has advised courts, provided training and supported the penitentiary sector by helping to secure some prisons and giving aid to

¹²⁵ Crisis Group interview, January 2007.

¹²⁶ Crisis Group interview, January 2007.

¹²⁷ "The program includes activities in the areas of institutional strengthening, reinforcement of case-management procedures (chaîne pénale), the prison system, legislative reforms and training.", "Canada steps up support for planned reform of Haiti's justice system", UNDP News Room, 7 March 2006.

¹²⁸ Crisis Group interview, January 2007.

¹²⁹ The grant followed the recommendations of the 2000 GAO report to encourage public support for the judicial reforms discussed above. Crisis Group interview, November 2006.

¹³⁰ Among these are the Réseau National de Défense des Droits Humains (National Human Rights Defence Network, RNDDH) and the Centre Oecuménique des Droits de l'Homme (Ecumenical Centre for Human Rights, CEDH). CEDH is also a member of the Forum Citoyen pour la Réforme de la Justice (Civic Forum for Justice Reform). See <http://www.forumcitoyen.org.ht>. Other NGOs have received some support, such as the Comité des Avocats pour le Respect de la Liberté Individuelle (Committee of Lawyers for the Respect of Individual Freedom, CARLI) and the newer Commission Citoyenne pour l'Application de la Justice (Civilian Commission for the application of justice).

¹³¹ Crisis Group interview, November 2006.

¹³² The design team plans to finalise its request for bids in March 2007, Crisis Group interview, Washington, January 2007.

¹³³ Crisis Group interview, November 2006.

¹³⁴ Crisis Group interview, November 2006.

detainees¹³⁵ and training and support to administrators.¹³⁶ With UNDP and the OAS, it is training *juges de paix* and prosecutors, with specific focus on the fast track procedure for *délits* initiated by the ministry. It plans to provide joint training for all judicial actors at the Magistrates School, and in the first trimester of 2007, to start a “train the trainers” program.¹³⁷ With France it is supporting a joint training program in judicial/police relations. Together with UNICEF, MINUSTAH provides technical expertise and training on juvenile justice.¹³⁸ Meanwhile, UNDP continues to maintain the database for correctional facilities throughout the country, and the UN Office for Public Services (UNOPS) has agreed to refurbish courthouses damaged in the civil strife at the time of Aristide’s departure.¹³⁹

B. EVALUATION

The post-2004 interventions by both local and international actors clearly reflect some lessons learned from the previous era. It is premature to evaluate donor contributions fully since the activities are just getting off the ground. It is also too early to assess whether donors will again seek quick fixes or will take more measured approaches, with realistic time lines. Likewise, the ministry of justice plan is only just off the drawing board.

Nor is it yet certain that all the lessons have been learned. Plans to train judges, prosecutors and police together at the Magistrates School are encouraging but it is not clear whether this training will be integrated into a holistic strategy. For example, when case management systems are designed, it is essential they be used consistently in all training and implemented uniformly in all jurisdictions, in order to reduce tensions between judicial actors. Neither is it yet known how extensive the range of subjects will be in the new train-the-trainers approach.

A few specific capacity-building measures appear to have been overlooked. The judicial police need training on preparing police reports. Prosecutors and

investigating magistrates must be part of that process so they can be clear about what they need to prosecute criminal cases. Donors will need to develop training programs to improve the techniques of investigating magistrates. Perhaps most importantly, the proposed programs are not sufficiently targeted to address the crime wave. For example, although the ministry’s plan does envisage special chambers to deal with drug trafficking, kidnapping, terrorism, corruption and money laundering, as well as creation of special units of judges, prosecutors and police, the resources, timetable and implementation strategy are not yet clear.

V. THE WAY FORWARD

A two-track reform strategy by the government, supported by the donors and MINUSTAH, is needed both to show results in 2007 and to sustain and expand those reforms.

For the short term,¹⁴⁰ the government and parliament should immediately develop and adopt laws to:

- ❑ Establish the status and rights and duties of magistrates.
- ❑ Establish a judicial council (*conseil de la magistrature*) with, among other powers in the ministry’s draft law, authority to remove judges for ethical violations, especially in cases involving drug trafficking, kidnapping, terrorism, corruption, money laundering, human trafficking and organised crime. The law should also give individuals the right to file complaints regarding ethical violations with the council and require prosecution of judges suspected of having committed crimes in connection with such violations.
- ❑ Establish the Magistrates School with clear legal status and coordinate courses with university law studies.
- ❑ Amend the Code of Criminal Procedure to allow plea-bargaining.
- ❑ Create a special criminal court chamber with jurisdiction over cases involving drug trafficking, kidnapping, terrorism, corruption, money

¹³⁵ MINUSTAH works with the ICRC on a nutrition program in prisons.

¹³⁶ Sixteen penitentiary experts, including three Americans and eight Canadians are to be provided.

¹³⁷ Crisis Group interview, MINUSTAH, November 2006.

¹³⁸ “The Juvenile court of Port-au-Prince has been paralysed for several months because of the refusal of judges assigned to the court to work in the shanty town of Bel-Air, where it is located”, “Report of the Secretary General on the United Nations Stabilisation Mission in Haiti”, 19 December 2006, p. 7.

¹³⁹ Crisis Group interview, MINUSTAH, November 2006.

¹⁴⁰ “Short term” as used here refers to actions that should begin as rapidly as possible within the current year; “longer term” refers to those that may not begin this year (but hopefully not later than 2008) and may extend well into the future.

laundering, human trafficking and organised crime, and equipped with a special corps of investigating magistrates, prosecutors and police. Its prosecutors should be given arrest powers beyond those which exist in cases of flagrante, its police authority to conduct preliminary investigations and its special investigating magistrates the possibility to delegate tasks to the police. A special commission should be established to nominate the chamber's judges,¹⁴¹ and the right to jury trial before the chamber should be guaranteed.

- Operationalise the JIU and link it to the evaluation of judges. It should be required to refer judges to the judicial council when it suspects violations of the code of ethics and be empowered to refer judges suspected of crimes to the special chamber.
- Establish a witness protection program, with initial implementation in the special criminal chamber which would try the most serious crimes. The program might be modelled on the one at the International Criminal Tribunal for the former Yugoslavia or on those in some of the countries of the former Yugoslavia. It should include, inter alia, 24-hour police protection during a trial and provision in special cases for a new identity and relocation.

Donors and MINUSTAH should in the short term:

- Monitor and give early warning about potential tension and violence related to the replacement of judges at local and departmental levels.
- Strengthen the legitimacy and effectiveness of the proposed special criminal court chamber by helping defendants appearing before it afford defence counsel; hiring staff with appropriate experience in the investigation and prosecution of the relevant crimes to train Haitian judicial personnel assigned to it; providing the necessary material and logistical support, including, if

necessary, salary supplements, and security by hiring police guards and taking other measures deemed necessary; and establishing a forensics laboratory for use in cases before the special tribunal.

- Fund more penitentiary infrastructure and establishment of a witness protection program.
- Provide training to parliament in general and the recently-constituted judiciary committees in particular, with a focus on development of the laws in the justice ministry plan. It will not suffice for foreign experts merely to offer drafts. That methodology has consistently failed. The goal must be to give key legislators the skills to develop and draft the legislation themselves.

For the longer term, the government and parliament should:

- Amend the constitution to provide for a more rational, effective procedure for judicial appointments. This would go a long way toward ensuring competency on the bench.
- Amend the Code of Criminal Procedure so as generally to grant prosecutors arrest powers outside of flagrante cases, police the power to conduct preliminary investigations and investigating judges the authority to delegate investigatory tasks to the judicial police in any criminal case; implement fully the fast track procedure for prosecuting *délits* ("comparution immédiate"); make permanent the panel that has been created for review of cases of long pre-trial detention; and adopt a law increasing the number of jury sessions held in the Cours d'Assises each year. These steps would all serve to reduce pre-trial detention and accelerate the processing of criminal cases.
- Set up a panel for periodic review of dismissals by prosecutors so as to identify cases where those dismissals result from corruption or failings such as poor file preparation by police.
- Amend the Code of Criminal Procedure to eliminate the police powers of the *juges de paix*, but only after the reform of the HNP currently under way has increased the number of well-trained police officers.¹⁴² This should minimise dismissals resulting from incomplete police files and curb abuse associated with improper criminal charges.

¹⁴¹ The law on the special chamber will need to be carefully drafted to avoid conflict with Article 173-2 of the constitution, which forbids any "Extraordinary Tribunal" but allows other tribunals to be created. The law would need to follow a fine line, creating a chamber with specialised criminal jurisdiction which is "ordinary" in the sense that it deals with recognised crimes but is outside the jurisdiction of the first instance court. Otherwise local assemblies, under Article 175, would have to nominate the special judges, a task for which they would not be competent given the nature of the tribunal. The commission responsible for this task should be composed of judges and jurists, appointed by the minister of justice.

¹⁴² See Crisis Group Briefing, *Security and the Reintegration of the State*, op. cit., p. 9.

Donors and MINUSTAH should in the longer term:

- Support the creation of a permanent, nationwide program for legal aid to indigent defendants in criminal cases. This program should be based in the law schools, with law students providing the services under professional supervision and with the bar associations monitoring quality.
- Expand the forensic laboratory created for the special criminal chamber so it can support all criminal cases.
- Support the expansion of the witness protection program to cover all criminal cases as necessary.
- Support improvement of the economic status of judges and of the judicial infrastructure, particularly at the *juge de paix* level.

Just as these measures are needed to establish the legitimacy and effectiveness of the special chamber in the short term, they are necessary reforms for the overall Haitian system, including to accelerate the pace of criminal prosecutions and reduce the length of pre-trial detention.

Moreover, donors and MINUSTAH should, together with the government, create a hybrid regional tribunal based in Haiti, funded and administered by the UN and mandated to prosecute cases of transnational crime.¹⁴³ The Haitian justice system is no match for organised crime, particularly that involving trafficking of arms and drugs. The proposed tribunal, like hybrids in other parts of the world such as Sierra Leone, East Timor, Bosnia and Cambodia, would require both Haitian and international judges, in this case from the Caribbean Community and Common Market (Caricom) nations, as well as specialised criminal investigators, international police and other international personnel. Participating states should conclude legal assistance agreements to allow the tribunal to effect arrests and conduct investigations beyond Haiti's borders as necessary.¹⁴⁴

¹⁴³ The constitution bars extradition of Haitian citizens. Until the justice system is strengthened, there are only two ways to prosecute individuals successfully for serious transnational crimes: amend the constitution to permit trial in the U.S. or elsewhere or establish a hybrid tribunal. Suspects were transferred to and tried in the U.S. during the interim government period.

¹⁴⁴ This recommendation has been received well by almost all Haitians queried, including the chief justice of the Supreme Court. In the past Haitians have been resistant to accepting international personnel in their legal system. However, this

VI. CONCLUSION

Bold measures are needed to combat the surge of kidnappings, drug and human trafficking, money laundering and organised crime perpetrated by armed gangs and other spoilers, which increasingly impacts upon the daily lives of Haiti's citizens. Local and international actors should soberly analyse the failure of attempts to reform the justice system in the 1990s and urgently tailor strategies to address the current crisis. This will entail significant material and budgetary support to improve the judiciary, repair infrastructure damaged in the wake of Aristide's departure and reform a system which remains dysfunctional.

The most important immediate requirement is for donors to support the establishment of a special criminal chamber within the Haitian judicial system with jurisdiction over those serious crimes. Its success will depend upon ensuring the security of its witnesses and personnel, the appointment of competent judges, prosecutors and police, payment of adequate salaries for all, establishment of a forensics laboratory and training in the requisite skills. However, both Haitians and internationals agree that more than ten years of failed justice have shown that domestic solutions will not be enough. Because the organised crime that plagues the country is not confined within its borders, as well as because the Haitian system is so weak, a transnational criminal tribunal based in Haiti, under UN auspices and with mixed Haitian and other Caribbean personnel, is needed. Without such concerted domestic and international strategies, the current escalation of organised violence and criminality may come to threaten the state itself.

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tribunal would have mixed personnel and operate outside that system. Most Haitian authorities who were asked acknowledged that the current justice system is no match for the transnational and organised crime, so they are willing to accept this international support.



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