POLICY AND PRACTICE NOTE

A Commitment to End Corruption or Criminalize Anti-Corruption Activists? A Case Study from Burundi

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Abstract

The Burundian government has pledged to end corruption and create a more transparent society. To fulfil this promise, the government established an anti-corruption investigatory unit and court. This policy and practice note examines the legal framework that created these institutions and their performance since inception. Drawing from two cases of activists who were charged with false declarations under anti-corruption laws, it demonstrates how the law has been used to punish individuals who denounce corruption and has adversely affected the important work of human rights activists and organizations. It provides some lessons learned for activists, legal scholars and donors working to promote anti-corruption legislation in other contexts.

Keywords: activists; Burundi; corruption; transparency

In 2006, the Burundian government passed an anti-corruption law that for the first time criminalized corruption and related acts under domestic law. In the same year, it also passed laws that established an anti-corruption brigade to investigate acts of corruption and a court to prosecute those acts. Burundi has been consistently ranked among the most corrupt countries in the world (Transparency International, 2012) and the passage of this law—a partial result of advocacy efforts by prominent civil society actors—was heralded as a much needed tool in the fight against corruption (International Foundation for Electoral Systems (IFES), 2008: 27).

The existence of the anti-corruption law and the institutions to enforce it has resulted in the prosecution of a number of junior public officials for corruption. At the same time, the government has used this law to target civil society actors who publicly condemn corruption, by threatening or charging them with false declarations under the law. The result has been a suppression of freedom of speech and a chilling effect on human rights activists' ability to

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condemn corruption. The law and the officials charged with enforcing it have additionally become another tool for the government to use in its effort to limit political space, public discourse, and individual freedoms. This example from Burundi provides some key lessons for legal scholars when drafting anti-corruption legislation in other countries and for activists who advocate for the passage of transparency laws. It equally provides lessons for international donors who fund human rights, advocacy, and measures aiming for law reform.

Burundi's new government commits to zero tolerance on corruption

Following nearly four decades of unrest, Burundians went to the polls in 2005 and democratically elected a new government. Burundi is a former colony of Belgium and after gaining independence in 1962 the country was plagued by a series of horrific cycles of ethnic violence. Burundi was ruled by several military governments, all composed of members of the minority Tutsi ethnic group, which came to power in a succession of coups. The executive branch had a near monopoly on power which included significant influence over the judiciary and legislature. To retain control, the government orchestrated mass killings of opposition fighters and those it believed supported them. Armed groups that opposed the government also engaged in the slaughter of civilians. Both sides committed widespread violations of international humanitarian and human rights law. After a short period of peace in the early 1990s, the first democratically elected president of Burundi, a member of the majority Hutu ethnic group, was assassinated in 1993 and the country descended into a civil war that lasted a decade (Human Rights Watch, 1998: 14–18).

The elections of 2005, which were widely viewed as free and fair, ushered in a new senate, legislature and president, Pierre Nkurunziza. Vowing to break with the past, President Nkurunziza pledged an inclusive, transparent government that would represent all Burundians. Among the priorities for the new government were the transparent management of public affairs and foreign aid and the fight against corruption (Cabinet du Président, 2005). In one of his first speeches as new leader, President Nkurunziza in August 2005 committed his government to the fight against corruption, proclaiming it was time to put an end to entrenched practices of corruption and the embezzlement of funds (IFES, 2008: 20). Still in power today, President Nkurunziza routinely declares his government's promise to fight corruption and has proclaimed that the country has a zero tolerance policy for all those guilty of corruption and that this policy should not be simply understood as a slogan (Burundi Presidency, 2011: 4).

Legislation to address corruption

In line with the government's commitment to democracy, the rule of law and transparency, a new constitution was drafted and approved by referendum in February 2005. Article 18 of the constitution specifically requires the

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government to respect the separation of powers, the rule of law, and the principles of good governance and transparency in its conduct of public affairs. It also contains a bill of rights which include an individual's freedom of expression and association, requiring the ministry of justice to uphold and defend those rights (Constitution, articles 18, 31, 32, and 60).[1]

The following year, the legislature passed and the president signed three laws to address corruption. In April, the government passed the Anti-Corruption Act which called for the establishment of the anti-corruption brigade and anti-corruption court and laid out the penalties for persons convicted of the crimes of corruption and related offences.[2] In July, it passed a law which established the anti-corruption brigade, a police unit with investigatory powers, to examine corruption allegations.[3] The law set out the brigade's roles and responsibilities and how it is to function in relation to the Anti-Corruption Act. In December, it passed a law that created the anti-corruption court.[4] This law provided for the recruitment of prosecutors and judges who would take investigatory files prepared by the brigade and prosecute those it deemed culpable.

In an examination of the public record, there are no documents available to suggest that the intent of government in passing these laws was to suppress human rights actors in denouncing corruption or that the laws would be used to prosecute them. Instead, these laws and the public comments made by government officials at the time of their passage show the government's motivation in passing these laws was solely to fight corruption. Indeed, article 1 of the Anti-Corruption Act makes clear that the objective of the Act is to prevent and repress corruption. In explaining to Parliament why there was a need for an anti-corruption brigade, the then Minister of Good Governance, General Inspection of the State and Local Government, Venant Kamana, expressed the view that acts of corruption were rampant in most of the branches of government. He went on to state that the creation of a brigade was necessary to fight against embezzlement of government funds needed for services (Burundi Senate, 2006a). At the time the Senate was debating the bill to set up the anti-corruption court, the then Minister for Justice and Keeper of Seals, Clotilde Niragira, explained to the Senate why there was a need for a court to deal specifically with corruption. She clarified that this bill was in line with the government's policy to fight corruption and its passage would provide the legal means to do so (Burundi Senate, 2006b).

1 Constitution of Burundi of 2005, http://www.bi.undp.org/election2010/doc/constitution_rpburundi.pdf.

2 Law No. 1/12, 18 April 2006 (IFES, 2008: 209).

3 Law No. 1/27, 3 August 2006 (IFES, 2008: 240).

4 Law No. 1/36, 13 December 2006 (IFES, 2008: 229).

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Anti-corruption mechanisms at work

In its first five years, the newly formed brigade and court have scored some impressive results. In the period from June 2007 until October 2011, the anti-corruption brigade investigated 605 cases of corruption and recovered more than four million US dollars in missing funds. In roughly the same time frame, the anti-corruption court ruled in 556 cases. The majority of these cases were brought against low and middle level civil servants charged with corruption, misappropriation, diversion and fraudulent management (East African Association of Anti-Corruption Authorities, 2011: 7).

In these same five years, however, there have been a number of corruption scandals including the unauthorized sale of the presidential aircraft, illegal government payments to an oil company, arms trafficking and unaccounted for donor aid. This has amounted to millions of US dollars missing from the public treasury, and cabinet ministers, friends of the president and the president's family are all alleged beneficiaries. But none of these or other major cases of corruption implicating senior government persons has been investigated by the brigade or tried by the court (International Crisis Group (ICG), 2012: 11–14). This very much calls into question the government's public commitment to ending corruption. Individuals who have spoken out demanding accountability in these cases face intimidation, threats and death. Such was the case of Ernest Manirumva, vice-president of government watchdog OLUCOME (Observatoire de Lutte contre la Corruption et les Malversations Economiques, Observatory for the Fight Against Corruption and Economic Embezzlement), who was assassinated in his home in 2009. Manirumva had been an outspoken advocate denouncing corruption practices by the ruling party. Although there was ample evidence—including information in a report prepared by the US Federal Bureau of Investigation (FBI)—linking his death to senior government people, none was tried for his murder (World Organization against Torture (OMCT), 2012).

Fear of the potential deadly consequences should meaningful investigations be undertaken may explain the recalcitrance of members of the anti-corruption brigade and court to prosecute senior members of the government. But the court, in particular, is subject to strong political pressure which has enabled senior government officials to benefit from impunity in corruption cases (ICG, 2012: 11). The court's budget and internal regulations are controlled by the minister of justice. The minister also appoints the prosecutors and judges of the court (Law No. 1/12, 2006: articles 3, 7, and 18). The minister of justice has great influence over which cases are investigated and tried, as will be illustrated in the two examples below. More generally, the anti-corruption court is not independent of the executive, as is the case with all other courts in Burundi (Observatoire de l'Action Gouvernementale, 2007: 8). Judicial hiring, promotion, regulation and removal are all governed by the Superior Council of the Judiciary of which the president is chair and the

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minister of justice vice-chair. The majority of members are appointed by the minister of justice (Niyonkuru, 2011: 11–16). Although by law a judge serves a term for life, this has not been the reality as a number of judges have been dismissed by the Council. Thus, executive control of the Council, which holds great power over the prosecutors and judges of the anti-corruption court, is an impediment to the impartiality of the court's work (ICG, 2012: 18). Government promises to pass legislation to reform the composition and powers of the Council have not been fulfilled.

The case of Ndikumana Faustin

In February 2012, human rights activist Ndikumana Faustin was arrested on charges of making false declarations under the Anti-Corruption Act. Faustin is the head of the Burundian anti-corruption organization, PARCEM, an acronym which translates as Action and Speech for the Evolution of Mentality. In the days prior to his arrest, PARCEM had released findings alleging corrupt hiring practices in the ministry of justice. As legal representative of PARCEM, Faustin did a round of radio interviews to explain the group's findings and recommendations (Ndikumana interview, 2012). Although PARCEM's report and findings had nothing to do with investigations by the anti-corruption brigade or court, article 14 of the Anti-Corruption Act allows for false declaration charges to be brought against anyone making false declarations in the press—even when those statements have no connection to the work of the anti-corruption bodies. Article 14 states that: 'Any individual who has made to the anti-corruption brigade, a judicial authority or public officer charged with duties under this act, or the press, false written or verbal statements or those not reflecting the truth in relation to offences under this act shall be punished.'[5] Persons convicted under the law can be sentenced to ten years' imprisonment and a fine of up to one million Burundian francs (660 US dollars) (Law No. 1/12, 2006: article 14). Burundian law contains both criminal and civil provisions against defamation but the penalties related to those offences are less severe than those available under article 14 of the Anti-Corruption Act. This may explain why the minister of justice preferred to target Faustin with false declarations charges.

Faustin was held first in jail and subsequently transferred to the central prison in Bujumbura for two weeks before he was released on bail. During his time in detention, Burundian human rights groups mounted a swift and vigorous campaign to secure his release. These groups issued several press statements, paid for his legal representation, attended his hearings en masse, and visited him daily while in detention (Tate, 2012). In April, Faustin was tried by the anti-corruption court for making false statements against the minister of justice. His lawyers argued that Faustin didn't make statements about the minister, only about a practice at the ministry, and introduced transcripts of

5 Author's translation of the French text.

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the interviews he had made on the radio.[6] They further argued that as legal representative of PARCEM, Faustin was speaking on behalf of the organization and only the organization should be judged, not Faustin as an individual (Nsabimana interview, 2012). Nonetheless, in July, Faustin was found guilty, sentenced to five years in prison and required to pay a fine of 500,000 Burundian francs (330 US dollars). His attorneys immediately filed an appeal with the Burundian Supreme Court which as of the time of this writing has yet to hear his case. Faustin was granted conditional release during the appeal process but remains at risk of being imprisoned at any time.

The case of Rududura Juvénal

The case against Rududura Juvénal bears some resemblance to that of Faustin's. In September 2008, Juvénal was arrested on charges of making false statements, a violation of article 14 of the Anti-Corruption Act, against the minister of justice. He was vice-president of the union of non-judicial staff at the ministry of justice and spoke out publicly, including on the radio, about corruption in staff recruitment at the ministry. Juvénal was held in prison for 10 months, during which time his repeated requests for release addressed to the anti-corruption court and his appeals to the Burundian Supreme Court were denied. Ten months later, he was provisionally released on order of the anti-corruption court who agreed to further investigate his case (Nsabimana interview, 2012). Curiously, the court in Juvénal's case ruled that they did not have the competence to try a case involving a sitting minister and the case was transferred to the Supreme Court. It was only in 2012, however, that the Supreme Court agreed to hear his case. As of this writing, his trial has concluded and Juvénal remains at liberty while awaiting the court's decision, though he has not been able to return to his job at the ministry of justice. He continues to declare his innocence, claiming that he made statements against corrupt practices in the ministry rather than against the minister, and further that his statements were true (IWACU, 2012).

Both Faustin and Juvénal's cases involved allegations of bribery in the ministry, the existence of which is common knowledge in Burundi. Academics and analysts both before and after these cases have reported publicly on corruption in the justice ministry (see e.g. International Alert, 2007; ICG, 2012; Niyonkuru, 2011). The same allegation had been made by the First Vice President in a speech before the judiciary corps in 2010 (speech of the First Vice President, 2010).[7] Moreover, despite the seriousness of these and other allegations, the anti-corruption brigade and court have shown no interest in investigating corruption in the ministry of justice. The failure of these bodies

6 These interviews were in Kirundi. The author has a rudimentary knowledge of Kirundi and was unable to read the transcripts.

7 'What do you expect from a young judge whose parents or close relatives bought his post at the ministry of justice? His first concern will be to collect bribes to reimburse the debt which enabled him to get the job.' (Author's translation from French.)

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to act on these allegations coupled with the zeal they showed in bringing false statement charges against Faustin and Juvénal strongly supports claims that the minister of justice has great influence over these anti-corruption bodies. It also demonstrates the control that the executive branch yields over the implementation of this law and the work of the court, as is equally the case with other courts in Burundi. Finally, it shows that the government has a new legal tool with which to silence critics and those who press for meaningful change, by criminalizing the work of human rights defenders and anti-corruption activists.

In Burundi, these cases have had a chilling effect on the willingness of civil society actors to investigate and report on corruption allegations related to powerful government figures which include the minister of justice (Ndikumana interview, 2012). Anti-corruption organizations, including PARCEM and OLUCOME, continue to demand government transparency but have tailored their verbal messages in order not to run afoul of the court. For example, when publicly denouncing corruption in various government ministries, these and other organizations allege corrupt practices generally and no longer identify persons by name even where they may have compelling evidence of individual culpability. In a similar way, organizations that work on corruption have begun to self-censor their written work before publishing, by removing the names of individuals alleged to have engaged in corrupt practices, in order to avoid criminal charges. Lastly, government spokespersons continue to threaten organizations who denounce corruption with false declaration charges, although to date only Faustin and Juvénal have been charged under the Anti-Corruption Act (Ndikumana email, 2013).

In the case of Faustin, it may be more in the government's interest to keep him under threat of arrest so as to curtail his anti-corruption work, rather than to condemn and imprison him in a case that is potentially embarrassing to the government (Nsabimana interview, 2012). Somewhat ironically Faustin's opinions and PARCEM's expertise on corruption are still solicited by the government even though the case against Faustin is still pending. Most recently, PARCEM was nominated to represent civil society on a government commission, which includes members of the anti-corruption brigade and officials in the ministry of justice, established to examine corruption in Burundi. For Juvénal, the cost of speaking out has been the loss of his job and economic stability.

The use of the Anti-Corruption Act to stifle civil society voices is but one tool being used by the government to suppress the work of human rights defenders. The two examples presented here must be viewed in the wider context of the Burundian government's recent efforts to criminalize human rights defenders and their work, a negative global trend to which the Burundian government is contributing (for a discussion on the criminalization of human rights defenders at the global level, see the introductory article by the co-editors of this issue). Journalists, human rights defenders, and

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anti-corruption activists who publicly denounce government abuses or mismanagement are targeted by the Burundian government and publicly labelled enemies of the state. Using a variety of methods—from surveillance, harassment, and threatening anonymous phone calls and texts to summons, interrogation, and arrest—the government has attempted to silence any criticism of its record.

Human rights defenders are routinely summoned to offices of the police, intelligence services, or ministry of the interior and threatened with legal action. In some instances, the defender is made to wait for an entire day before being berated by an officer, usually with threats of treason charges or shutting down the organization where he or she works (Mbonimpa interview, 2012). Journalists, too, are increasingly being targeted. In perhaps the best known case, Ruvakuki Hassan of local radio station Bonesha FM was sentenced in June 2012 to life in prison for purportedly aiding in plotting the overthrow of the state. Hassan had conducted an interview with a rebel group in Cankuzo province that was broadcast on local radio. Throughout his trial, he maintained that he was simply performing his duty as a journalist, and that he was neither a member of the group nor spreading messages to encourage the overthrow of the government. On appeal, Hassan's conviction was upheld but his sentence reduced to three years (Radio France International (RFI), 2013).

The trend towards criminalizing human rights defenders and civil society actors in Burundi seems likely to continue. Due to a boycott of elections in 2010 by nearly every opposition party, the president's party enjoys wide majorities in both legislative houses which have worked in tandem with the executive branch to suppress criticism of the ruling party. In June 2013, for example, the government passed a new media law that places broad restrictions on subjects on which journalists can report, limits their ability to protect sources, and enables the government to severely fine any journalist found violating the law (Reporters without Borders, 2013). The law requires journalists to refrain from reporting on information that could affect national unity, public order and security, morality and good conduct, national sovereignty, and information that could affect the credit of the state and the national economy (Amnesty International, 2013). It also restricts journalists from reporting on issues that involve propaganda of the enemy of the Burundian nation in times of war and peace. Although too early to have had any impact, the law clearly restricts journalists from writing about political killings or security issues. It may also prevent journalists from presenting research on corruption undertaken by civil society groups such as PARCEM. Finally, it may prevent women's rights activists, who press for equal inheritance rights for women, from being interviewed on this issue on the radio. In the past, the president has made clear that calls for equal inheritance rights for women and girls is destabilizing to public order and national unity (Niyonkuru email, July 2013).

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Lessons learned

The anti-corruption legislation and manner in which it has been used by the Burundian government provide some important lessons for scholars and activists when drafting or advocating for the passage of anti-corruption laws. Firstly, there must be adequate safeguards in place to protect those who come forward with allegations of corruption. While the Anti-Corruption Act does have some protections for whistleblowers, the existence of these provisions in the Act provided no security for Faustin or Juvénal (Law No 1/12, 2006: article 12). This is because these safeguards protect only those who provide information in the course of investigations, not persons alleging corruption generally. Secondly, it is of paramount importance to ensure truthfulness in investigations and cases of corruption. That people who make false statements in the course of these proceedings should be held accountable in courts of law is self-evident. But there should be no provision in an anti-corruption law to bring defamation charges against persons making statements completely unrelated to the work of the anti-corruption bodies. In Burundi, the article permitting these charges is all the more surprising given existing libel and slander laws that provide for criminal and civil penalties. And a group of civil society actors has quietly begun to strategize on how to launch a campaign to amend article 14 of the Anti-Corruption Act. Lastly, to ensure impartial corruption investigations and cases, anti-corruption bodies must have complete independence from undue influence from other branches of government. At the time the court was established in Burundi, it was well known that the judicial branch was not independent and was under the control of the executive branch. What is needed is reform of the Superior Council of the Judiciary of Burundi to prevent the president and minister of justice from exerting influence over judges and the anti-corruption court. For Burundian activists who were committed to the ideals of an impartial anti-corruption court, it may have been more prudent to press for legislation that first reformed the Council and later established the anti-corruption court. This suggests that the timing of the passage of laws may be as important as their content and implementation.

The lessons above are equally applicable to funders when thinking about supporting anti-corruption campaigners. It is also important for funders to consider with grantees interested in advocating for legislation all the possible negative ramifications that could come about if the bills become law. For donors or grantees without extensive legal knowledge, one way to do this would be to have the legislation vetted by an external group of technical legal advisers who could provide analysis. Many programme officers—and this applies equally to this author—are under great pressure to show that grantees are making a difference. When an organization is part of a successful effort in the passage of legislation, it is an easy way for funders to show impact to their boards and external supporters. But funders that support organizations

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engaged in policy advocacy may be unwittingly complicit in future negative results arising from the passage of laws if those laws are not first properly vetted.

Lastly, as was the case with Faustin, the swift and coordinated response of national human rights groups in Burundi in securing his release provides strong evidence of the power of broadly funding locally. The reaction by local civil society groups to work together following Faustin's arrest stems in part from a deliberate effort made by local organizations to help one another in times of difficulty after the 2009 killing of anti-corruption activist Ernest Manirumva. This coordinated response can also be partially attributed to donors who have suggested that organizations should work more closely together for their own protection. It also demonstrates that by providing financial and other support to an array of organizations working in the same geographical area, donors can help enable groups to coordinate their advocacy and actions and come to each other's assistance when one of them comes under threat.

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