
**International Legal Assistance Consortium
Discussion Paper**

Judges as Peacebuilders: How Justice Sector Reform Can Support Prevention in Transitional Settings

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I. Introduction – Purpose of this Discussion Paper

This Discussion Paper represents an effort to gather ILAC and its member organizations’ experience and knowledge, most notably via our joint rule of law efforts in the Middle East and North Africa (MENA) region, in order to contribute to understandings of how justice sector reform can be designed and implemented in a manner that maximizes its effectiveness both in its own terms, and in terms of the contribution it represents to transitional justice efforts in societies emerging from authoritarianism and conflict.

Given that justice sector reform is a specialized category of broader institutional reforms, and that these fall into the category of transitional justice activities referred to as “guarantees of non-recurrence”, a key finding of this paper is that one of the most important objectives of justice reforms in transitional settings should be to create the long-term conditions for prevention of the recurrence of conflict and mass human rights violations. This is best achieved by building the resilience of justice sector institutions and ensuring that they provide the broadest and most equitable access to legal remedies possible.

The Discussion Paper results from a pilot policy dialogue process initiated by ILAC, together with its member organizations, at the end of 2015. The positive results of the process have included enthusiastic engagement by a broad range of member organizations, initiation of substantive dialogue with several UN human rights mechanisms and other international rule of law actors, and no less important, the first systematic efforts to review ILAC’s results from the field in seeking to consciously draw lessons for future activities and proposals.¹ Building on this experience, policy dialogue and knowledge management were included as components of ILAC’s work in its new strategy:

By engaging with international policy dialogues, ILAC’s aim is to pool the experience and expertise of its members to inform the direction of policy and normative processes that will affect the Rule of Law field going forward. ILAC will also seek natural counterparts in undertaking such activities. Such strategic partnerships allow ILAC to compile the collective experience and insights of its members, contributing substantively to the development of policies, standards and best practice guidelines.²

1 In addition to this Discussion Paper, other related efforts to compile lessons learned have included a review of work in Haiti during the 2000s, as well as the publication of a background piece on a thematic gender justice project undertaken during the same period. See Rhodri Williams, “Of Arson & Legal Aid: The Integration of Rule of Law in Peace and Development Policy and Practice”, *ILAC blog* (06 April 2017), available at: <http://www.ilacnet.org/blog/2017/04/06/arson-legal-aid-integration-rule-law-peace-development-policy-practice/>. See also Nina Lahoud, “Overview of ILAC/UNIFEM Gender Justice Initiative by Nina Lahoud: Presented at the Session on “Exploring ILAC Thematic Issues” at ILAC’s 2016 Annual General Meeting on 20 May in Solna, Sweden”, *ILAC blog* (30 June 2017), available at: <http://www.ilacnet.org/blog/2017/06/30/overview-ilacuni-fem-gender-justice-initiative-nina-lahoud-presented-session-exploring-ilac-thematic-issues-ilacs-2016-annual-general-meeting-20/>.

2 *ILAC Five Year Strategy, 2017-2021* (2017), 10.

The conception and writing of the Discussion Paper has occurred during a period in which the adoption of the 2030 Agenda confirmed the importance of the rule of law, good governance and peace to sustainable development, while the UN Sustaining Peace resolutions and other key documents confirmed that prevention of conflict would be the central plank of international peacebuilding efforts. ILAC has worked strategically to orient itself to these developments based on an informed understanding of how we can work with our members to support effective reform of justice systems in conflict-affected and fragile settings.

In conducting its policy dialogue work, ILAC has sought to maximize the advantages of both its central position in the Swedish rule of law debate and its global reach. At the local level, ILAC supported the launch of a Swedish Transitional Justice Network (STJN) in early 2016,³ and has worked with the Stockholm International Peace Research Institute (SIPRI) to spread awareness of how rule of law reforms can support international development. ILAC sponsored sessions at the annual SIPRI Stockholm Forum on Peace and Development in 2016 and 2017 that addressed, respectively, the lessons learned from piloting the new “justice goal” of the 2030 Agenda,⁴ and the broader integration of justice issues into development work.⁵

ILAC’s local engagement has turned out to be pivotal in developing contacts and ideas for more global policy dialogue efforts. Through its participation in the SIPRI Stockholm Forum, for instance, ILAC was able to deepen its dialogue with the Secretariat of the g7+ group of conflict-affected and fragile countries, resulting in an ongoing strategic partnership aimed at supporting the justice pillar of the *New Deal for Engagement in Fragile States*.⁶

- 3 The early meetings of the STJN focused on transitional justice and support to the work of the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff. See Rhodri Williams, “Political transition offers an opportunity to consolidate rule of law institutions”, *ILAC blog* (30 October 2015), available at: <http://www.ilacnet.org/blog/2015/10/30/rhodri-williams-political-transition-offers-an-opportunity-to-consolidate-rule-of-law-institutions/>. See also, Transitional justice and today’s challenges – interview with Sabine Michalowski, *ILAC blog* (25 February 2016), available at <http://www.ilacnet.org/blog/2016/02/25/transitional-justice-and-todays-challenges-interview-with-sabine-michalowski/>.
- 4 “Learning while doing: Experiences from Piloting the SDGs”, *Stockholm Forum on Security and Development Policy Brief #16* (May 2016), available at: <https://www.sipri.org/sites/default/files/2016-Forum-Policy-Brief-No-16.pdf>.
- 5 “How can the New Deal and SDG 16+ be achieved?”, *Stockholm Forum on Peace and Development Session Report #5* (May 2017), available at: https://www.sipri.org/sites/default/files/2017-09/session_report_no_5.pdf. See also, ILAC Proud to Contribute to 2017 Stockholm Forum on Peace and Development, *ILAC blog* (05 June 2017), available at: <http://www.ilacnet.org/blog/2017/06/05/ilac-2017-stockholm-forum-peace-development/>.
- 6 ILAC cooperated with the g7+ Secretariat as well as the Japan International Cooperation Agency (JICA) in developing a public seminar on “building resilient and responsive justice institutions in fragile and conflict-affected countries” that took place during ILAC’s annual general meeting in Tokyo in May 2017. See “Public Seminar in Japan Addresses “A Pivotal Challenge: Building Resilient and Responsive Justice Institutions in Fragile and Conflict-Affected Countries””, *ILAC blog* (24 May 2017), available at <http://www.ilacnet.org/blog/2017/05/24/public-seminar-japan/>. ILAC was subsequently invited to discuss lessons learned on access to justice with the g7+ Secretariat in meetings culminating in a side-event at the 72nd session of the UN General Assembly in September 2017. See “ILAC Participates in 72nd Session of the United Nations General Assembly”, *ILAC blog* (19 September 2017), available at: <http://www.ilacnet.org/blog/2017/09/19/ilac-participates-u-n-general-assembly/>.

Of most direct relevance to this paper, ILAC's support to the Swedish Transitional Justice Network helped to foster contact and dialogue with the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff. Based on this contact, the paper was initially developed as a contribution to Mr. de Greiff's efforts to advise states on how to achieve effective "guarantees of non-recurrence". In his September 2015 report on this topic,⁷ de Greiff defined such guarantees in terms of *prevention*; as measures to shield the population as a whole in transitional societies from the resumption of gross violations of human rights.⁸

As a rule of law consortium operating in transitional settings, ILAC has long taken care to seek complementarity between its specific activities and broader rule of law and transitional justice priorities. Since 2013, ILAC has understood its justice sector reform work as being intrinsically supportive of transitional justice efforts to reform institutions in a manner that can prevent the recurrence of atrocities. By confirming that justice sector reform constituted a neglected but crucial form of prevention, the de Greiff report on prevention spoke directly to ILAC's experience.

Given the numerous common points of reference between de Greiff's findings and the conclusions of past holders of the "independence of judges and lawyers" mandate, ILAC initiated a dialogue with both mechanisms at the beginning of 2016, with the aim of furthering international understandings of how justice sector reform to promote the independence of judges and lawyers can contribute to the prevention of violations in countries experiencing transitions. Both were invited to a seminar on "Breaking the Cycle of Violations: Reforming Judiciaries as Prevention" at ILAC's May 2016 Annual General Meeting (AGM) in Stockholm and expressed their interest, though only Mr. de Greiff was able to come.

At the seminar, de Greiff introduced his report on prevention and expressed his hope that organizations such as ILAC's members could contribute with their experiences to the development of policies on dealing with the intricacies of judicial reform.⁹ Given ILAC's strong experience working with justice sector institutions, he saw a particular opportunity to reinforce transitional justice understandings that have until now been "insufficiently sensitive to institutional context." He also noted that the report was "intended as a means of increasing dialogue without imposing a single model or policy. The aim is to increase coherence and harness existing ideas."

7 UN General Assembly, "Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff", UN Doc A/HRC/30/42 (04 September 2015) – hereinafter, "De Greiff prevention report". Available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/30/42.

8 *Id.*, paras. 23-26. Beyond defining such guarantees, de Greiff also set out to provide "a general framework for designing an actionable non-recurrence policy" to duty bearers and sought international expertise in assisting to define the details of such a framework. *Id.*, para. 22.

9 The other participants in the seminar were Dr. Per Bergling, Principal Advisor on International Law to the Swedish Foreign Ministry and Elizabeth Andersen, Director of the American Bar Association Rule of Law Initiative. For more information, see "ILAC Initiates Dialogue with UN Rapporteur on Transitional Justice: "Breaking the Cycle of Violations: Reforming Judiciaries as Prevention" (blog article, 31 May 2016), available at <http://www.ilacnet.org/blog/2016/05/31/readout-from-ilac-seminar-breaking-the-cycle-of-violations-reforming-judiciaries-as-prevention/>

An initial draft of the discussion paper was prepared by the ILAC Secretariat and circulated to the membership for comments in January 2017. The member organizations welcomed the initiative and several prepared extensive comments which were subsequently incorporated.¹⁰ The paper's findings were presented to Mr. de Greiff in Geneva on March 8, 2017, in a meeting convened by ILAC President Elizabeth Howe and attended by representatives of ILAC members the International Bar Association Human Rights Institute, International Bridges to Justice, and the International Commission of Jurists. Mr. de Greiff welcomed the initiative, provided feedback on the paper and invited ILAC to join his core group on developing a prevention policy framework. Subsequently, on March 16, ILAC Senior Legal Expert Rhodri Williams presented the paper to the then-newly appointed Special Rapporteur on the Independence of Judges and Lawyers, Mr. Diego García Sayán.

Following from these discussions, this Paper seeks to draw on the experience of ILAC and its members, notably in the MENA region, in contributing to a vital discussion on how justice reform can best serve the crucial aim of prevention in transitional settings. Equally important, we hope to provide specific guidance on how such reforms can bolster broader efforts to build civic trust and societal resilience, preventing the recurrence of human rights violations.

¹⁰ Comments were received from Carlos Vasconcelos for the International Association of Prosecutors, individual member Suzannah Linton, individual member Paul Hoddinott, Sanjeewa Liyanage for International Bridges to Justice, Marek Svoboda and Joel Martin for the CEELI Institute, Matt Pollard for the International Commission of Jurists, Martien Schotsmans for RCN Justice and Democracy, Eman Siam for the Raoul Wallenberg Institute, and Natacha Bracq and Veronica Hinestroza for the International Bar Association Human Rights Institute.

II. Background – Transitional Justice and Rule of Law Practice

The International Legal Assistance Consortium (ILAC) is a consortium of fifty global and regional organizations of judges, lawyers, legal experts and rule of law assistance practitioners worldwide. ILAC was founded in 2002 as a mechanism for coordinating joint need assessments in conflict-affected settings that would allow for rapid identification of rule of law gaps and needs together with national and international stakeholders.

Since then, ILAC has worked with its member organizations to conduct and publish numerous rule of law assessments, as well as to lead thematic work on gender justice in the wake of UN Security Council Resolution 1325.¹¹ ILAC has also progressively taken on a greater role in coordinating justice sector reform programming by its members in conflict-affected and fragile settings, including most recently a large-scale program in the Middle East and North Africa (MENA) region in which six ILAC member organizations worked with rule of law institutions in eight countries in the region. This has been accompanied by a parallel program to provide a lifeline to Syrian jurists seeking to maintain the integrity of Syrian law as well as to provide basic legal services in areas of the country outside of the control of the government.

In the course of conducting these activities, ILAC and its members have been confronted with the need to maintain the integrity of their approach to rule of law work while simultaneously understanding and adapting to rapid changes in the rule of law field. These changes have in part resulted from global political and conflict trends, including specific events such as those flowing from the 2011 Arab Uprisings, as well as more general trends such as the prevalence of protracted or cyclical conflict in settings of extreme poverty.

There have also been significant developments in international rule of law practice. These include the rise of “bottom-up” approaches focused on equal access to justice, legal empowerment, and reliance on civil society organizations and customary adjudicators in supporting the claims of ordinary justice-seekers and marginalized communities.

11 See ILAC, UNIFEM and Ministry for Foreign Affairs of Sweden, “Building Partnerships for Promoting Gender Justice in Post-Conflict Societies” (2005); ILAC, UNIFEM, the Ministry for Foreign Affairs of Sweden, and the Ministries of Gender and Development and Justice of the Republic of Liberia, “Gender Justice in Liberia – The Way Forward” (2006); ILAC, Raoul Wallenberg Institute, and the Haitian Ministry of Women’s Affairs and Women’s Rights, “Gender Justice Best Practices” (2007); ILAC, UNIFEM, the Ministry for Foreign Affairs of Sweden, and the Ministry of Justice and Constitutional Development of South Africa, “Advancing Gender Justice in Conflict Affected Countries” (2007); ILAC, UNIFEM, the Ministry for Foreign Affairs of Sweden, and the Judicial Service of Ghana, “The Role of the Judiciary in Promoting Gender Justice in Africa” (2008). All the gender justice reports are available at <http://www.ilacnet.org/publications/>.

They also include the trend toward mainstreaming rule of law concerns in sustainable development practice, as manifested by the efforts of the g7+ group of conflict-affected and fragile states to include a justice pillar in the 2011 *New Deal for Engagement in Fragile States*, and promote the “governance goal” (Goal 16) included in the 2015 *Sustainable Development Goals* (SDGs). The last trend has been complimented by the migration from development to rule of law practice of “politically smart” approaches – those focused on understanding and harnessing existing political dynamics and addressing root cause issues of conflict.¹²

Alongside these trends, one of the most sustained influences on rule of law practice during ILAC’s lifetime has been the expansion of transitional justice as a field of practice, and particularly its extension from post-authoritarian to post-conflict settings. The emergence of the transitional justice discourse into peacebuilding practice has largely taken place during ILAC’s lifetime, and some of ILAC’s founding documents reflect early awareness of the crucial link between accountability, rule of law and prevention:

The collapse of state institutions, like the judiciary, is a fundamental cause for the subsequent failure of the legal system and the general breakdown of the rule of law. Rehabilitating the judicial system and ensuring accountability for those who have violated international human rights law is fundamental to the development of a stable environment To maintain peace, citizens need to feel that they are equal under the law and that perpetrators of committed atrocities are held accountable; otherwise they will take actions to ensure their own security and the process of conflict begins again.¹³

Nevertheless, for rule of law practitioners in conflict-affected settings, the ascendancy of transitional justice initially raised concerns. The effect of yet another field of post-conflict practice on limited international donor funding and strained coordination mechanisms was feared, as was the extent to which the galvanizing effect of transitional justice discourse could raise dangerously high expectations on the part of victims of conflict and human rights abuses.

12 Richard Sannerholm, Shane Quinn and Andrea Rabeus, “Responsive and Responsible: Politically Smart Rule of Law Reform in Conflict and Fragile States” (Folke Bernadotte Academy, 2016).

13 The Stanley Foundation, “Creating the International Legal Assistance Consortium” (conference report, February 2000).

However, transitional justice proponents have consistently sought to ease such concerns by emphasizing synergies between the fields. For instance, in an essay on transitional justice and development, current special rapporteur (and then-research director for the International Center for Transitional Justice) Pablo de Greiff struck a practical tone:

... while I am interested in establishing links between transitional justice and development, I am also interested in drawing certain boundaries around each—not just for reasons of clarity, but also in the belief that effective synergies depend on sensible divisions of labor.¹⁴

Meanwhile, conceptual complementarity emerged early on, with rule of law acknowledged as one of the core aims of transitional justice efforts, and transitional justice processes recognized in turn as being key to creating the conditions for rule of law.¹⁵ The formal pairing of rule of law and transitional justice as mutually reinforcing elements of peace building came with a seminal 2004 report by then-UN Secretary General Kofi Annan.¹⁶ The report recognized both lack of accountability for past abuses and ongoing rule of law deficits affecting those left marginalized by conflict as central obstacles to the consolidation of peace.¹⁷ It also set out a definition of transitional justice, including its main aims and the mechanisms used to achieve them, that has become authoritative with the passage of time:

The notion of “transitional justice” discussed in the present report comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.¹⁸

During this period, ILAC and its members have developed a greater understanding of both the synergies presented by transitional justice efforts in conflict and fragile settings, as well as the challenges they pose. Understanding this dynamic in countries where ILAC is present has been an increasingly central cross cutting element of recent rule of law assessments and programming.

14 Pablo de Greiff, “Articulating the Links Between Transitional Justice and Development: Justice and Social Integration” in Pablo de Greiff and Roger Duthie (eds.), *Transitional Justice and Development: Making Connections* (New York: Social Science Research Council, 2009), 29.

15 For a detailed analysis of this complementarity, see Pablo de Greiff’s 2012 report on rule of law and transitional justice: UN General Assembly, “Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence”, UN Doc. A/67/368 (13 September 2012).

16 UN Security Council, “The rule of law and transitional justice in conflict and post-conflict societies – Report of the Secretary-General”, UN Doc. S/2004/616 (23 August 2004).

17 *Id.*, para. 2.

18 *Id.*, para. 8.

ILAC is a rule of law consortium and makes no claim to be a transitional justice actor with the full range of expertise that implies. Moreover, ILAC is primarily composed of organizations representing jurists associated with formal justice sector institutions, such as judges, prosecutors, lawyers and clerks. This means that the organization's main strength lies in peer-to-peer work with justice sector actors and formal institutions in the countries where we are present. Our purpose as a consortium is to assist justice institutions to be effective, resilient and responsive to claims by justice seekers, but our methodology involves doing so by taking on board 'bottom-up' perspectives on the justice system by maintaining contact with civil society organizations and maintaining an updated political and context analysis.

Nevertheless, many of ILAC's member organizations have developed considerable expertise in transitional justice practice, and this has undeniably coloured the consortium's work.¹⁹ ILAC conducts its rule of law assessment and assistance work in conflict-affected and fragile settings where transitional justice is often a major issue. As such, ILAC must frequently work to assess and build the capacity of institutional rule of law actors facing challenging transitional justice demands. In such settings, transitional justice actors have a legitimate interest in the outcome of ILAC's work, just as ILAC has a clear stake in the effectiveness and viability of transitional justice programming.

19 Numerous ILAC member organizations have been involved in transitional justice work in the field as well as analysis and reporting on issues related to transitional justice. To cite just one example, the Executive Director of the International Bar Association, Mark Ellis, has published widely on international justice issues, including a recent book: *Sovereignty and Justice: Balancing the Principle of Complementarity between International and Domestic War Crimes Tribunals* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2014).

III. ILAC engagement with transitional justice issues in the MENA region

The first explicit use of transitional justice analysis in ILAC’s work came in 2013 with the publication of a rule of law assessment report on Libya.²⁰ The report noted the tremendous demand for both rule of law and transitional justice in the wake of the 2011 uprising in Libya, and sought to identify the dynamic this dual focus would produce in relation to rule of law actors.

It began by analysing the four key transitional justice mechanisms identified in the 2004 UN Secretary General report (truth-seeking, prosecution of those responsible for abuses, reparations to victims, and prevention - via “institutional reform” to address structural factors that allowed abuses to happen):

Efforts to rebuild the rule of law most clearly correspond to institutional reform. However, rule of law reform arguably operates along a longer time frame. It encompasses not only “transitional” reforms to address the complicity of judicial institutions in past abuses, but also long-term technical reforms to optimize the effectiveness of such institutions under more ordinary circumstances. Meanwhile, the institutions that are the object of transitional reform may also become involved in addressing other transitional issues, such as the prosecution of alleged wrongdoers and reparations programs. Thus in Libya, proposals to vet the judiciary are considered while the judiciary plays a central – and demanding – role in judging those accused of past human rights violations.²¹

At the same time as the release of the Libya report, ILAC also engaged its members in a seminar discussion on transitional justice at its 2013 Annual General Meeting in Prague. Growing interest in the issue was reflected in the ILAC MENA Programme 2014-2016, which was funded by the Swedish International Development Cooperation Agency (Sida) and both directly and indirectly engaged with transitional justice issues in the MENA region while supporting the capacity of rule of law institutions.

20 *ILAC Rule of Law Assessment Report: Libya 2013* (May 2013).

21 *Id.* 31-32.

The MENA Programme consisted of six operational “components” run by five of ILAC’s member organizations.²² Of the components, only one explicitly addressed transitional justice – by providing training on the crimes defined in the then-newly ratified Rome Statute of the International Criminal Court, the International Bar Association Human Rights Institute (IBAHRI) prepared Tunisian judicial officials to tackle transitional justice prosecutions:

In acceding to the Rome Statute, Tunisia must now promote the implementation of international instruments supporting transitional justice and equip judges and prosecutors with the knowledge and tools necessary to ensure accountability for past violations and justice for victims in line with international standards. Only then will Tunisia be in a position to bring to justice perpetrators of the institutional violence experienced during the regime and build its future.²³

Other components of the MENA Programme engaged transitional justice issues more indirectly. For instance, a component run by the American Bar Association Rule of Law Initiative (ABA-ROLI) involved assistance to Libya’s new national human rights institution (NHRI).²⁴ Although this body did not have an explicit mandate to address transitional justice issues as such, its role in receiving and investigating complaints of human rights violations positioned it as a key part of broader institutional reforms meant to ensure non-repetition of the widespread violations that had characterized the 2011 Revolution and the pre-revolutionary period.²⁵

Meanwhile, a component run by the CEELI Institute to strengthen the capacity of a new Tunisian anti-corruption agency was closely linked to the Tunisian vision of transitional justice.²⁶ This was reflected in the Tunisian transitional justice law of December 2013, which set up specialized chambers to not only prosecute human rights violations such as killings and torture, but also cases of financial corruption and

22 One of the lessons learned from the MENA Programme was that this methodology was not optimal in terms of garnering sustainable results. Subsequent programming has focused on thematically defined components driven by expertise from multiple members. See ILAC MENA Programme Annual Report 2016 (2017), 12 and 32.

23 See “Strengthening the application of international of human rights standards in Tunisia through supporting understanding of international criminal law” (ILAC MENA Programme component description, December 2013), available at <http://www.ilacnet.org/ilac-work/ilac-mena-programme-2013-2016/supporting-international-criminal-law-in-tunisia/>

24 See “Strengthening the Capacity of the National Council for Civil Liberties and Human Rights in Libya” (ILAC MENA Programme component description, December 2013), available at <http://www.ilacnet.org/ilac-work/ilac-mena-programme-2013-2016/capacity-building-and-support-of-the-basic-freedom-and-human-rights-council-in-libya/>

25 In the wake of fighting in the summer of 2014 that made it impossible for for the Libyan NHRI to continue functioning, this component was reformulated as a lifeline program to maintain the capacity of individual lawyers and human rights defenders, supporting their ability to rebuild human rights institutions and support effective transitional justice mechanisms when conditions allowed. In currently pending proposals for a new MENA Programme, ILAC has proposed to develop prevention indicators based on the analysis in this Paper for the components focused on Libya.

26 See “Strengthening the capacity and effectivity of Tunisian Anti-Corruption Agency” (ILAC MENA Programme component description, December 2013), available at <http://www.ilacnet.org/ilac-work/ilac-mena-programme-2013-2016/strengthening-the-tunisian-anti-corruption-agency/>

misuse of public funds referred by the truth commission.²⁷

A training meant for all Tunisian judges and prosecutors conducted jointly by CEELI and IBAHRI raised the same thorny issue identified in ILAC's 2013 Libya report – the need for the judiciary in the context of the Tunisian transition to simultaneously reform itself, contribute to other transitional justice aims and continue to provide ordinary justice and rule of law for all the citizens of the country.²⁸ The aim of the course was both to train judicial officials on the application of human rights law and to encourage judges to reconceive their independence in terms of an obligation to serve ordinary citizens and engage with actors such as civil society and the media, in order to encourage public understanding of how the law works. In seeking to achieve these goals, CEELI and IBAHRI recognized the centrality of changing attitudes, a challenge that was to be tackled via seeking exposure to a 'critical mass' of judges, ensuring that all had been familiarized with the same messages.²⁹

A different approach to meeting these challenges has been pursued at the regional level by the Raoul Wallenberg Institute of Human Rights and Humanitarian Law (RWI), which has worked with seven judicial training institutes in the MENA region on the application of international human rights standards in Arab courts.³⁰ Through joint efforts to reform training curricula and methodology in accordance with international standards and practice, RWI has promoted the capacity of the judiciary to bring justice to victims of conflicts and violations, particularly in times of transition. Finally, the International Association of Women Judges (IAWJ) worked with women judges from five countries in the region to address both obstacles to women's careers in the judiciary as well as barriers to equal justice for female litigants.³¹

Where, as in the MENA region, ILAC's rule of law work runs in parallel with ongoing transitional justice processes, ILAC's greatest contribution will inevitably come at the point where the overlap with its own work is greatest. In some cases this may involve assessing or building specific capacity for transitional justice-related prosecution of perpetrators of human rights abuses or reparations for victims, where ordinary justice institutions have been given significant responsibilities in these areas (by contrast, ILAC will rarely deal directly with truth seeking, as ad hoc commissions typically handle these measures).

27 *Organic Law on Establishing and Organizing Transitional Justice* (Unofficial Translation by the International Center for Transitional Justice (ICTJ), adopted December 2013), article 8.

28 "Training of Tunisian Judges" (ILAC MENA Programme component description, December 2013), available at <http://www.ilacnet.org/ilac-work/tunisia/tunisia-training-of-judges/>

29 *Id.*

30 See "Supporting application of human rights standards by Arab courts", available at <http://www.ilacnet.org/ilac-work/ilac-mena-programme-2013-2016/supporting-application-of-human-rights-principles-in-arab-court-rulings%E2%80%A8/>.

31 See "Strengthening women judges' capacity to provide judicial leadership on gender and access to justice", available at <http://www.ilacnet.org/ilac-work/ilac-mena-programme-2013-2016/strengthening-women-judges-capacity/>.

In almost every case, ILAC assessment and capacity-building activities will touch on important questions related to institutional reform – and specifically justice sector reform – as a transitional justice measure. This was the key insight made in the 2013 Libya assessment report and it still holds based on ILAC’s subsequent experience. This is the reason that Special Rapporteur Pablo de Greiff’s 2015 report on “guarantees of non-recurrence” has had a great deal of resonance in relation to ILAC’s experience. Simply put, “guarantees of non-recurrence” refer to precisely the type of institutional reform measures that are usually included in transitional justice programs in order to address structural factors in institutions – such as the security forces or the judiciary – that have allowed abuses to take place.

IV. Prevention and Justice Reform in Transitional Justice Thought

In his September 2015 report on “guarantees of non-recurrence”,³² de Greiff defined such guarantees in terms of prevention; as measures to shield the population as a whole, from the resumption of gross violations of human rights and serious violations of international humanitarian law, in settings in which they had already occurred.³³ Beyond defining such guarantees, de Greiff also set out to provide guidelines to duty bearers in giving them effect:

...the main interests underlying the report are practical, and aim to show that the topic can be concretely acted upon; demonstrate that it is a fit object of rational policymaking, including planning, budgeting and monitoring; and offer a general framework for designing an actionable non-recurrence policy.³⁴

In setting out steps that states should consider, the report focuses on three categories, beginning with conventional institutional (and legal) reform measures ordinarily undertaken by state authorities. However, the report breaks new ground by going on to specify steps that civil society can and should be encouraged to undertake as active contributors to transitional justice policies, as well as broader interventions in the sphere of “culture and personal dispositions” designed to change habits of attitude or belief that contributed to past atrocities. There are points of interest related to justice sector reform in all three sections and a key aim of this Discussion Paper is to bring ILAC’s experience to bear in providing insights on how a prevention framework could address such reforms across all three areas of activity.

The first and most conventional set of activities come under the rubric of “institutional interventions” and encompass a broad range of steps from providing basic security and documentation of legal identity to ratification of human rights conventions and constitutional reforms. De Greiff recognizes the fact that for many transitional justice actors, security sector reform (SSR) has become virtually synonymous with institutional reform.

32 UN General Assembly, “Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff”, UN Doc A/HRC/30/42 (04 September 2015) – hereinafter, “De Greiff prevention report”

33 *Id.*, paras. 23-26.

34 *Id.*, para. 22.

Thus, in order to give SSR its due – and avoid distracting attention from the range of other, less familiar interventions highlighted in this report – de Greiff devotes an entirely separate report to SSR.³⁵ By contrast, de Greiff notes that justice sector reform has been relatively overlooked as a form of institutional reform contributing to transitional justice:

Given the importance of an independent and effective judiciary in securing rights — but also of acknowledging the dubious role some judiciaries have played in pre-transitional periods in some countries — it is somewhat surprising that judicial reform has not played a more prominent role in discussions about guarantees of non - recurrence. This is in spite of recommendations made by many truth commissions in relation to judicial reform and the fact that many transitional countries have reformed their justice systems. This serves as a good illustration of the lack of focus and strategy in discussions about guarantees of non-recurrence, and of the disconnect between transitional justice and other policy interventions with which it coexists but rarely interacts.³⁶

The recommendations on judicial reforms fall into three categories. First, the need to screen judiciaries and remove personnel that facilitated past abuses is addressed, noting the “particular challenges” posed by the fact that judges are in principle protected from dismissal.³⁷ Second, the need for measures to promote judicial independence is raised, based on the risk that “without such reforms, the likelihood that courts will (at least) dare to check executive powers will not increase significantly, and will be entirely dependent on the virtue of particular individuals.”³⁸ Measures to support the individual independence of judges include a range of protections from physical safety to security of tenure, fair working conditions and protection from arbitrary transfer to undesirable locations.³⁹ Measures to protect institutional independence such as provision of adequate resources, administrative autonomy and enforcement guarantees for judicial decisions are also recommended.

Finally, the report recommends specialized preventive capacity building, not only through training on relevant international norms but also on how to prosecute “‘structure crimes’, such as genocide, crimes against humanity and war crimes, which rely upon a network of actors.”⁴⁰

35 UN General Assembly, “Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence”, UN Doc A/70/438 (21 October 2015).

36 De Greiff Prevention Report, para. 52 (citation omitted).

37 *Id.*, para. 55.

38 *Id.*, para. 57.

39 *Id.*, paras. 58-9.

40 *Id.*, para. 61.

Moving from institutional reform, the second set of measures, under the rubric of “societal interventions” go beyond what the state should do on its own to focus on how the state can support an active civil society in creating an enabling environment in transitional settings:

In past reports, more concerned with issues of redress, the point to emphasize was that a strong civil society diminishes the costs and risks of raising claims, both for individuals and groups. In the context of a discussion about prevention, the point to emphasize is that in a strong civil society, in which individuals and groups are empowered to exercise their rights, the violation of rights is less likely.⁴¹

Here, legal empowerment measures are particularly recommended as a means to ensure that “those who have traditionally been excluded from the protection of the law, particularly women” are facilitated in making use of the legal system “to advance their own rights, promote government accountability and resolve local disputes.”⁴² An important argument for community level legal empowerment measures is their potential to increase trust in institutions that may have previously been seen as inaccessible or oppressive, allowing them to support the “enhanced ability, confidence and willingness of individuals and communities to participate in sociopolitical processes, including transitional justice mechanisms.”⁴³

The third and final set of recommended measures are given as “interventions in the cultural and individual spheres”. In a sense, these measures are to be understood as the type of changes in attitude and predisposition that are necessary in order for the more technical changes called for in the prior sections to truly take hold in transitional societies, releasing their full preventive potential to hinder a return to large-scale violations:

... the sort of transformations that are called for in order to approximate anything resembling guarantees of non-recurrence following mass violations cannot be achieved through “institutional engineering” or institutional reforms alone. The challenge of achieving justice retrospectively and prospectively is not merely a technical one. Lasting societal transformations require interventions not only in the institutional sphere but also in the cultural sphere and at the level of personal, individual dispositions. While culture and “character” play a stabilizing function in social relations, and as such are by nature relatively immune to deliberate change, they are not immutable altogether. Hence, in the present report, the Special Rapporteur pays attention to interventions in the cultural and the personal domains that have received comparatively less attention.⁴⁴

41 Id., para. 89.

42 Id., para. 83.

43 Id., para. 84.

44 Id., para. 32.

Examples given in the report include developing educational curricula that promote analysis and critical reasoning, cultural interventions including exhibitions and memorialization, protection of archives related to past atrocities, and psychosocial support to victims.

In subsequent reports, Mr. de Greiff has reiterated his concern that guarantees of non-recurrence remain the “least developed pillar” of transitional justice,⁴⁵ but promoted a “comprehensive framework approach to prevention” that largely proceeds in substance from the original conclusions of his 2015 report.⁴⁶ One of the main aims of the latter report is to address the fragmentation of knowledge that poses a challenge to shifting from crisis management to genuine prevention. He notes that “most of the truly effective preventive measures ... in particular processes of institutional reform (including initiatives to establish judicial independence or civilian oversight over security forces) ... are rarely categorized as preventive tools.”⁴⁷

In another recent report, de Greiff acknowledges the particular challenges of transferring the transitional justice model from the negotiated post-authoritarian transitions where it was born to the complex and weakly institutionalized post-conflict settings where it is most frequently applied today.⁴⁸ In describing the original model, he pointed out that:

Most states regarded themselves as recovering legal traditions temporarily disrupted by authoritarianism. While such a perspective might seem somewhat self-serving, the States had modern, functional institutions with the capacity to make reliable attributions of criminal responsibility, an institutional set-up and the economic capacity to establish ... institutions sufficiently strong and compliant to withstand reform processes.⁴⁹

Describing the destructive effect of conflict on institutions, de Greiff notes that the existence of institutions is a *sine qua non* for human rights protection, and that in conflict settings, no one has focused sufficient attention on “how post-conflict societies should be assisted ... to effectively bridge institutional gaps that may hinder the realization of rights ...”⁵⁰ De Greiff concludes that no blueprint exists for achieving justice in the absence of institutions, but that justice cannot be reduced to “a luxury that only the affluent (or at least well institutionalized) countries can afford.”

45 UN General Assembly, “Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his global study on transitional justice”, UN Doc A/HRC/36/50/Add.1 (07 August 2017), para. 85.

46 UN General Assembly, “Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence”, UN Doc A/HRC/75/523 (12 October 2017).

47 *Id.*, para. 21.

48 UN Human Rights Council, “Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence”, UN Doc A/HRC/36/50 (21 August 2017).

49 *Id.*, para. 39.

50 *Id.*, paras. 55-6.

The same dilemma has been described in relation to broader development efforts by the g7+ Group of Conflict-Affected and Fragile States. In a recent concept paper relating the New Deal on Engagement with Fragile States to the UN 2030 Agenda, the vicious circle created by institutional weakness and fragility is clearly set out:

While the ambition set by the 2030 Agenda is to eradicate extreme poverty from the globe, empirical evidence suggests that, if current trends continue, extreme poverty will increasingly be concentrated in countries affected by fragility and conflict. These countries face context-specific challenges, including weak institutions and insufficient resources to tackle competing demands.⁵¹

For transitional justice practitioners, Mr. de Greiff recommends “a problem-solving” approach based on taking whatever steps are feasible within the given context to “secure in the short term maximum satisfaction for victims, and, eventually the full realization of ... rights.”⁵² However, he also notes that it is “imperative to find ways of integrating the transitional justice agenda closely with institution-building and institution-strengthening processes”, both to secure eventual legal redress for past violations and to prevent their future recurrence.⁵³

51 International Dialogue on Peacebuilding and Statebuilding, Conceptual Note: Realisation of the SDGs in Countries Affected by Conflict and Fragility: the Role of the New Deal (2016), available at https://www.pbsb-dialogue.org/media/filer_public/72/7b/727b3ec5-d96d-4acf-bcad-987ee5cb2094/realisation_of_the_sdgs_-_the_role_of_the_new_deal_3.pdf.

52 De Greiff Report on Transitional Justice in Post-Conflict Settings, para. 58.

53 Id., paras. 60-61.

V. Observations on judicial reform and prevention – how ILAC can contribute

Proceeding from the above developments in transitional justice thinking – and with a view to helping to integrate efforts to rebuild justice institutions with transitional justice measures – this discussion paper makes five key observations on the relationship between justice sector reform and prevention in transitional settings:

A. Justice sector actors require sustained, long-term support in order to meet their full preventive potential

ILAC was founded in recognition of the fact that rule of law assistance in conflict-affected settings is both particularly difficult and particularly crucial. It is difficult due to the destructive effect of conflict, not only on the physical infrastructure and personnel of justice institutions, but also on public confidence in institutions in general. However, it is also crucial due to the expectation that such institutions could nevertheless continue to dispense justice, absorbing the large and small disputes that might otherwise destabilize delicate peacebuilding settings.

One of the paradoxes of justice reform in transitional settings is the fact that even after justice institutions have been implicated in – or at least failed to prevent – serious past abuses and corruption, residual expectations frequently remain that they will nevertheless deliver justice in the aftermath. As a result, the ability of justice institutions to meet these expectations is frequently pivotal to public perceptions of justice, and therefore the success or failure of prevention policies. This analysis was key to ILAC's theory of change in its original proposal to work in the MENA region:

...focusing on rule of law institutions in post-conflict countries in the MENA region represents an effective and sustainable way of supporting efforts to move beyond societal conflict precisely because such institutions are recognized as being part of the solution to a greater degree than they may still be seen as part of the problem. Formal rule of law institutions foster greater legal certainty than any of the alternatives and offer more meaningful opportunities for human rights protection over the long-term, particularly for vulnerable and marginalized groups in society.

While such institutions share the same short-term legitimacy deficits of *any* formal institutions that have carried over from the previous regime, their apolitical nature, aspirations to independence and centrality to both dispute resolution and human rights protection make them an indispensable element of reform, even in the difficult conflict and post-conflict conditions now prevailing in much of the region.⁵⁴

Given the extent to which UN peace building and rule of law discourses have circled back around to prevention,⁵⁵ it is easy to forget that this issue has been central to both rule of law and transitional justice discourses since their founding. For instance, the UN Secretary General noted in 2004 that:

...in matters of justice and the rule of law, an ounce of prevention is worth significantly more than a pound of cure. While United Nations efforts have been tailored so that they are palpable to the population to meet the immediacy of their security needs and to address the grave injustices of war, the root causes of conflict have often been left unaddressed. Yet, it is in addressing the causes of conflict, through legitimate and just ways, that the international community can help prevent a return to conflict in the future.⁵⁶

For ILAC and its members, assessment and capacity-building work with justice sector reform in conflict settings is a vital exercise in rebuilding institutions with the mandate and capacity to address the types of injustices that can trigger renewed conflict and abuses. However, it is important to recognize that the preventive effects of judicial reform may be indirect, long-term and difficult to measure. At a practical level, one of the most important preventive effects of judicial reform may be its ability to avoid scenarios in which the failure of justice institutions to live up to the high expectations placed on them during transitions itself becomes a driver of renewed tensions and grievance. ILAC described this dynamic in its 2012 proposal to work in the MENA region:

Such processes are inherently difficult even in the absence of conflict. People are impatient for results and any expectations that rule of law institutions can both reform themselves and begin dispensing justice virtually overnight are bound to be disappointed. However, assistance and capacity building that support and hasten such reform processes can dampen these tensions.

ILAC's approach to conflict analysis is therefore based on the calculus that timely and effective support to rule of law institutions in transitional settings can speed the necessary changes that allow such institutions to become a

54 ILAC MENA Proposal, 8.

55 UN General Assembly, "Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence", UN Doc A/HRC/75/523 (12 October 2017). *See also*, Eli Stamnes and Kari M. Osland, "Synthesis Report: Reviewing UN Peace Operations, the UN Peacebuilding Architecture and the Implementation of UNSCR 1325" (Norwegian Institute of International Affairs, 2016); Arthur Boutellis and Andrea Ó Súilleabháin, "Working Together for Peace: Synergies and Connectors for Implementing the 2015 UN Reviews" (International Peace Institute, May 2016).

56 UN Security Council, "The rule of law and transitional justice in conflict and post-conflict societies – Report of the Secretary-General", UN Doc. S/2004/616 (23 August 2004), para. 4.

positive factor in transforming conflict rather than an object of conflict and tension themselves.⁵⁷

As described in ILAC's 2013 assessment report on Libya, the very transitional nature of such settings raise inherent challenges. In Libya, the justice system faced the triple necessity of balancing two key transitional justice tasks: (1) undertaking meaningful reforms to prevent future violations, including vetting and dismissal of abusers among their own ranks, and (2) driving prosecutions in highly sensitive cases of abuses related to the revolution, while simultaneously (3) continuing to process ordinary caseloads. Noting the extent to which the aftermath of the 2011 uprising risked entrenching victor's justice against those perceived as allies of the overthrown strongman Muammar Gaddafi, the report pointed out that the stakes could not have been higher:

Libya's international law obligations require that the guilt of individual members of impugned communities be determined in accordance with law. At the same time, the country's political future depends on finding a transitional justice formula that allows such communities to reintegrate into the new Libya, alongside Gaddafi's victims and the population as a whole. However, recent strict political vetting proposals risk creating a destabilizing alliance between disenfranchised political elites and dispossessed communities. Whether viewed from the perspective of rule of law, transitional justice or political stability, Libyan authorities must pursue individual accountability and avoid collective retribution.⁵⁸

In the event, the Libyan courts did not make significant headway on either their own reform or transitional prosecutions, and the resulting sense of drift and injustice did little to hinder to the country's slide back into large-scale violence in 2014. In the meantime, ILAC had become involved in extensive capacity-building work with the judiciary in neighboring Tunisia, which faced a similar set of pressures related to the combination of its ordinary and preventive roles. In his February 2012 report on a mission to Tunisia, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment Juan E. Mendez described this dynamic:

As in other transitions to democracy, Tunisia is faced with the fact that cases accumulated over years might be neglected, as the judiciary is overburdened with the task of dealing simultaneously with the cases stemming from the Ben Ali regime, cases from the revolutionary period, new cases and ongoing reforms. Some interlocutors strongly supported the establishment of an ad hoc tribunal or another transitional justice mechanism to deal primarily with the cases of the past regime.⁵⁹

57 ILAC MENA Proposal, 8.

58 ILAC, "Libya 2013", 33.

59 UN General Assembly, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Tunisia (15 to 22 May 2011)", UN Doc A/HRC/19/61/Add. 1 (02 February 2012), para. 77.

In the same report, Mendez called for meaningful reform of the judiciary,⁶⁰ pointing out that its lack of independence had rendered it unable to prevent past practices of systematic torture and abuse of detainees:

The Special Rapporteur was informed that complaints of torture were rarely investigated under the Ben Ali regime. The judiciary has reportedly been tightly controlled by the executive branch. In the majority of cases, the investigating judge would refuse to register complaints of torture out of fear of reprisals, and complaints lodged by victims to the prosecution were almost always dismissed immediately. The practice of admitting a confession obtained under torture into evidence was widely practiced by judges. In addition, forensic assessments generally were not conducted or, if they were, their credibility was undermined by many deficiencies or falsified conclusions.⁶¹

In a Tunisia mission report of his own one year later, Pablo de Greiff responded to the concerns Mendez expressed and reaffirmed Mendez' conclusion that fundamental judicial reform was a key necessity for preventing the recurrence of violations.⁶² Emphasizing that the use of courts to ensure criminal justice after a transition is "a matter of legal obligation",⁶³ de Greiff criticized the shortcomings of trials presided over by the military justice system to that date, but acknowledged that "a large proportion of the population sees the military courts as being more independent than the civilian justice courts."⁶⁴ In de Greiff's opinion, the necessity of shifting trials of security officials for human rights violations to civilian courts made the reform of civilian courts a key priority in preventing further abuses:

The fact that citizens consider military courts to be more effective in securing their rights than civilian courts speaks to the challenges that the judicial system in Tunisia currently faces. Obviously, the solution cannot consist merely in a decision to move to unreformed civilian courts; such a solution also lies in an earnest and systematic effort to improve their reliability.⁶⁵

60 *Id.*, paras. 100 (h) (on steps to increase the independence of the judiciary and its effectiveness in prosecuting past violations), and 102 (b) (on steps to enhance judicial monitoring of alleged and apparent abuse in custody).

61 *Id.*, para. 32.

62 UN General Assembly, "Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff – Addendum: Mission to Tunisia (11–16 November 2012)", UN Doc A/HRC/24/42/Add.1 (30 July 2013).

63 *Id.*, para. 42.

64 *Id.*, para. 50.

65 *Id.*, paras. 50-51.

De Greiff accordingly prioritizes “comprehensive reform of the civilian judiciary, to guarantee its full independence and impartiality” in his discussion of measures of institutional reform to prevent the recurrence of violations.⁶⁶ Like Mendez, he also makes detailed recommendations related both to prosecution of past crimes by ordinary courts,⁶⁷ and to prevention, by way of strengthening the independence of the judiciary, including greater formal guarantees of independence, the adoption of ethical codes, increased self-regulation, and greater security of tenure for judges introduced after a systematic but procedurally fair vetting process to remove judges disqualified by their complicity in past abuses.⁶⁸

These findings align with ILAC’s own conclusions on the difficulty and necessity of judicial reform in Libya and the broader MENA region; in order to play a meaningful role in preventing future abuses, post-conflict judiciaries burdened with heavy ordinary caseloads must take on two additional transitional tasks. They must not only bear their share of the burden of guaranteeing accountability for past crimes, but in order to do so credibly they must quickly reform themselves in order to become – and be seen to become – independent and effective. Justice institutions facing such extraordinary challenges in moments of post-conflict disarray frequently require sustained assistance in order to address such comprehensive multiple challenges.

In the MENA region and beyond, ILAC has sought to support to support justice sector actors facing the multiple demands posed by transitions and peacebuilding. As in the 2013 ILAC assessment in Libya, a crucial starting point for such assistance involves efforts to engage with national actors in analyzing the specific scope and nature of the challenges in any given setting. This assessment work results in contextually-grounded conclusions and recommendations that can be taken up by both national actors and their international partners, including ILAC and its members, in promoting accountability and supporting necessary reforms.

Where ILAC does go on to provide expertise to assist in justice sector reform, it seeks to do so with a long-term perspective and an iterative approach that allows rapid adaptation in response to results monitoring and opportunities and risks arising in the field.⁶⁹ In the MENA region, for instance, ILAC has expanded its earlier MENA Programme in order to support key actors such as court administrators not included in the original concept, developed techniques for active outcome mapping, and most recently proposed a new MENA Programme that builds directly on results achieved in earlier activities, based on a theory of change honed over the course of years of engagement in the region.

66 Id., paras. 51, 55-62.

67 Id., para. 85

68 Id., para. 87 (b).

69 See for instance, “Fast and flexible Tunisian work” – mid-term Project Review shows “good grades” (ILAC blog piece, 23 April 2014), available at <http://www.ilacnet.org/blog/2014/04/23/fast-and-flexible-tunisian-work-mid-term-project-review-shows-good-grades/>.

B. To be effective in transitional settings, “judicial reform” should be conceived of holistically and in terms of reform of the broader justice system

Judges are the central actors in justice systems but do not act in isolation. For judges to function effectively, a range of actors within a broader justice system must play their corresponding roles. This includes actors as mundane but crucial to judicial effectiveness as court administrators, clerks, court marshals and notaries. In criminal law contexts, justice systems are typically defined to include not only judges and the judiciary, but also actors exercising executive functions such as the prosecution and police tasked with receiving and investigating complaints.

While lawyers typically act in a private capacity and bar associations are in effect a type of civil society organization, the legal profession nevertheless frequently has public functions and acts in accordance with mandates and roles set out in laws. In its capacity of providing legal defense, the legal profession is clearly to be seen as part of a functional justice system. Finally, independent “fourth pillar” bodies such as national human rights institutions or anti-corruption and integrity agencies may play an important role in justice systems by e.g. investigating patterns of crimes and violations and referring cases to prosecutors.

Understanding the roles played by the respective actors in justice systems has been a longstanding preoccupation for ILAC in its assessment work, which has traditionally aimed at developing as comprehensive a picture of the justice system as possible. Attention to the respective components of justice systems has remained a priority in more recent program work. For instance, in its MENA Programme Proposal, ILAC began by describing the long-term changes it aimed to support through capacity development work in relation to five types of “core” rule of law actors:

These ‘core’ rule of law institutions can be divided into several categories. Some are longstanding public bodies formally charged with maintaining law and order, most notably ministries of justice and the judiciary. The private bar is also a key actor, serving as a crucial link between the judicial system and ordinary people involved in civil disputes and criminal cases. Finally, watchdog bodies including both National Human Rights Institutions (NHRIs) and Anti-Corruption Agencies are increasingly frequently resorted to as a means of promoting respect for rights and transparency in national legal systems.⁷⁰

70 ILAC MENA Proposal, 10.

Broad approaches to justice sector reform must necessarily be nuanced and differentiated to take into account the various interconnected roles and mandates of the respective actors involved in any given setting. In this sense, it is more complicated than narrower judicial reform, even if work with judges constitutes its central element. It is also crucial to take contextual particularities into account against a background of relevant international standards and practice.

For instance, the ILAC MENA Programme included prosecutors in capacity development programs for judges based on the tendency in the MENA region to legally classify the prosecution as a part of the judiciary. However, there is a general trend in global practice toward differentiation of judges and prosecutors, based on the fact that the role of prosecutors in justice systems typically includes strong elements of executive power. In the context of the MENA region, where judges frequently spend considerable periods of their careers acting as prosecutors, excluding prosecutors from medium-term capacity support for judges would clearly be self-defeating, but proposals for longer-term reforms should nevertheless take into account recommendations by international experts in favor of clearer differentiation of roles.⁷¹

Across a range of fields, judicial reform efforts are dependent on understanding and addressing the roles of complementary actors in the broader justice system and beyond. For instance, in describing practical steps to achieve judicial accountability for corruption and human rights violations, the International Commission of Jurists recommends a “holistic” approach that recognizes that “measures taken only by or only in relation to the judiciary are unlikely to succeed if they are not matched, sooner or later but preferably at the same time, by similar efforts to address corruption and abuses by other governmental and non-governmental actors.”⁷²

Indeed, in an ideal scenario where reforms have taken hold, judges should themselves understand the need for – and demand – measures to ensure that other actors in the justice system are also supported in understanding the urgency of system-wide reform and the role that they can play. During a 2014 review of ILAC’s judicial training work in Tunisia, for instance, an expert evaluator found a sign of progress in the fact that judges had begun to formulate concrete recommendations along these lines:

While the judges insisted that they were doing their best, some asserted that they couldn’t do anything without the reform of other institutions that the judiciary directly or indirectly depended on to do their job. Foremost among these are the prosecutors, particularly in their role as the authority mandated to oversee the work of the Judicial Police.

71 In Tunisia, former UN Special Rapporteur on the independence of judges and lawyers Gabriela Knaut recommended that judges and prosecutors be more clearly distinguished under national law: “The Special Rapporteur emphasizes that the perception by the general public of sitting judges and prosecutors performing different roles and functions is important, given that public confidence in the proper functioning of the rule of law is best ensured when every State institution respects the sphere of competence of other institutions (A/HRC/20/19, para. 40) and its actors have a separate career.” UN Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers on her mission to Tunisia, UN Doc. A/HRC/29/26/Add.3 (26 May 2015), para. 70.

72 International Commission of Jurists (ICJ), *Judicial Accountability: A Practitioner’s Guide* (June 2016), 3.

While the judges recognized their own deterrence role, they viewed the Prosecutors as more directly responsible for preventing abuses and recommended ... either direct inclusion of representatives of key non-judicial institutions in the course, e.g. the Judicial Police, the Directorate for Children, and the Directorate for Family Law, or ... a specialized course for prosecutors that focused on greater oversight of and interaction with the Judicial Police.⁷³

During both the ongoing trainings and subsequent meetings with judges to monitor the results, similar demands arose for greater attention to the needs of court administrators and clerks.⁷⁴ It was clear from the beginning that these demands were clearly linked to one of the challenges ILAC had observed to judicial reform, namely the fact that judges remained “isolated and overburdened with work”:

... inefficient court administration gives rise to backlogs of cases that can leave judges in countries such as Tunisia with no discretionary time. In this sense, caseload and working conditions constitute a central obstacle to independence and human rights application, as they leave judges with almost no time to confer with their colleagues or undertake research on applicable human rights norms.⁷⁵

ILAC was able to follow up by carrying out an assessment, together with its member organization the National Center for State Courts (NCSC) on court administration in Tunisia in early 2015. This was followed up by programming with NCSC involving joint work with judges and court administrators to introduce more effective practices.⁷⁶ These efforts have been well received as reforms to the justice system with clear positive impacts on the work of the judiciary and benefits for users of the courts.

Monitoring of the “Improving Court Administration in Tunisia” program indicates that work with clerks and court administrators improves litigants’ experience of the courts, augmenting their understanding of their rights and how they can practically access justice. The same work also improves judges’ understanding of the litigants that they serve, and the challenges that they face in accessing justice. By developing routines, computerising data systems, and improving their communication with litigants, clerks not only facilitate the work of the judges, but also set higher expectations on judges to deliver justice.

73 Stockholm Policy Group, *Mid-term Review of ILAC’s Program on Training of Tunisian Judges* (March 2014), 30.

74 ILAC MENA Programme 2014 Narrative Report, 13.

75 ILAC MENA Programme 2014 Narrative Report, 11.

76 ILAC and National Center for State Courts, *Tunisia 2015: Assessment of the Tunisian Court System* (2015).

C. The central challenge of justice sector reform in transitional settings is the achievement of changes of attitude and expectations among justice sector actors

One of the most important insights that ILAC has gained in its rule of law work during and since the MENA Programme has been the importance of understanding how justice sector actors perceive their mandate and role in society. A common obstacle to effective rule of law assistance arises in cases in which the type of national-level changes required in order to comply with international norms and standards are perceived as outside impositions without clear benefits for actors in and users of the justice system.

Successful justice sector reform frequently involves mobilizing key actors within justice institutions by helping them understand how reforms based on international standards can be adapted to local contexts in order to bring gains in terms of both capacity and legitimacy.⁷⁷

Given ILAC's nature as a consortium composed of organizations representing justice sector professionals, rapport has tended to come quickly with national counterparts in countries where we are carrying out assessment and capacity development work. However, building such peer to peer relationships is only the first step in the arduous and long-term task of supporting reform. A great deal depends on understanding how the judiciary understands its own role in society and moving toward a shared understanding of what steps must be taken to rebuild public trust eroded by conflict or abuses. This work tends to come down to what de Greiff describes in his 2015 prevention report as "the level of personal, individual dispositions" among justice sector actors. Reforms will not be sustainable without fundamental changes in attitude. However, this conclusion presents a great challenge in dealing with judicial institutions, which tend to be inherently conservative, hierarchical and structurally resistant to change.

It is important to recall that while judicial conservatism can delay reforms, it can also serve an important protective function. In its 2013 MENA Programme proposal, for instance, ILAC described how this tendency helped judiciaries in the region emerge from authoritarian rule with a degree of integrity intact:

While judicial systems and the broader legal sector in Arab states were damaged by the attempts of authoritarian regimes to marginalize and co-opt them, they frequently retained a degree of independence and continued to provide indispensable services to ordinary people. Moreover, a common denominator for authoritarian Arab regimes was the use of ad hoc special courts that bypassed the ordinary judiciary to carry out the worst abuses of justice.

⁷⁷ Sannerholm, Quinn and Rabus, 21.

As a result, ordinary court systems and bar associations have a salvageable legacy and enjoy a degree of legitimacy higher than that of executive (and sometimes legislative) bodies seen as having been entirely subjugated by past authoritarian rulers.⁷⁸

In other words, although judicial independence is conceived of differently in different systems, a feature that unites many judiciaries is an ingrained resistance to change, whether such is imposed by authoritarian dictators or well-meaning international rule of law experts. In the sense of de Greiff's prevention report, therefore, meaningful "institutional interventions" involving judicial reform, will succeed to the extent that they incorporate "interventions in the individual sphere" aimed directly at the justice actors composing judicial institutions, and particularly the potential change agents among them.

Indeed, the extent to which judges are likely to be resistant to change distinguishes judicial reform significantly from other "institutional interventions" involving reform of state institutions. In this sense the judiciary epitomizes de Greiff's departure point for describing "interventions in the cultural and the individual spheres" to an unusual degree:

Culture and personality structures are, generally speaking, sources of stability and continuity in social relations, hence, neither one is open to direct and immediate change by legal fiat. However, this does not imply that they are immune to any change.⁷⁹

It is particularly important to understand this distinction in relation to fields such as security sector reform, which has been the predominant form of institution-building activity in transitional justice practice debate.⁸⁰ While a central aim of security sector reform is to impose relatively straightforward civilian control over the security forces via the executive branch,⁸¹ the aim of judicial reform must be understood to be fostering and maintaining meaningful independence from the executive branch while simultaneously encouraging judges to reconceive what independence means in terms of their relationship to society at large. A recent report by the International Commission of Jurists illuminates the subtle but crucial relationship between independence from the political branches and accountability to society and the law in a democracy:

78 ILAC, "ILAC Mena Programme 2013-2016: Building capacity and infrastructure" (December 2013), 7.

79 De Greiff prevention report, para. 92.

80 A 2014 Legatum Institute report on police and justice reform in Georgia demonstrates the pitfalls of applying the same approach to both fields. The report describes how the positive effects of a root and branch reform of the police forces to bring them fully into a hierarchical command system were vitiated by a subsequent attempt to bring the judiciary to heel by similar methods. Peter Pomerantsev, "Revolutionary Tactics: Insights from Police and Justice Reform in Georgia" (Legatum Institute Transitions Forum, June 2014).

81 UN General Assembly, "Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence", UN Doc A/70/438 (21 October 2015), paras. 52-3, 65.

The judiciary is accountable to the other branches of government – legislative or executive – in the same sense as it is accountable to society more generally: as an institution, it must be able to demonstrate that judicial decisions are based on legal rules and reasoning, and fact-finding based in evidence, in an independent and impartial way free from corruption and other improper influences. The principle of judicial independence precludes, on the other hand, any claim that the judiciary should be accountable to the executive or the legislature in the sense of “responsible” or “subordinate” to these branches of government.⁸²

Judges in transitional settings, in other words, are to be both empowered to resist change and encouraged to embrace it. In the case of judicial vetting, experts such as de Greiff have suggested that aspects of individual independence such as security of tenure should be extended to judges only once they have acted to collectively remove those among them complicit in past abuses and corruption.⁸³ Indeed, the risks of judges failing to demonstrate willingness to meaningfully reform themselves in transitional settings are demonstrated by the case of Libya, where judges were ultimately included in a lustration regime for public officials, the “Political Isolation Law”, that was roundly condemned by all observers as overbroad and arbitrary.⁸⁴ During ILAC’s 2013 assessment in Libya, prior to the Law’s passage, the risks posed to the legitimacy of the judiciary were already clear:

... most judicial officials interviewed for this report contended that a post-2011 process of review, which generally followed the pre-existing procedures used by the Judicial Inspectorate, had accomplished the goal of removing incompetent and politically appointed judicial officials through retirement or transfer to other departments within the Ministry of Justice. ... Nevertheless, judicial vetting remains at the heart of the current debate, with some observers speculating that the vehemence behind the Political Isolation bill may stem from the failure of earlier vetting processes ... to cover judicial officials. Driving the debate over judicial vetting is the uncertainty regarding whether judges volunteered or were forced to serve on Gaddafi-era special courts.⁸⁵

82 International Commission of Jurists, “Judicial Accountability”, Practitioners Guide No. 13 (2016), 16-17.

83 De Greiff Tunisia report, para. 87 (b).

84 See, e.g. Mark Kersten, “Libya’s Political Isolation Law: Politics and Justice or the Politics of Justice?”, Middle East Institute Pathways to Transitional Justice in the Arab World Essay Series (05 February 2014), available at: <http://www.mei.edu/content/libyas-political-isolation-law-politics-and-justice-or-politics-justice>.

85 ILAC Libya Assessment (2013), 36-7.

This dynamic results in a delicate balancing act for both justice sector actors in countries in transition and international rule of law actors seeking to support reforms. In her 2015 report on Tunisia, then-Special Rapporteur on the independence of judges and lawyers Gabriela Knaul listed numerous legislative, structural and practical barriers to independence, but located the most critical barrier squarely in the attitudes of the judiciary itself:

The Special Rapporteur found that the main challenge in the reform of the judiciary in Tunisia is to change the mentality of judges, prosecutors, lawyers and administrative staff in courts.⁸⁶

This type of finding clearly complicates the nature of the recommendations that can be provided. Where mentality is diagnosed as the main problem, the types of legislative and technical fixes frequently recommended in human rights reports will only scratch the surface. However, Ms. Knaul's recommendation that the current culture of the judiciary "must ... give way to a culture based on human rights and an understanding of the principle of independence" while clearly correct, does not set out an actionable policy.⁸⁷ Research on rule of law assistance by the Folke Bernadotte Academy (FBA) nevertheless indicates that sustained efforts to convince justice sector actors of the necessity of reform is the only approach likely to yield sustainable results.

While there are technical change factors to rule of law efforts, most components involve what is called 'adaptive change'. The term involves changing people's habits, beliefs, priorities and loyalties, which require decision makers to make significant internal shifts and to begin acting differently. This reflects what has long been considered as 'responsive regulation' and accumulated thinking on how best to encourage change through regulation where formal rules are but one part of the approach. ... Technical solutions do not sufficiently change the behaviour of relevant actors. It is rather personal and individual actions that manifests change. This is also the most common cause of failure in reform initiatives – that is, the application of technical solutions to adaptive challenges.⁸⁸

The question naturally remaining is how such "personal and individual actions" can be encouraged in practice. Although there is not a simple answer to this, ILAC's experience indicates that targeting individual change agents within institutions is an important way forward. However, in hierarchical institutions such as the judiciary, the individual actors most open to change may often be junior, relatively inexperienced and isolated within larger structures. Moreover, even where high level change agents are identified, the persistence of ingrained habits and the reproduction of attitudes through established training procedures can lead to an inertia that may be resistant to change by fiat, even from within the institution.

86 UN General Assembly, "Report of the Special Rapporteur on the independence of judges and lawyers on her mission to Tunisia", UN Doc. A/HRC/29/26/Add.3 (26 May 2015), para. 86.

87 *Id.*, para. 90.

88 Sannerholm, Quinn and Rabus, 39 (citations omitted).

ILAC and its members have struggled with this general dynamic in a region characterized by hidebound justice systems. As set out in the 2014 Annual Report for the ILAC MENA Programme, ingrained and inflexible attitudes have presented an obstacle to the meaningful implementation of human rights standards and judicial protection of marginalized groups throughout the region:

... judicial institutions remain highly formal and hierarchical in a manner that tends to discourage initiatives on the part of individual judges or prosecutors and encourage ineffective, top-down micromanagement. Expectations placed on judges tend to focus solely on their application of domestic statutory law; while they are not prohibited from applying international norms such as human rights, the lack of any formal guidance, active encouragement, or positive incentives constitutes an implicit discouragement. In practice, human rights are rarely referenced or applied by courts.⁸⁹

Indeed, as pointed out in regard to the Tunisian judicial training programme in the same report, these attitudes meant that judges attending early iterations of the trainings frequently misunderstood the fundamental aim of such activities.

On the side of participants, there appears to have been a misperception that the role of international trainers was to provide direct answers to the concrete problems they faced, rather than a set of conceptual tools to assist them in resolving these issues themselves. This misperception may itself in part reflect Tunisia's tradition of control over the judiciary, with some judges still conditioned to seek authoritative answers from others rather than guidance in arriving at them themselves.⁹⁰

In approaching this problem in its judicial trainings in Tunisia, ILAC has, together with its member organizations the IBAHRI and CEELI Institute, developed a theory of critical mass involving trying to expose as much of the judiciary as possible to the same discussions regarding independence and the application of human rights:

The concept of independence of the judiciary contains an element of critical mass or "safety in numbers". In order to make the concept a reality, it has to be understood and encompassed by the majority of judges. A judge, who can trust and rely on the loyalty and solidarity of his or her fellow judges, will be much more likely to be able to withstand pressure from outside sources. And conversely, a politician will be less likely to attempt to unduly influence the outcome of a case if there is a risk that the attempt will be exposed, or if he knows that if he tries to remove an independent-minded judge from a case, it will be impossible or difficult to find a replacement. As a consequence of this theory of critical mass, this kind of training will reach its full potential only if its message will reach practically all judges.⁹¹

89 ILAC MENA Programme Annual Report 2014, 10.

90 ILAC MENA Programme Annual Report 2014, 30.

91 See Training of Tunisian Judges" (ILAC MENA Programme component description, December 2013), available at <http://www.ilacnet.org/ilac-work/tunisia/tunisia-training-of-judges/>

Again, recent research supports the potential efficacy of pursuing such approaches, including scaling them up to include other stakeholders. For instance, the FBA has emphasized the need to move beyond early practices of supporting legislative reform without following up to ensure that the resulting new norms would be sufficiently well understood and supported by key stakeholders to be sustainable. In emphasizing the importance of ensuring that “law plays a role of supporting or facilitating change, not as the main vehicle through which change happens” the FBA suggests that:

For effective change any institutional reforms launched must be of such a comprehensive nature that they “do not only change the individual stakeholders’ perceptions about ‘how to play the game’, but also (and foremost) her perceptions of whether ‘most other’ stakeholders in her situation are also willing to change their behaviour”.⁹²

In the case of judges participating in ILAC’s Tunisia training programme, efforts to monitor results turned up evidence of a significant change in attitude by 2014. This began with the tendency of judges to correctly identify the purpose of the course itself, and understand its benefits in terms of providing tools rather than answers. By their own account, this was largely due to their communication with colleagues who had participated in the trainings, and as a result of the increasing openness to problematizing and discussing their roles as judges at ILAC’s trainings and in other forums made available by internationals at the time. A November 2014 interview with a judge in a central Tunisian court is typical of the trend observed:

[During the course, the subject had set a personal action plan of] pushing for a judicial code of ethics. Since finishing the course, he has on his own initiative informed himself about the ongoing effort to draft a code of ethics. At the time of the interview, he discussed the draft that had just been circulated and the challenges that remained in finalizing and adopting it. He commented, “Judges must exert pressure and launch initiatives, they cannot only wait.” [He] noted that the type of exchange of experience highlighted at the ILAC trainings were crucial in Tunisia’s time of transition, and that the benefit of the training flowed from the opportunity to engage in an open-ended discussion with colleagues and international experts.⁹³

Another approach to changing attitudes within the judiciary is reflected by the work undertaken by the Raoul Wallenberg Institute (RWI) with judicial training institutes in the region, in the framework of the ILAC MENA Programme. Facing a reluctance to apply anything but rote domestic law even by judges given formal training in international human rights, RWI sought to gather and compile all existing national court

92 Sannerholm, Quinn and Rabus, 55 (citing Valters, Van Veen & Denney, *Security Progress in Post-conflict Contexts: Between Liberal Peacebuilding and Elite Interests* (2015) p. 25).

93 ILAC, “Monitoring the ILAC MENA Programme: Examples of “Verifiable Instances” (internal memorandum, updated 25 February 2016), 5.

decisions from the region that apply or rely on international human rights standards, making them justiciable.⁹⁴ By working with national judicial training institutes in the region to undertake this work, RWI also created the conditions for sustainable incorporation of regional human rights jurisprudence into the training curricula that shape the approach of new judges in each of the involved countries:

To encourage sustainability, ownership and adoption of the concept of application of international standards in national courts, an inclusive and participatory approach has been developed in implementing activities with the national partners The concept was created with the National Working Groups (NWG) of the 7 judicial institutes. However, the development of the “training manual” and the curricula were not limited to the NWG but also included the participation of the training staff at the judicial institutes to ensure the adoption and ownership of the new training methodology and supporting material ... not only at the institutional level but also at the individual level i.e. the teachers who would be using it.⁹⁵

In short, encouraging judges to rethink the premises of their work is a difficult but not hopeless task. In the experience of ILAC and its members, sustained, long-term engagement can provide opportunities to facilitate genuine change.

94 In all seven research studies have been carried out together with the judicial institutes in the MENA region, in addition to a regional training manual and two regional jurisprudence books on the application of international standards by national courts. See: <http://rwi.lu.se/2016/09/two-new-books-on-arab-jurisprudence-published/>

95 ILAC MENA Programme Annual Report 2016 (2017), 15.

D. The attitudinal changes that justice reforms in transitional settings seek to bring about must involve openness to and engagement with justice seekers and the broader public

One of the pitfalls of rule of law assistance in countries experiencing transitions is the tendency for judiciaries to understand the independence they aspire towards both too broadly and too narrowly. Too broadly in the sense that judiciaries sometimes understand their independence not only as a shield against interference by the executive branch, but as a protection against interaction with any actor. And too narrowly in the sense that this conception of independence excludes the responsibilities and indeed the accountability that lie with the judiciary with regard to the rest of society.

To quote the 2004 UN Secretary General report, post-conflict judiciaries, in particular, must not stray too far from their fundamental duty to extend the protection of the law to all, including the most marginalized:

Our experience in the past decade has demonstrated clearly that the consolidation of peace in the immediate post-conflict period, as well as the maintenance of peace in the long term, cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice. At the same time, the heightened vulnerability of minorities, women, children, prisoners and detainees, displaced persons, refugees and others, which is evident in all conflict and post-conflict situations, brings an element of urgency to the imperative of restoration of the rule of law.⁹⁶

At a very practical level, judiciaries that are seen as having become too distant from the populations they serve during periods of authoritarian rule are placed on notice by the lack of trust expressed in them during transitions. In Tunisia, Pablo de Greiff emphasized the risk that prosecution for past violations in ordinary courts would fail to achieve justice if urgent reforms were not undertaken to increase confidence in the judiciary.⁹⁷ Meanwhile, Gabriela Knaul provides specific guidance on the accountability of judges,⁹⁸ and has called for a change of judicial culture in Tunisia implying greater responsiveness:

96 Annan Report on rule of law and transitional justice, para. 2.

97 De Greiff Tunisia report, para. 51.

98 Knaul Tunisia report, paras. 29-34.

Although the general public has a poor perception of the justice system and trust in it is low, justice not only needs to be done but must also be seen to be done. The abuses of the previous regime, where corruption and regular executive interference in the work of the judiciary to influence the outcome of specific cases before the courts were common, must cease. The issue of the independence of the judiciary is also related to institutional culture and mentality, which must eventually give way to a culture based on human rights and an understanding of the principle of the independence of the judiciary and the separation of powers.⁹⁹

In the terms of de Greiff's 2015 prevention report, this is the point at which the link is clearest between "institutional interventions" involving judicial reform and "societal interventions" involving legal empowerment. Civil society organizations that engage in legal empowerment activities, including efforts to ensure that the claims of victims are brought to adjudicatory bodies, can play an invaluable role in creating demand for justice and pressuring justice sector actors to respond appropriately. Where courts are responsive, this can help to catalyze "the enhanced ability, confidence and willingness of individuals and communities to participate in sociopolitical processes, including transitional justice mechanisms."¹⁰⁰ In other words, where courts affirm the equal citizenship of victims of gross violations, they build the civic trust between citizens and institutions that is a precondition for the rule of law to function. However, where courts have failed to undertake the necessary reforms and vetting to merit public trust, this virtuous cycle will fail to materialize.

ILAC's reports from the MENA region reflect some progress in this regard in countries like Tunisia. For instance, monitoring of the judicial training program have noted a broad range of initiatives aimed at making courts and procedures accessible for ordinary litigants. Even the most modest among them provide evidence of evolving judicial attitudes toward ordinary users of courts. Even early reports provided examples of positive changes (described as "verifiable instances") of this nature:

... verifiable instances as prosaic as placing signs in courthouses to guide visitors ... are similarly reflective of transformative change. The idea that justice should be accessible to ordinary citizens and that judges are in some manner accountable for guaranteeing this is an important attitudinal change in a system in which judges and administrative officials were previously encouraged to be remote and inaccessible. Concrete measures such as signs are an important part of creating the conditions for the enjoyment of access to justice and the right to a fair trial. By independently taking steps to promote such changes, individual judges demonstrate a newfound sense of independence.¹⁰¹

99 *Id.*, 90.

100 De Greiff prevention report, 19.

101 ILAC MENA Programme Annual Report 2014, 31.

Further examples of relatively straightforward changes capable of high impact for claimants were provided by a family law judge in the interior of the country:

[The subject] said that the programme had inspired him to try to improve planning in his chamber to minimise the amount of time that parties had to wait. He found that although the great variation in how long family cases take prevented him from scheduling exact times for each meeting, simply letting parties know if their case was to be heard in the first or second half of the day had allowed him to effectively cut their waiting time in half. The shorter queues outside his door meant reduced stress and allowed him to take sufficient time to allow the aims of the meetings to be achieved.¹⁰²

A colleague in a different court had arrived at a more systematic approach to the same problem:

[The subject] developed a personal action plan involving reorganizing her chamber so as to allow for more effective sequencing of cases in light of the heavy workload she and her colleagues faced. She succeeded by working closely with the two junior judges in her Chamber, along with the registrar staff. She meets with her colleagues regularly to plan ahead and take time to mentor newly recruited judges. This approach has facilitated more systematic scheduling of cases that allows both quicker processing and more thorough attention to sensitive categories of cases involving vulnerable parties such as children.¹⁰³

The significance of such early openings appears to have been confirmed by increasingly sophisticated interventions indicating an improved understanding of what human rights norms imply for judicial work, greater openness to individuals affected by the justice system and an ability to apply these insights in a sustainable manner, based on a thorough understanding of the local context. For instance, a Prosecutor from a medium-sized Tunisian coastal town was quoted describing a system he had developed to minimise abuse in police custody, which he said had come about as a direct result of his experience of participating in the ILAC training:

Under the new procedure, he now demands to see each suspect before granting any application to hold them in detention. He asks all suspects if they have been subjected to any form of violence in connection with the arrest or during detention. If he gets any indication that something is wrong the suspect is removed from the custody of the persons involved. He then routinely secures lists of other detainees in the same detention centre and questions them to get independent evidence from the police.

¹⁰² ILAC, Monitoring the ILAC MENA Programme: Examples of ‘Verifiable Instances’ (updated 25 February 2016), 3.

¹⁰³ *Id.*, 6.

When the system was first implemented suspects would often raise issues of mistreatment but as the police have got used to the new system and adjusted to the rules, the number of such instances has dropped significantly and now it is very rare. He believed this was because they have changed how they behave towards suspects and stopped using violence.

In addition, [the subject] has put routines in place to reduce unnecessary time spent in detention. He is able to grant three days detention. Previously, the police often would bring suspects before the court on a Friday. That way, the judge would feel compelled to grant the full three days as the suspect would otherwise have to be released before the weekend without any chance for the police to conduct investigations. According to the new routines, the application must be made on Thursdays at the latest. He said the rules had meant a change for the police. However, having had time to adjust, police officers now say that they like working with him because the procedure is clear. They know what is expected of them and the system is predictable.¹⁰⁴

While these anecdotes indicate considerable progress in how Tunisian judges view their relationship with justice-seekers and the broader public, the process is by no means complete. In the course of scoping work for a new MENA Programme proposal submitted earlier this year, ILAC observed that many judges still need to improve the way that they communicate with the public. In light of increased public scrutiny since the 2011 Revolution, the judiciary continues to struggle with a sense that interest in its work from the public and the media represents an effort to interfere with their decisions. This reaction may stem from frustration over the fact that judges still struggle to explain their decisions in terms that the public understand and resent what they frequently view as partisan misrepresentation of their work in the media. Despite this, the judges interviewed consistently emphasized that the burden was on them to improve, and did not dismiss or criticise the public's right to demand transparency from the judiciary.¹⁰⁵

104 Id., 7-8.

105 ILAC Mission Reports, MENA Programme Bridging Period, February and March, 2017.

E. One of the most significant practical obstacles to effective justice sector reform in transitional settings is the challenge presented by the need to measure change

Supporting rule of law reform that changes the attitudes of justice actors in transitional settings is challenging work on its own terms. However, it is frequently further complicated by the need to measure results and the necessity of demonstrating positive change for donors.

The value of monitoring and measuring results in rule of law assistance is undeniable, and it lies in the interest of organizations like ILAC to develop constructive and innovative solutions to overcoming the challenges of doing so. Aside from reporting to donors, comprehensive results management can allow lessons to be drawn from past experiences, improving the effectiveness of future rule of law reform assistance activities.

Predicting rates of change over time poses a particular challenge when trying to comply with donor requirements. Fostering meaningful change in the behavior of justice sector actors requires a long-term perspective that seldom corresponds to the 3 to 4-year programmatic time-frames that most donors assume. Change on an institutional level is slow, with studies talking about change occurring over decades rather than years.¹⁰⁶ Although donors have previously struggled with these issues, change now seems to be afoot. For instance, the Swedish Government's forthcoming *Global Strategy for peaceful and inclusive societies* is expected to focus more systematically on support to institutional development and acknowledges the corresponding need to assume a more long-term perspective.¹⁰⁷

Both implementers and donors must continue to develop their approaches to results management and measurement in relation to change at the level of institutions. Although deep institutional change might not be measurable over the short term or in the early stages of programmatic support, it is incumbent upon all parties to find realistic ways to measure long-term change within more limited program periods. Moreover, efforts to isolate and measure change achievable within shorter programmatic time-frames must not distract from the fundamental goal of fostering genuine institutional change over a longer timeframe.

¹⁰⁶ Sannerholm, Quinn and Rabus, 68.

¹⁰⁷ Government Offices of Sweden, Regeringen ger uppdrag om ny biståndsstrategi för fredsinsatser (press release, 30 November 2016), available at: <https://www.regeringen.se/pressmeddelanden/2016/11/regeringen-ger-uppdrag-om-ny-bistandsstrategi-for-fredsinsatser/>.

ILAC has worked with its members in the MENA region to develop and continually improve a means of presenting indicative evidence of changes in the form of ‘verifiable instances’ that seek to present qualitative data in a manner that allows for at least rough measurability of results. As described in a 2015 ILAC memo on verifiable instances, the aim of this method of reporting is to present indicative qualitative evidence reflecting trends in outcomes from rule of law assistance programs.

The basic concept involved in defining verifiable instances is that such instances should be both (1) potentially (if not exclusively) qualitative in nature, and (2) measurable in the sense that registration of a significant number of such instances is indicative of positive change in support of targeted outcomes. The use of this concept should allow the capture of a broad cross-section of observations that might be dismissed as anecdotal if taken on their own, but which may be the best way at getting at elusive shifts in collective attitudes among rule of law actors when compiled and analysed in conjunction with each other.

The aim in monitoring verifiable instances is not to try to seek to compile the highest possible number of such instances but rather to analyse a sufficient number of them to be able to identify trends and changes over time. Single verifiable instances may often be indicative of changes, insights and innovations that may hold potentially significant impacts for the entire judicial system. The focus of monitoring and reporting will be to portray such instances in a manner that highlights their significance in reflecting the overall trajectory of change in the rule of law institutions we are working with.¹⁰⁸

A lesson subsequently learned from the application of this method is that although it is a good approach for triangulating anecdotal evidence with other forms of results monitoring, it lacked a basis against which these verifiable instances could be measured. When working towards intangible and qualitative results like changes in attitudes and behaviour within the justice sector, it is imperative to analyse observed results in relation to a preconceived theory of change. Establishing that interventions are based on a solid prediction of progress is key, otherwise implementers run the risk of being perceived as taking credit for results after the fact.¹⁰⁹

108 ILAC, Monitoring the ILAC MENA Programme: Examples of ‘Verifiable Instances’ (updated 25 February 2016), 1.

109 In formulating its approach to measuring change, ILAC has benefited greatly from ongoing discussions related to outcome mapping. See, for instance, the Outcome Mapping Learning Community, available at: <https://www.outcomemapping.ca/>.

When gathering anecdotal evidence through verifiable instances, and consolidating it with other more tangible results it is important for organisations like ILAC to clearly set out – and distinguish between – the changes it expected to see, those it hoped to see (in an ambitious but not unrealistic scenario), and changes that would ideally occur if the many factors outside the control of implementers aligned in favour. This last category is presumptively overambitious and not generally achievable within the scope or time-frame of one programme. However, it remains an important reference point, a benchmark for the long-term aspirations short-term programs should serve. Tiering change in this manner reflects the importance of maintaining a long-term perspective when measuring change in rule of law assistance.

Efforts to predict results at the outset of programmatic work provides a framework within which to analyse the change that does subsequently occur and more credibly attribute aspects of that change to the work that ILAC and its members have done. Positioning “verifiable instances” within such a framework gives more weight to the results observed where they demonstrably reflect the type of change predicted at the outset. Of no less significance, cases in which rule of law assistance has not resulted in the predicted changes, provide an opportunity to analyse faulty assumptions or unexpected outcomes and adapt support accordingly.

The challenge for ILAC and its members involves reviewing the means we have developed for assessing and supporting the capacity of rule of law actors to conduct justice sector reform in a spirit of prevention, as well as the methods we have developed for implementing and measuring such programs. By identifying successful practices and analyzing the reasons for their success, we can not only make our own work more effective but also contribute meaningfully to ensuring access to justice and preventing the resumption of conflict and human rights abuses.

ILAC is a worldwide consortium providing technical legal assistance to post-conflict countries.

ILAC's mission is to rapidly respond to and assess the needs of the justice sector in conflict-affected and fragile countries, and help strengthen the independence and resilience of justice sector institutions and the legal profession.

Today, ILAC has 52 member organisations representing judges, prosecutors, lawyers and academics worldwide.

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