

UNAFEI PANEL DISCUSSION ON ACCESS TO JUSTICE

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In connection with the topic, 'Measures to enhance access to justice for children and women as victims in the field of criminal justice', I have been asked to address two questions: 1) the background to the discussions during the adoption of 2030 Agenda for Sustainable Development on the origin and development of the concept of 'access to justice', and what measures will be required in the future regarding access to justice, and 2) the status of developing indicators on access to justice for the SDGs (target 16.3).

I. SIGNPOSTS ON THE ROAD TO THE SUSTAINABLE DEVELOPMENT GOALS

'Access to justice' has been incorporated into Goal 16 of the SDGs, which calls upon member states to '[p]romote peaceful and inclusive societies for sustainable development, provide access to justice for all, and build effective, accountable and inclusive institutions at all levels.' This is backed up by Target 16:3, which is to '[p]romote the rule of law at the national and international levels and ensure equal access to justice for all.'

Several different elements of the United Nations system, and several constellations of stakeholders contributed to this incorporation. Access to justice is regarded as a key element of the rule of law (and thus a human rights issue), and was recognized as such in paras 14–16 of the 2012 Declaration of the High-Level Meeting on the Rule of Law,¹ an important milestone in the formulation of Goal 16. Separately, access to justice has been recognized also for example as a gender equality issue, a fundamental right of children, a development issue, and a criminal justice issue.

The basic international instrument on the rights of women is the Convention on the Elimination of All Forms of Discrimination against Women. This convention does not contain an express provision on access to justice, although it is implicit in the second article, on protection of the rights of women. The 1995 Beijing Women's Conference considered the issue of access to justice in a rather piecemeal fashion, in connection with violence against women (paras. 118 and 124), labour laws (para. 164), gender-based discrimination (para. 178) and general legal literacy (para. 227). Subsequently, access to justice has been recognized as a fundamental element of the human rights of women.

Also the basic international instrument on children, the Convention on the Rights of the Child, does not contain a specific reference to access to justice. Nonetheless, the Committee on the Rights of the Child has held that the right to an effective remedy is an implicit requirement of the Convention. Access to justice for children is dealt with at length in the report presented by the High Commissioner for Human Rights in 2013 to the UN Human Rights Council, which held a special session on the theme of 'access to justice for children' (A/HRC/25/35).

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¹ 30 November 2012, A/RES/67/1. These paragraphs read as follows:

14. We emphasize the right of equal access to justice for all, including members of vulnerable groups, and the importance of awareness-raising concerning legal rights, and in this regard we commit to taking all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all, including legal aid.

15. We acknowledge that informal justice mechanisms, when in accordance with international human rights law, play a positive role in dispute resolution, and that everyone, particularly women and those belonging to vulnerable groups, should enjoy full and equal access to these justice mechanisms.

16. We recognize the importance of ensuring that women, on the basis of the equality of men and women, fully enjoy the benefits of the rule of law, and commit to using law to uphold their equal rights and ensure their full and equal participation, including in institutions of governance and the judicial system, and recommit to establishing appropriate legal and legislative frameworks to prevent and address all forms of discrimination and violence against women and to secure their empowerment and full access to justice.

In respect of development, the UNDP sees the importance of access to justice in alleviating poverty and promoting economic growth. The UNDP defines access to justice as the ability of people from disadvantaged groups to prevent and overcome human poverty by seeking and obtaining a remedy, through the justice system, for grievances in accordance with human rights principles and standards.

Within the United Nations Crime Programme, in turn, the key instrument is the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems was adopted as recently as 2012 (GA resolution 67/187). This is the first international instrument on the right to legal aid. It establishes minimum standards for the right to legal aid in criminal justice systems and provides practical guidance on how to ensure access to effective criminal legal aid services.

II. THE NEGOTIATIONS ON THE GLOBAL INDICATORS

The United Nations have developed an initial set of 'Global Indicators' that set global benchmarks for the practical implementation of the SDGs in all countries.² The Global Indicators are intended both to promote progress within countries and to facilitate comparisons of the progress made by countries relative to one another.

In respect of access to justice, a grand total of two indicators are included in the Global Indicators:

- 16.3.1 Proportion of victims of violence in the previous 12 months who reported their victimization to competent authorities or other officially recognized conflict resolution mechanisms
- 16.3.2 Unsentenced detainees as a proportion of overall prison population

Several comments are in order regarding these two indicators. As background, it can be noted that they were the result of an intensive debate. 'Access to justice' has many dimensions, and many stakeholders were involved in the negotiations. Each, of course, had their own special interests in seeking to ensure that at least certain aspects of access to justice would be assessed through the indicators. Few, if any, of the stakeholders were fully satisfied with the two indicators that 'made the final cut'.

During the negotiations, other access to justice indicators had been proposed, among them

- ratification and implementation of the key human rights treaties,
- the proportion of those who have experienced a dispute in the past twelve months, who have accessed a fair formal, informal, alternative or traditional dispute mechanism, and who feel the process was just,
- the physical distance to affordable and effective legal services,
- accessibility of dispute settlement mechanisms,
- the opinions of 'users' regarding the 'fairness' of justice processes,
- the availability of counsel for criminal defendants, and
- the financial threshold at which legal aid is provided.

The basic problem was that the proposed indicators had to be quantifiable (measurable); there had to be some prospect that the necessary data already is, or can readily be made, available at reasonable cost (and that this data would be both valid and reliable)³, and the indicators had to be easy to understand and to convey to the public. Furthermore, the indicators should capture elements of access to justice that are particularly relevant for the purpose at hand.⁴ For a variety of reasons, the alternatives noted above were not included in the official list.

A second observation is that both of the final two access to justice indicators focus on criminal justice. From the point of view of gender equality, the rights of children, the eradication of poverty and human development, access to civil justice is arguably as important as access to criminal justice, if not more so. Civil law involves issues as diverse as proof of national identity, family and matrimonial rights, child custody, rights

² The Global Indicators were established by the United Nations Interagency Expert Group on Sustainable Development Goals, or IAEG-SDG. They are available at https://unstats.un.org/sdgs/indicators/Global%20Indicator%20Framework_A.RES.71.313%20Annex.pdf.

³ This requires a balance between being satisfied with the status quo of what data are available, and proposing realistic (but not yet universally available) indicators that could play a role in catalyzing new data collection efforts and capacity building.

⁴ Timothy Hansen, 'Rule of Law' Indicators in the SDGs, available at deliver2030.org/?p=6859

of the disabled, property rights, the right to accommodation, the right to fair employment and fair wages, financial and consumer rights, commercial rights and contractual rights.

A third observation is that, even from the point of view of criminal justice, the two indicators are quite limited. They focus only on victimization to violence, and on the use of pre-trial detention. There is nothing about many key aspects of victimization (victimization to other types of crimes, the availability of victim support, the availability of compensation), of the criminal process (the right to legal aid as a defendant or as a victim, confidence in the police, the length of proceedings, the right to appeal, satisfaction that the outcome was 'just') and of corrections.

III. ONGOING WORK ON INDICATORS

In light of the differences between countries, all countries are expected to establish their own national indicators for measuring progress toward achieving each of the Goals, including Goal 16. Regional indicators had been developed already (and for different purposes) in Europe (for example by the European Commission for the Efficiency of Justice, and the Fundamental Rights Agency of the European Union) and in Latin America (for example by the Economic Commission for Latin America and the Caribbean). National examples include the comprehensive set of indicators developed in the United States.⁵ A number of other countries conduct surveys that are useful in this regard; among them are a large number of developing countries.

Reference should also be made to sector-specific indicators, such as those developed to assess implementation of CEDAW⁶ and of the two corresponding regional conventions on violence against women (the Council of Europe Convention and the Inter American Belém do Pará Convention), as well as the indicators developed by various organizations, institutes and think tanks, such as the OECD Social Institutions and Gender Index, the Rule of Law Index developed by the World Justice Project, and the Gender Statistics developed by the World Bank.

IV. HOW SHOULD WE FURTHER DEVELOP INDICATORS OF ACCESS TO JUSTICE?⁷

Indicators should serve not only to assess progress in implementation of the SDGs, but also to strengthen work on access to justice. Broadly speaking, indicators should be developed that deal with what could be referred to as the enabling environment (the existence of remedies), the 'supply side' of access to justice (the institutions and human resources that provide justice services, and their outreach to those in need of access) and the 'demand side' of access to justice (the ability of persons to seek access to justice).⁸ Given the interest in gender equality, the rights of children and the rights of disadvantaged groups, data should ideally be disaggregated by race, ethnicity, gender, age, disability, and other categories.

The **enabling environment** ensures that remedies exist. This includes international and constitutional law, legal and regulatory frameworks, and customary norms and jurisprudence that set out the rights and entitlements, and the legislation and safeguards that determine when and how persons can have access to justice.

This enabling environment can be assessed by expert interviews, or reviews of legal documents. In respect of the rights of women, one indicator could be the extent to which national laws prohibit direct and indirect discrimination in respect of legal capacity/standing, property rights, inheritance rights, rights within marriage, rights to obtain a divorce and custody over children, the capacity to open a bank account, the right

⁵ Recommended Access to Justice Indicators for Implementation of Goal 16 of the UN 2030 Sustainable Development Agenda in the United States. Developed for the "Civil Society Consultation with White House Legal Aid Interagency Roundtable on Goal 16 Access to Justice Indicators and Data", Thursday, September 15, 2016 Washington, DC, available at <http://web.law.columbia.edu/human-rights-institute> and <http://ncforaj.org>

⁶ See in particular Teresa Marchiori, A Framework for Measuring Access to Justice. Including Specific Challenges Facing Women, Report commissioned by UN Women. Realized in partnership with the Council of Europe, October 2015, available at <https://rm.coe.int/1680593e83>

⁷ This section is based largely on Marchiori, pp. 123-140.

⁸ See, for example, Marchiori, op.cit., p. 124, and Ramaswamy Sudarshan, Rule of Law and Access to Justice: Perspectives from UNDP Experience, paper presented at the European Commission Expert Seminar on Rule of Law and the Administration of Justice as Part of Good Governance, Brussels, 3-4 July 2003.

to acquire, change, retain or convey one's nationality, the right to education, and the right to employment.

The **supply side** of access to justice is the capacity of the formal and the informal justice system to provide effective remedies through adjudication, enforcement and oversight. The supply side includes the outcomes of the process of justice – including the largely intangible issues of the fairness of the process and the outcome.

Examples of supply side indicators include the number of judges (by sex, and by type and level of court), the number of cases per judge, the provision of mandatory training for justice personnel on gender issues, the number of legal aid providers per 100,000 inhabitants (by sex, and by civil / criminal cases), the availability of free legal assistance for indigent defendants, the quality of the legal aid service provided, the percentage of persons reporting that physical access to justice fora is convenient in terms of distance, the average cost of judicial proceedings (by type of case), the percentage of persons reporting that access to courts is affordable (by sex), the percentage of persons reporting having been asked to pay a bribe or other inducement to initiate or expedite a court process or to obtain a favourable decision, the average length of procedures (by type of case), the availability of a small claims court or fast track procedure for small claims, and the number of cases that are dropped or that exit the system through attrition.

The **demand side** (legal empowerment) involves legal awareness, the ability to use legal advice and representation (legal aid), and the ability to access formal and informal justice services. The demand side also relates to the question of justice needs, and of trust in the system of justice.

Examples of demand side indicators are the types and number of complaints that are lodged with dispute resolution mechanisms, user surveys and expert surveys of the main justiciable issues experienced by persons, the action taken by them to solve the disputes, and the main barriers that they have experienced in accessing justice; household surveys of the extent to which women and men are aware of specific laws or rights, as well the extent to which they are aware of the main dispute resolution mechanisms available; the number of women and men who have benefited from legal aid, the yearly attrition rate in rape, domestic violence and sexual violence cases; and household surveys of the confidence expressed by respondents that they can access affordable and quality legal assistance and representation, that they would be treated fairly and without discrimination in the resolution of a dispute, and the percentage of respondents who have experienced a dispute who report access to a satisfactory dispute resolution.