

STATEMENT OF THE INTERNATIONAL DEVELOPMENT LAW ORGANIZATION

THE RELATIONSHIP BETWEEN LAW AND DEVELOPMENT

PANEL DISCUSSION ON ARBITRATION, LEGAL SERVICES OF THE PERMANENT COURT
OF ARBITRATION AND MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

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Let me say at the outset how much the Director General of IDLO, Irene Khan, would have wished to be here today. She values very highly collaboration with AALCO, and had the occasion to visit its headquarters in New Delhi only a few weeks ago. We are also very grateful to AALCO for having joined other legal institutions and firms in partnering with IDLO in carrying forward our new program on Investment Support for the LDCs, to which I will revert shortly. An urgent matter has unfortunately prevented the Director General from traveling to New York today but she very much hopes that there will soon be another occasion for her to participate personally in one of the stimulating events sponsored by AALCO here at the UN.

The subject on which we have been asked to speak – the challenges that the relationship between the law and development poses for nations and the international community – is a complex one.

It is a complex subject because what constitutes development lacks a conclusive definition, and it is complex because, for a number of reasons I will touch on in a moment, the relationship is best addressed in terms of the “rule of law” and its role in development – and the “rule of law” also lacks, as we know, an internationally agreed definition, and of course legal cultures vary enormously across regions and countries and indeed communities within countries.

One way to approach what constitutes development is simply to look at the UN Charter that speaks of “social progress, and better standards of life in larger freedom” and to trace the evolution within the UN of the concept of “sustainability”: how policy development has been evolving at the UN as to the factors that are most conducive to this progress and to its being sustained over time. This evolution can be described in a nutshell as one of moving from a focus on ensuring that economic and social progress is environmentally sustainable, to the much broader approach to sustainable development embodied in Agenda 2030 that focuses on poverty eradication, on impact on the daily life of people, on inclusiveness, on combatting inequalities, on the empowerment of women, on inter-generational justice, as integral to the concept of sustainable development. Agenda 2030, beyond substantially expanding the concept of sustainable development, reflects a deep international consensus, built on the lessons of the past, that unless progress reaches all, unless no one is left behind, and unless all can be agents of progress,

development will not be sustained. And this consensus has now been reinforced by the evolution within the UN of the concept of “sustaining peace” that recognizes that conflict prevention and peacebuilding will succeed only if accompanied by a deliberate, focused effort to address the root causes of conflict that often lie in the lack of economic opportunity, discrimination and exclusion.

If one looks at development in this perspective what should be juxtaposed to it must go beyond laws and regulations as such and must bring into the analysis how they are administered, the effectiveness and responsiveness of institutions, what avenues exist to access justice, how level the playing field is, locally, nationally and internationally – in other words the whole range of issues that come into play under the concept of the rule of law.

Irene Khan (whose article on “Shifting the Paradigm: Rule of Law and the 2030 Agenda for Sustainable Development” in the World Bank Legal Review I will draw heavily in these remarks) often contrasts the concept of the rule of law with that of rule by law.

Although, as I said, there is no universally accepted definition of the rule of law, the basic notion that lies at its heart is that of equal protection: that all persons are equal in the eyes of the law and equally accountable under the law. Building on that notion, the rule of law as we understand it and try to advance it in IDLO, fully encompasses the basic concept of justice – procedural justice or due process, but also, equally if not more relevant from a development perspective, substantive justice: the pursuit of fair, equitable outcomes that also serve to protect and uphold rights. This understanding leans on the words of Amartya Sen: “the question to ask is whether the demands of justice must be only about getting the institutions and rules right? Should we not also have to examine what does emerge in society, the kinds of lives that people actually lead?” “Justice” he stresses “cannot be indifferent to the lives of people”.

This understanding of the rule of law contrasts sharply with the notion of rule by law, where the law – its formality, consistency and efficiency – can become instruments to institutionalize and legitimize oppression and inequality (say, the rule by law prevailing in apartheid South Africa) rather than as means to counter them; and as instruments to ingrain discriminatory practices rather than to help overcome them.

And, it seems to me that it is around this notion of justice that the relationship between, on the one hand, the law seen under the prism of the rule of law, and, on the other, development, as conceived under Agenda 2030 (with its emphasis on inclusion, on combatting inequalities, on the imperative of engaging the poor and the marginalized in the quest for development, as key conditions for sustaining progress) that the relationship between the law and development becomes in a sense obvious, I would say symbiotic. Indeed, for practitioners of the rule of law such as IDLO it is often difficult to distinguish between the two.

What I have called a symbiotic relationship is well illustrated by the evolution of the process of negotiations of Agenda 2030. The relationship law/development was in the initial phases of the negotiating process one of the most hotly debated topics, but, as the

understanding of both notions evolved and deepened in the same directions – as the pursuit of equality, equity and social justice gained prominence in the analysis of what produces development and ensures its sustainability, and as the values on which the rule of law is based came progressively to be viewed as key ingredients to ensure that wealth and progress can be shared in a fair and balanced way, the debate naturally turned not on whether, but on how best, the principles and objectives of the rule of law should be integrated in the Agenda as basic components of the construction of an environment most conducive to development and its sustainability.

The acknowledgement in the 2030 Agenda of the rule of law and access to justice as key drivers of sustainable development is made explicit in SDG 16 that focuses on peace, justice and strong institutions but is also well embedded in various other goals and targets across the entire Agenda, through repeated references to equality, inclusion and equity, rights, legal frameworks and accountable institutions in relation among others, to quality education (SDG4), gender equality (SDG 5), decent work and economic growth (SDG 8), and addressing inequalities (SDG10).

The adoption of the 2030 Agenda has in many ways settled the political debate. The challenge now is to ensure that the rule of law is translated in real development outcomes in countries as well as globally, and that it does so not only in relation to each of the three pillars – economic, social and environmental – of sustainable development, but also in advancing the integration of policies that is such a crucial feature of the conception of Agenda 2030. Legal and institutional reforms, protection of rights, access to justice and legal empowerment strategies provide unique means to underlay policy coherence and mutual reinforcement of policies and their outcomes.

In this perspective, the menu of challenges for countries and the international community in maximizing the contribution of the rule of law to progress towards the goals of the 2030 Agenda is as broad as it is demanding. It encompasses overhauling laws and policies; building the capacity of institutions, including in particular but not exclusively in the justice sector; and strengthening access to justice. Let me touch briefly on each of these three elements, bearing in mind the universal character of the Agenda that is intended to engage all countries whatever their stage of development, social inclusion and equity being objectives towards which progress may be measured but which no country can claim to have definitely accomplished.

Laws first. Reformed laws, as Irene Khan reminds us in the article I have just cited, have constituted in many countries historic milestones, charting progress towards greater freedom. Laws not only reflect society's priorities in the different sphere of development. They are also key means to serve these priorities. Laws can shift norms and practices to counter discriminatory practices and enable the poor and the marginalized to realize their rights. Reforming family and inheritance laws to provide women with more equitable access to land can at the same time advance gender equality and be a powerful agent to promote food security. And so on. Across the 2030 Agenda, many if not all of the SDGs point to reforms of the legal framework as key means to achieve the policy objectives that they enshrine.

Effective legal frameworks are equally if not more essential for trade, investment and economic growth. And here international as well as national dimensions of the rule of law come forcefully into play. The key objective of the rule of law to create a more level playing field at both the national and the international levels find in these areas perhaps the most glaring point of confluence.

Institutions second. Institutions play a key role in the defining the relationship between the states and citizens and in cementing development gains. Through their oversight role, judicial, quasi-judicial and administrative institutions play an important part not only in resolving disputes but also in providing for equitable access to social services and ensuring their quality, and, more generally, in securing the proper enforcement of laws and regulations. Effective institutions can do much to eradicate poverty and reduce inequalities but they themselves need to be transparent and accessible.

Third, access and empowerment. “Accessibility” according to the World Bank Development report for 2016 “depends on how compatible laws are with the norms and understandings that shape people’s life. Legal institutions need to be physically and economically accessible and people need to have the knowledge and capacity to claim their rights”. Access to justice can in turn help improve access to public services and resources, thereby advancing social inclusion. Related to access to justice, awareness of rights and access to information, including legal information, are proven ways to activate communities to realize their rights in areas ranging from food security and health care to drinking water and sanitation – actually, again, most if not all of the key goals embodied in Agenda 2030.

These are also the main considerations that have guided the elaboration of the current Strategic Plan of IDLO which is to provide orientation to our work through 2020 and was mandated by IDLO’s governing bodies to maximize the contribution of the organization to the realization of Agenda 2030. As I had occasion to recall in my recent statement to the Sixth Committee under the agenda item on the rule of law at the national and international level, IDLO’s Strategic Plan is built around two overarching themes: access to justice; and equality and inclusion, and sets out 3 basic Goals: one aimed at impacting the fairness of laws and policies and the effectiveness, accessibility and accountability of institutions; and a second, oriented towards the empowerment of people to realize their rights. Advancing the rule of law as a driver of sustainable development at local and global level features as a third, cross cutting “impact goal”.

The main thrust of the Plan, across these 3 Goals, is to address the underlying factors that make institutions and people vulnerable, impede socio-economic progress and its sustainability and, by perpetuating inequalities, gender violence and discrimination, social exclusion and marginalization, deprive societies of crucial agents of development. In other words, a vision of the rule of law that seeks to advance the objectives of access to justice and of constructing peaceful, inclusive societies that are at the heart of SDG 16, but also approaches the rule of law as an enabler of progress across all the SDGs.

We are pursuing the new Plan and these policy directions while remaining faithful to the principles that have throughout guided our work: respect for the plurality and equal value of different legal systems; a focus on national implementation of international law and

international norms; and capacity building and country ownership as guiding tenets of our operational work.

Let me before concluding, point to two aspects of our current program that provide a good illustration of IDLO's ongoing efforts to support countries and regions to engage the rule of law as an agent of sustainable development.

One has to do with the follow-up to the Conference that IDLO, in cooperation with the Government of Tanzania, convened in Dar es Salam in June 2016. And let me highlight here the important role that the Secretary General of AALCO in his previous capacity played in supporting IDLO in the conception and running of the Conference. The Conference provided a multidisciplinary and inclusive platform for African leaders, policymakers and experts to exchange experiences and strategies to advance the rule of law in Africa as an integral element in the implementation of the 2030 Agenda for Sustainable Development and African Union's Agenda 2063. This Conference has in turn proved to be instrumental in imparting a new momentum to IDLO's activities in support of sustainable development in Africa, and, even more important, to generate synergy and mutual support among African countries in furthering access to justice and the rule of law on the continent. An excellent example is the establishment of the African Centre of Excellence for Access to Justice, as part of the outcome of a multi stakeholders Conference held, with IDLO support, in Kigali last August to further collaboration and dialogue between the judiciary and community justice institutions in Africa.

A new initiative across the African and Asian regions, but geared exclusively to address the special needs of the least developed countries that I would also like to recall on this occasion, is the launch, last September in the margins of the UN General Assembly, with the participation of Ministers and representatives from LDCs governments, LDCs development partners and experts from both the public and the private sector, of an innovative Investment Support Program, conceived as a genuine public-private partnership. The Program - designed by the UN Office of the High Representative on Least Developed Countries, Landlocked and Small Island States in cooperation with IDLO, and now entrusted to IDLO for implementation, envisages the provision on demand of legal services to LDCs in relation both to the negotiation of investment contracts or agreements and to investments-related dispute resolution, drawing on a roster of legal firms and experts committed to partner with the Program on a pro bono or reduced fee basis. The Program also provides for complementary training support and, indeed, a focus on capacity building across all of its dimensions. The initiative was welcomed in the Ministerial Declaration of the LDCs adopted on the 22 September and a significant number of legal firms and experts worldwide - including, as I said, AALCO - have already indicated their readiness to partner with the Program. IDLO looks forward to implement this program as a contribution to the range of measures to be put in place by the international community to ensure that investments in LDCs are strengthened and diversified, and are geared to maximize their contribution to their sustainable development of the LDCs, including, supporting, on demand, the process of graduation that a number of them are in the process of undergoing.

One last personal thought, if I may. The magnitude of the challenge that Agenda 2030 poses for the legal community is not, in my view, being as yet fully realized. In my presentation I have only touched on some aspects of this challenge that are closest to IDLO's mandate. Different UN and others institutions are addressing and endeavoring to act on different, important aspects of this challenge. But the full mobilization of knowledge and talent across the humanitarian, criminal, civil, human rights and development branches of the law that are called into action in SDG16 and indeed across the SDGs - a mobilization that is, in my view, essential to help realize the transformational ambition of Agenda 2030 - has yet to take place. I hope that the legal communities in Africa and Asia that AALCO supports and indeed the Sixth Committee as a whole, will find their way to address this challenge head-on so as to ensure that the law, in its various disciplines, makes the singular contribution that only it can make to policy coherence and effectiveness in achieving and sustaining progress towards the interrelated objectives of Agenda 2030.

The International Development Law Organization (IDLO) enables governments and empowers people to reform laws and strengthen institutions to promote peace, justice, sustainable development and economic opportunity.