



Monitoring judicial integrity: Lessons for implementation of UNCAC Article 11

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by

Livingston Armytage¹

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Corruption is undermining justice in many parts of the world, denying victims and the accused the basic human right to a fair and impartial trial ... It is difficult to overstate the negative impact of a corrupt judiciary: it erodes the ability of the international community to tackle trans-national crime and terrorism; it diminishes trade, economic growth and human development; and, most importantly, it denies citizens impartial settlement of disputes with neighbours or the authorities (TI 2007:xxi).

Not everything that can be counted counts,
and not everything that counts can be counted (Albert Einstein).



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U4 Issue

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Abstract

This U4 Issue Paper translates lessons related to monitoring judicial reform to the specific requirements of UNCAC Article 11. Taking the Paris Declaration's requirement to monitor for development results as a starting point, it asks what this might mean with respect to measures aimed at increasing integrity and reducing corruption. The need to clarify what to monitor, who to monitor, at what cost, and for what purpose, is elaborated. The Paper also highlights the links between effective monitoring and an appropriate selection of indicators, capacity for data collection and analysis, and a feedback mechanism to support ongoing evaluation and fine-tuning of the reform process.

Executive summary

The objective of this U4 Issue Paper is to review experience in monitoring judicial reforms, with a view to offering lessons which may be relevant for the purpose of implementing Article 11 of the UN Convention against Corruption 2003 (UNCAC).

Judicial integrity and corruption – issues specifically covered by the UNCAC – are a relatively recent focus of the law and development field. Over the past decade, however, practitioners have invested considerable resources into the creation of monitoring frameworks, as part of a growing imperative to demonstrate the effectiveness of development aid. This U4 Issue Paper reviews the spectrum of existing approaches and general lessons about implementing such monitoring frameworks. It argues that the broader experience of judicial reform is relevant for the judiciaries of States Parties to the UNCAC and interested donors.

The first major lesson concerns the need to develop a consensus on the definitions of judicial integrity and corruption at the country level and on the focus of specific performance indicators. That is, agreement is needed on what is to be monitored, for what purpose, and how success will be measured.

The abuse of public (or entrusted) office for private gain is a widely-recognised definition of corruption. While integrity may be understood as the antonym of corruption, it actually covers a broader range of qualities, from soundness to completeness, with shades of morality or probity attached. An agreed understanding of terms among stakeholders will need to be facilitated for the purpose of implementing Article 11.

The decision of what to monitor and why will determine the allocation of resources for collecting and analysing data. In the past, monitoring tended to focus on the efficient delivery of reform measures; increasingly, however, this approach is now seen as being of limited value as it does not assess the actual outcome of reform efforts, and key concerns about development effectiveness and impact remain unanswered. Thus, part of designing any monitoring approach for the UNCAC will also involve finding a cost-effective balance between monitoring reform outputs, their effects on judicial integrity and corruption, or both. The information collected can be used to monitor the reform process by state authorities including members of the justice sector, by external actors such as parliament or civil society, and not least by any international mechanism that might be established in the future to review UNCAC compliance.

The second major lesson is that there are many choices about how to monitor progress. Unresolved debates – about the relative merits of scientific versus participatory methods, and the use of quantitative and/or qualitative data – should be addressed from the outset. While it is acknowledged that quantifying and monitoring corrupt behaviour is difficult, there are both direct measures of experience and indirect measures of stakeholder perceptions which are generally regarded as useful. Judicial reform experience suggests that the more “scientific” (quantitative) approach is often neither feasible in developing environments (owing to the cost and constraints on the availability of reliable data), nor entirely relevant. Consequently, while some measures of actual corruption may be possible,

the optimal monitoring approach is likely to be a combination that is more inclusive and participatory, involving perception surveys of court users, experts, and civil society.

The third major lesson is on the need to build monitoring systems that provide adequate levels of accurate and reliable data in step with developing the often-fragile local information management capabilities which are cost-effective and sustainable.

While numerous tools and frameworks already exist to assess aspects of integrity and corruption, effective monitoring of UNCAC implementation requires a carefully thought-through, country-led process. From a review of recent experience monitoring judicial reforms, a number of relevant lessons emerge.

Lessons from judicial reform experience

- a. Establishing a framework to monitor Article 11 will require making choices about what specifically is to be monitored: integrity, corruption or both, noting that the notion of integrity is broader than that of corruption, and that a consensus on key definitions is required from the outset.
- b. There is a need to develop a cogent theoretical framework for integrity and corruption which links causes to behaviours, and defines clear objectives and outcomes by which progress can be monitored and success measured.
- c. The recent focus on managing for development results has transformed the monitoring and evaluation functions: performance targets and indicators need to be “SMART” – specific, measurable, accurate, reliable, and time-bound.
- d. Any monitoring framework should be designed to focus on integrity and corruption in terms of the results of reform endeavours, rather than on the efficiency of their delivery.
- e. The design of monitoring systems should focus on supplying sufficient data on judicial integrity and opportunities for corruption to enable the evaluation of key aspects of performance and the effectiveness of reform.
- f. The recent proliferation of judicial reform indicators illustrates a range of design approaches and data-collection methodologies. While some focus on perceptions and experience of corruption in the sector, others address judicial integrity in terms of professional and organisational soundness.
- g. Experience in implementing the *Paris Declaration on Aid Effectiveness*² has demonstrated that there are numerous challenges in selecting appropriate reform indicators. Care must be taken to avoid indicators that are meaningless, irrelevant, redundant, overly burdensome, misleading or prone to misuse.
- h. There is an overarching need to invest in ongoing empirical research of causal factors of judicial corruption, the nature and relationship of incentives, and the proven effectiveness of reform counter-measures, with which to inform and guide systemic, evidence-based policy interventions to promote judicial integrity and reduce opportunities for corruption.

² The *Paris Declaration on Aid Effectiveness*, endorsed on 2 March 2005, requires that Partner countries “[e]ndeavour to establish results-oriented reporting and assessment frameworks that monitor progress against key dimensions of the national and sector development strategies; and that these frameworks should track a manageable number of indicators for which data are cost-effectively available”. Partner countries and donors jointly commit to “[w]ork together in a participatory approach to strengthen country capacities and demand for results based management” (OECD 2005).

- i. In development, monitoring frameworks fit within a reform management cycle intended to systematically link identified needs with reform objectives, and implementation of activities with outcomes. While cause-effect relationships in complex reforms involving judicial integrity and anti-corruption are rarely entirely linear, this approach is rigorous in integrating the planned targets of reform with clear and specific indicators for results that can be monitored.
- j. Establishing a monitoring framework requires from the outset local capacity-building that not only recognises the importance of training, but also develops the institutional, organisational, technological, and human dimensions of capacity.
- k. A cost-benefit analysis of monitoring options should be undertaken at the outset.
- l. While it is generally recognised that there is no single right answer to the design and methodology of monitoring frameworks, consideration should be given to focusing monitoring where consensus is strongest, and combining a mixture of objective and perceptions-based data in a process that is inclusive and relevant to local stakeholders.
- m. Consideration should be given to whether the judiciary or external stakeholders manage the monitoring function.

It is hoped that this U4 Issue Paper will provide relevant, timely, and useful insights from judicial reform experience with which to stimulate consideration of key issues for the purposes of designing a framework for monitoring the implementation of UNCAC Article 11.

1. Introduction

The objective of this U4 Issue Paper is to review experience in monitoring judicial reforms, with a view to offering lessons which may be relevant for the purpose of implementing Article 11 of the United Nations Convention against Corruption (UNCAC).

Judicial integrity and corruption – issues specifically covered by the UNCAC – are a relatively recent focus of the law and development field. Over the past decade, however, practitioners have invested considerable resources into the creation of monitoring frameworks, as part of a growing imperative to demonstrate the effectiveness of development aid. This U4 Issue Paper reviews the spectrum of existing approaches and draws general lessons about implementing such monitoring frameworks. It argues that the broader experience of judicial reform is relevant for the judiciaries of States Parties to the UNCAC and interested donors.

2. Context

- *Lesson* – Establishing a framework to monitor Article 11 will require making choices about what aspects of integrity and corruption will be monitored: the notion of integrity is broader than that of corruption, and a consensus on key definitions is required from the outset.

Recognising the critical role that the judiciary plays in both preventing and sanctioning corruption, the UNCAC provides, in Article 11(i), that:

[E]ach State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to *strengthen integrity* and to *prevent opportunities for corruption* among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary (UNODC 2003, emphasis added).

Additional significant provisions include: Article 5(iii), which requires states to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption; and Article 61(iii), which requires states to monitor their policies and actual measures to combat corruption and make assessments of their effectiveness and efficiency.

It is noteworthy that the UNCAC does not offer an explicit definition of either integrity or corruption. Certainly, the Convention does provide numerous references to specific behaviours which, by inference, contribute to a general understanding. For example, Article 8 aims to promote integrity, honesty and responsibility among public officials. Other behaviours are to be criminalised: bribery (Arts. 15 and 6); embezzlement, misappropriation and diversion for personal benefit (Art. 17); trading in influence (Art. 18); abuse of position (Art. 19); illicit enrichment (Art. 20); increase in assets without reasonable explanation and laundering (Art. 23). This approach underscores the reality that there is, as yet, no international consensus on the definition of corruption – the concept which lies at the heart of the UNCAC.

Unsurprisingly, this lack of definition creates some foundational uncertainties for the purpose of establishing a framework to monitor UNCAC Article 11. It is therefore important to recognise from the outset that this article deals in two core concepts: the strengthening of *integrity* and the prevention of opportunities for *corruption* among members of the judiciary. While it may be argued in the context of the UNCAC that integrity is the antonym of corruption, it may equally be argued from the experience of judicial reform that integrity is broader in meaning than lack of corruption, and this difference has direct significance for determining what is to be monitored.

The importance of facilitating consensus over definitional issues from the outset, as the foundation for any monitoring approach, cannot be over-emphasised. Equally, this should not be over-simplified. In common parlance, integrity is generally defined as: (a) being unimpaired and uncorrupted, (b) having soundness of moral principle and uprightness, and/or (c) having no part or element wanting and being complete (SOED 1987). Depending on the purpose, therefore, integrity may be variously defined to span a range of notions from uncorrupted to soundness and completeness, with varying shades of morality or probity. Global Integrity, a leading NGO in the field of governance reform, describes integrity as “a holistic concept that champions the public interest over the personal and refers to mechanisms that promote government honesty, openness, accountability, responsiveness and transparency”.³ While amplifying its component qualities, this definition hardly reduces the abstraction.

Consensus over the definition of corruption is equally elusive. As noted earlier, the UNCAC itself describes corrupt acts rather than the phenomenon itself. In common usage, corruption often refers to the willingness to act dishonestly in return for money or personal gain. Transparency International (TI) defines corruption as the abuse of entrusted power for private gain, including both financial or material gain and non-material gain such as the furtherance of political or professional ambitions. It discerns two principal types of corruption that most affect judiciaries: political interference in judicial processes by either the executive or legislative branches of government, and bribery. More specifically, it defines judicial corruption as including any inappropriate influence on the impartiality of the judicial process by any actor within the court system and refers to any inappropriate influence on judicial proceedings and judgements (TI 2007). At the World Bank, corruption is generally seen as an outcome of poor governance, involving the abuse of public office for private gain.

In light of these diverse descriptions, corruption in the judiciary may be described as the misuse of judicial office for private gain. It is important to recognise that this is a discernibly narrower notion than that of judicial soundness or completeness, which might be inferred for the notion of integrity. Recognising the differences in the breadth of meaning, monitoring Article 11 will ultimately require that choices be made about what aspects of corruption and integrity will be monitored. As will be seen shortly from a review of the experience of judicial reform, there is a tendency for many existing monitoring frameworks to adopt the broader concept of integrity. That said, unless it is addressed, the existing lack of conceptual clarity and consensus over definitions of key concepts will create foundational difficulties for the establishment of a monitoring framework and the selection of performance indicators for Article 11.⁴

3. History – and the need for a cogent rationale for reform

- *Lesson* – There is a need to base reform efforts on a cogent rationale and sound understanding of the problem. The reform framework should link causes to behaviours, define clear objectives, and provide measurable outcomes by which to monitor progress.

It is useful to briefly review the history of judicial reform in the context of the law and development movement, which has more recently included aspects of integrity and corruption as subjects of monitoring. This experience offers a range of practical lessons for monitoring UNCAC.

The field of judicial reform in international development assistance has grown substantially and rapidly in various iterations over the past 50 years. Commencing with the post-war reconstruction of Europe, followed by the “law and development movement” of international assistance in Latin America in the 1960s and 1970s, judicial reform also constituted a significant aspect of Washington

³ <http://www.globalintegrity.org/reports/2004/default3abd.html?act=9#b3>

⁴ The diversity of definitions and approaches is addressed in a recent UNDP survey of existing governance and corruption-related indices. See UNDP (2008).

Consensus era support to market economies in the post-Soviet bloc during the 1980s and 1990s. Judicial reform has more recently moved across the developing world as a means of promoting human rights, good governance, and poverty reduction in what has been termed “the rule of law revival” (Carothers 2006:3).

The development rationale for judicial and legal reform has been variously conceptualised during this period as promoting economic growth by strengthening legal frameworks to secure market dealings;⁵ as building governance and democracy through the rule of law and judicial independence; as consolidating the capacity of state institutions to provide public goods (notably public order, safety and security); and as reducing poverty by increasing empowerment, human rights and access to justice.⁶ For these reasons – economic, political, and social – policy-makers and development agencies have seized on the rule of law as, in the words of one commentator, “[a]n elixir for countries in transition” because it promises to remove the chief obstacles on the path to democracy and market economy (Carothers 2006:7). Judicial reform – a core element of promoting the rule of law – has become a big business, supported by numerous multilateral and bilateral donors in hundreds of programmes and projects of steadily increasing size.⁷

Over the past 50 years, understanding of judicial reform has evolved in line with international development assistance and the growing recognition that policy, governance and institutional dimensions shape development. Economic thinking has traditionally prevailed to cast the state, and the judiciary, in an instrumentalist role supporting the development of markets. More recently, this approach is yielding to a more human-centred, pro-poor vision for judicial reform. At the same time, understanding and appreciation of the complexity of the political economy environment has also deepened with experience. Donors’ continuing support for judicial reform reflects the growing recognition of the importance of justice to societal welfare.

Notwithstanding its expansion over this period, judicial reform has been characterised by disappointment at two levels: first, at the overarching ineffectiveness of development economics in reducing global poverty and eliminating the poverty gap, and second, at its lack of impact in redressing the widening equity gap for the world’s poor. This disappointment with the performance of judicial reform arises in part from the conflation of the goals of reform, which causes dissipation of efforts and confusion over expectations, and from the enduring lack of cogent theory that confounds practice. Carothers (2006), for example, argues that after 30 years of activity, what he describes as “the rule of law revival” continues to lack a well-grounded rationale, a clear understanding of the essential problem, a proven analytic method, or an understanding of the results achieved. Upham (2006) agrees, arguing that the goal of promoting the rule of law – including through judicial reform –

⁵ Weber (1954) established the key developmental proposition that modern legal doctrines of property and contract enforced by a politically independent and technically competent judiciary are the best means of managing the risks of transactions with strangers. North (1990), among others, built on Weber’s work and proposed that economic performance hinges on institutions such as functioning courts of law to protect property and contractual rights.

⁶ See Rawls (1978 and 1985) and Sen (1999), in particular. Rawls argues that the principles of justice, resting on the notion of fairness, form the basis of society and are the object of the original social contract. Sen sees justice as fundamental to the creation of social opportunities and the expansion of human capabilities because it contributes directly to the quality of life; and it links closely with his view of the state’s role to supply public goods such as health, education and effective institutions for the maintenance of local peace and order.

⁷ The World Bank has increasingly come to recognise that the judicial system plays an important role in the development of market economies, and justice sector reform has emerged both as a priority development goal in recent international declarations and as one of the four pillars of development in its Comprehensive Development Framework. The World Bank has financed more than 1,300 legal and judicial reform projects. From 2001 to 2006, worldwide lending for public administration, law and justice increased from USD 3.9 billion to USD 5.9 billion. In the same period, worldwide thematic lending for *rule of law* projects also rose, from USD 410 million to USD 757 million. Asian Development Bank’s *Access to Justice Loan* to Pakistan is valued at USD 350 million. AusAID is presently conducting a law and justice reform programme in Papua New Guinea valued at around USD 150 million. USAID has two law and justice initiatives in Cambodia valued at around USD 40 million, and similar amounts in Afghanistan.

has acquired the status of evangelical orthodoxy in absence of real evidence. Given the attention and money now directed to legal-reform efforts, one would assume, he argues, that there is a carefully elaborated model of law and development based on empirical evidence from the developmental periods of Western economies of what has and has not worked. If such a model exists, he observes, “I have not found it” (Upham 2006). Many other commentators share this criticism.⁸

The purpose of this overview of the history of judicial reform is to emphasise that in establishing a framework to monitor Article 11, it will be timely and useful to consider the rationale and ultimate purpose of this framework: what is it really supposed to be monitoring and how is success to be measured? Is judicial integrity and corruption to be monitored in the context of promoting economic development (in which case, indicators of economic outcomes may be required), good governance (in which case, indicators of state and organisational functioning may be required), access to justice or other objectives (in which case, indicators of dispute resolution and human rights may be required)? This question is hardly polemic considering the scarcity of available resources, highlighting the need for a practical, focused, feasible, and cost-effective approach.

4. Monitoring as a means of managing for development results

- *Lesson* – The recent focus on managing for development results has transformed the monitoring and evaluation functions, and requires measurability: performance targets and indicators of attainment need to be designed to be “SMART” – specific, measurable, accurate, reliable, and time-bound.
- *Lesson* – Early consideration should be given to the specific purpose(s) of a monitoring framework to implement UNCAC Article 11.
- *Lesson* – Any monitoring framework should be designed to focus on integrity and corruption in terms of the results of reform endeavours, rather than on the efficiency of their delivery.

Within this context, *monitoring* is generally seen as the process of observing and reporting on something over a period of time. It is recognised as a continuous examination of progress achieved during the implementation of a development project to track compliance with the plan and to take necessary decisions to improve performance (UNEG 2005). It is defined by OECD as being:

A continuing function that uses systematic collection of data on specified indicators to provide management and the main stakeholders of an ongoing development intervention with indications of the extent of progress and achievement of objectives and progress in the use of allocated funds (OECD 2002).

While there has always been a close link between monitoring and evaluation – where monitoring provides much of the data on which evaluation is based – the monitoring function enables stakeholders to track what is happening with their projects and to check that progress is being made towards the achievement of the objectives. Cracknell (2000:161) differentiates this role from evaluation, which is carried out by the staff from outside the project for the purpose of learning lessons primarily for application to any future projects of a similar kind and of course accountability. In practice, many see the monitoring function as providing the data to enable evaluation and, in this sense, it lays a foundation for the key evaluation function.

Over the past decade, there has been an increasing investment in monitoring development assistance, including judicial and legal reforms, as a means of enabling the evaluation of aid, and thereby addressing concerns about disappointing results and improving effectiveness. Confronted with the

⁸ See for example Jensen (2003), Trubek and Santos (2006), and Barron (2005).

imminent prospect of major shortfalls in resources required to achieve the poverty reduction targets of the United Nations' *Millennium Development Goals* (MDG, UN 2000), the international community made a number of commitments.⁹ Among these, the *Paris Declaration on Aid Effectiveness* (2005) formulated principles for the new development order, the most relevant for this discussion being “managing for results”, whereby development partners collectively manage resources and improve decision-making, based on improved monitoring of development results or the lack thereof.¹⁰

These roundtables have marked a transformational phase in development assistance, where it is now universally acknowledged that there is an overarching need to demonstrate increased effectiveness. Managing for development results (MfDR) is now a central feature of the new development approach which emphasises improving performance and ensuring demonstrable results, and encapsulates a ground shift from the prevalent outputs-based monitoring of process to an outcomes-based monitoring of results.¹¹ Its purpose is to improve organisational learning and to fulfil accountability obligations through performance reporting. The main elements of MfDR include focusing the dialogue on results throughout the development process; aligning programming, monitoring and evaluation of results; keeping measurement and reporting simple; managing *for* not *by* results; and using results information for learning and decision-making. Overall, it provides a management framework and tools for strategic planning, risk management, performance monitoring, and evaluation (OECD/WB 2008).

Within this context, a significant feature of the judicial reform experience over the past decade has been the imperative to develop the capacity to demonstrate results. Monitoring has consequently become a key tool to be integrated from the earliest phase of reform planning throughout implementation to support ongoing decision-making and activity management. It is no longer a formalistic function completed at the closure of activity.

The implications of this experience for monitoring UNCAC Article 11 are potentially profound because it highlights a transition in the monitoring and evaluation functions from an accountability/audit model to a learning and continual improvement model. These functions have now been repositioned to the centre of endeavour and are to be integrated throughout the planning and implementation of reforms. The selection of outcome and result indicators in designing any monitoring framework imposes a rigour on setting clear and measurable targets from the outset. Thus, it is no longer technically acceptable to define the purpose of supporting Article 11 as being to “improve integrity” or to “reduce opportunities for corruption” as this is abstract and unmeasurable. The new emphasis on demonstrating development results requires measurability: performance targets and indicators of attainment need to be “SMART” – specific, measurable, accurate, reliable, and

⁹ The first of these, known as the *Monterrey Consensus on Financing for Development* in 2002, “urged” developed countries to make concrete efforts towards a target of 0.7 percent of GNP as aid to developing countries, and to promote development effectiveness (UN 2002). The most recent development roundtable, convened in Accra in 2008 to review the implementation of these Principles, found that although progress was being made, it was insufficient to meet MDG targets (Accra Agenda for Action 2008).

¹⁰ See footnote 2. The five Paris Principles are: (1) *ownership* – primacy vests in the developing countries for leadership in policies and strategies and the co-ordination of development actions; (2) *alignment* – donors will support partner countries’ national development strategies, institutions, and procedures; (3) *harmonisation* – donors’ assistance will be more harmonised, transparent, and collectively effective; (4) *managing for results* – development partners will collectively manage resources and improve decision-making for results; and (5) *mutual accountability* – development partners will be jointly accountable for development results, with initial targets set in attaining MDG targets.

¹¹ Managing for development results (MfDR), or results-based management (RBM) can be defined as a broad management strategy aimed at achieving important changes in the way government agencies operate, with improving performance (achieving better results) as the central orientation. A key component of results based management is performance measurement, which is the process of objectively measuring how well an agency is meeting its stated goals or objectives. Key elements of RBM include identifying measurable objectives aided by logical frameworks, selecting indicators to measure progress towards each objective, setting explicit performance targets for each indicator, developing a performance monitoring system to regularly collect data on actual results, reporting on and reviewing those results, and integrating evaluations to analyse and advise on performance. See for example Binnendijk (2000:4).

time-bound. In effect, any monitoring framework for Article 11 should specify how improvements in integrity and reductions in opportunities for corruption will be measured against quantitative baseline measures or, alternatively, set an equivalently measurable standard for monitoring compliance.

While most development practitioners appreciate the new focus on results, a range of criticisms of MfDR have emerged over recent years. First, there is an emerging tendency to focus on monitoring at the expense of evaluation. While monitoring and evaluation are complementary management tools, these functions may compete for resources: for example, since USAID established its performance management and measurement systems in the 1990s, the size of USAID's central evaluation office staff and resources has declined considerably, as has the number of evaluations conducted by USAID's country operating units (Binnendijk 2000:14, 24). Second, there is competition between the requirement for independence and impartiality which lie at the heart of the evaluation function, and the need to integrate an effective cycle of organisational learning at the operational level of both donors and developing governments. Insulating the evaluation function solely for the purpose of preserving impartiality has in practice often been at the cost of reducing the integration of effective organisational learning systems, procedures and practices (Binnendijk 2000:20). Third, while MfDR places priority on measuring outcomes rather than outputs, some evaluation studies have demonstrated that there is no correlation with results and, moreover, that MfDR generates unintended effects, known as the "performance paradox".¹² Counting only what can be counted results in the tendency to pay more attention to issues of efficiency rather than effectiveness, diverting attention from what is really important though often more difficult to quantify (Perrin 1998:377).¹³

In effect, for purposes of monitoring UNCAC Article 11, this experience emphasises the importance of designing a framework that focuses on monitoring integrity and corruption in terms of the results of reforms rather than the efficiency of their delivery, that evaluates key aspects of performance, and that links specific reform measures to those performance outcomes.

5. Monitoring and evaluation

- *Lesson* – The design of monitoring systems should focus on supplying sufficient data on judicial integrity and opportunities for corruption to enable the evaluation of key aspects of performance and the effectiveness of reform.

In the development context, there has always been a close link between monitoring and evaluation, though the nature of this relationship has been debated over the years. These days, monitoring is generally accepted as providing some of the information essential for evaluation. In the pre-Paris Declaration era of development, monitoring and evaluation were essentially focused on donor accountability – in essence, an audit model – providing the evidence that assistance delivered what it was supposed to. This led to the continuing prevalence in monitoring on outputs to ensure that all scheduled activities are done on time and within the budget. After the Paris Declaration, however, the preoccupation of development monitoring has shifted to focus on the extent to which agreed-upon results have been realised, and ultimately on evidence of impact, for the purpose of ongoing refinement in approach – in essence, a learning model. This move responds to the imperative to demonstrate improved development results, and transitions from an accountability to an effectiveness approach.

¹² This paradox refers to a weak correlation between performance indicators and performance itself caused by the tendency of performance indicators to run down over time, so that the relationship between actual and reported performance declines. See Van Thiel and Leeuw (2002).

¹³ Bouckaert and Peters (2002:361) also warn that MfDR encourage a range of perverse measures and implies a coherency which risks being insufficiently realized: paradoxes, dilemmas, contradictions, and tradeoffs emerge during implementation that require sensitive treatment, more qualification that is usually politically feasible, and ongoing research to promote better understanding.

The change in approach is not without its risks, however. The experience in establishing a performance monitoring framework in Papua New Guinea, for example, demonstrates the risk of overwhelming fragile management systems by amassing large volumes of data for excessively broad purposes. In moving to a focus on effectiveness, there is a need to balance the requirement for sufficient relevant data to accurately portray the indicators being monitored with the responsibility to avoid overburdening the usually limited available capacity to collect, validate and use this data to evaluate performance and inform managerial decision-making.

The lesson of this transition for establishing a monitoring framework for UNCAC Article 11 is to ensure that the new framework is purposive. No monitoring framework should exist for its own sake. Rather, it should focus on meeting pre-defined objectives: that is, providing specific data relating to judicial integrity and opportunities for corruption, which will enable the evaluation of performance of judges and courts, and of the effectiveness of reform efforts.

6. Existing monitoring frameworks

- *Lesson* – The recent proliferation of judicial reform indicators illustrate a range of design approaches and data collection methodologies. While some of them focus on perceptions and experience of corruption in the sector, others address judicial integrity in terms of professional and organisational soundness.

As a predictable consequence of the Paris Declaration imperative to demonstrate results, considerable resources have been invested in developing monitoring frameworks in the fields of governance, legal and judicial reform in recent years. Many of these frameworks directly monitor aspects of integrity and corruption.

Some prominent examples are overviewed below in alphabetical order to illustrate the range of existing design approaches and the spectrum of available indicators:

- *ABA-CEELI's Judicial Reform Index* measures judicial reform and judicial independence in emerging post-Soviet democracies and transitioning states through a prism of 30 criteria, each of which enumerates particular standards relating to six core dimensions: quality, education and diversity of judges, judicial powers, financial resources, structural safeguards, accountability and transparency, and judicial efficiency.¹⁴
- *Bertelsmann Transformation Index* provides a global framework of measures for democracy anchored in the rule of law and a market economy, ranking 125 countries in two indices: development to democracy and a market economy in a status index, and the quality of governance among decision-makers in a management index. The *status* index measures *political* transformation (including notions of stateness, political participation, rule of law, and stability of democratic institutions among others) and *economic* transformation (including level of socio-economic development, market organisation, welfare regime, economic performance and private property, among others). The *management* index measures steering capability, resource efficiency, consensus-building, and international cooperation. Potentially relevant to the UNCAC, the rule of law criteria describes the check and balance of state powers and civil rights, with indicators measuring the extent to which there is a working separation of powers, an independent judiciary, legal or political penalties for officeholders who abuse their positions, and the guarantee of protection and redress for civil liberties.¹⁵
- *European Commission for the Efficiency of Justice* has embarked on a major statistic-gathering exercise which in due course seeks to monitor the efficiency of judicial systems in 40 European countries through comparative measurement of indicators of court performance including: budgets,

¹⁴ http://www.abanet.org/rol/publications/judicial_reform_index.shtml

¹⁵ <http://www.bertelsmann-transformation-index.de/11.0.html?&L=1>

legal aid, the courts, judicial staff, profession, users, information technology, treatment of criminal and civil cases, length of proceedings and enforcement (CEPEJ 2006).

- *Freedom House's World Survey* is an annual global survey on the state of freedom which ranks 193 countries as 'free', 'partly free' or 'not free' using a range of criteria including political rights, civil liberties, and the rule of law. Rule of law is measured through numerous survey questions that principally relate to four values: (1) the independence of the judiciary, (2) civic control of law enforcement, (3) protection from political terror, and (4) the guarantee of equal treatment before law.¹⁶
- *Global Integrity Index* assesses the access that citizens and businesses have to a country's government, their ability to monitor its behaviour, and their ability to seek redress and advocate for improved governance. These integrity indicators are organised into six main categories: (1) civil society, public information and media; (2) elections; (3) government accountability (including judicial accountability); (4) administration and civil service; (5) oversight and regulation; and (6) anti-corruption and rule of law, including anti-corruption law and agency, rule of law and law enforcement. It does not measure corruption *per se*, perceptions of corruption, or governance "outputs" relating to service delivery, crime, or socio-economic development.¹⁷
- *IFES Rule of Law Tool* provides statements of 18 *Judicial Integrity Principles*, which comprise the following: guarantee of fair trial; independence of judges; judicial review; judicial resources; training; security of tenure; enforcement of judgments; judicial freedom of expression; qualification and selection; judicial career promotion; disciplinary process; immunity from suit; conflict of interest rules; assets disclosure; standards of judicial conduct and ethics; transparent court administration; access to judicial information; and public access to legal and judicial information.¹⁸
- *RechtspraakQ – Court quality*: The Dutch Council for the Judiciary monitors a system of quality indicators which comprise five core measures, as follows: (1) impartiality and integrity of judges, (2) expertise of judges, (3) treatment and attitude of the judges, (4) unity and equality of law, (5) speed and timeliness.¹⁹
- TI offers a number of comparable international indices that capture certain aspects of judicial corruption, including the *Global Corruption Barometer* and the *Bribe Payers Index*.²⁰ In addition, many TI chapters and other civil society groups have conducted local surveys to establish forms and levels of corruption in the judicial process.
- TI's *Diagnostic Checklist for Assessing Safeguards against Judicial Corruption* synthesises international standards on judicial independence, accountability and corruption, to list five minimum criteria for ensuring the existence of a systemically 'clean' and corruption-free judiciary. These relate to the existence of entrenched safeguards for the independence of judges, good conditions of service for judges, fair and independent appointments processes, judicial accountability, and transparency.
- *UN's Rule of Law Index* is presently being developed to monitor the needs for assistance in protecting the rule of law and to measure progress when assistance is provided. It will monitor the justice sector generally, with an emphasis on criminal justice and penal law.²¹

¹⁶ <http://www.freedomhouse.org/template.cfm?page=15>

¹⁷ <http://report.globalintegrity.org/globalIndex.cfm>

¹⁸ See Henderson and Autheman (2003:8) and Henderson et al. (2003).

¹⁹ <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/rechtspraakcompletereport.doc>

²⁰ <http://www.transparency.org>

²¹ http://www.hks.harvard.edu/criminaljustice/publications/justice_indicators_workshop_2008.pdf

- *International Framework for Court Excellence*: This framework is presently under development although it is already in use in the US, replacing the earlier *Trial Court Performance Standards: Courttools*. It provides standardised performance measures across seven areas of excellence: (1) public trust and confidence, (2) court management and leadership, (3) court policies, (4) court proceedings, (5) user satisfaction, (6) court resources (human, material and financial), (7) and affordable/accessible court services.²²
- *Vera Institute's Justice Indicators* cover civil safety and security, access to justice, policing, ministries of justice supervising prosecution and legal aid, judicial performance, non-custodial sentencing mechanisms, prisons, accountability mechanisms and non-state institutions (Vera Institute 2003 and 2008).
- World Bank's *Worldwide Governance Indicators* are arguably the most comprehensive aggregate indicators that monitor the quality of six dimensions of governance, as follows: voice and accountability, political stability and absence of violence, government effectiveness, regulatory quality, rule of law, and control of corruption. The rule of law dimension monitors perceptions of the extent to which informants have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence. The control of corruption dimension monitors perceptions of the extent to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as 'capture' of the state by elites and private interests.²³

While by no means exhaustive, this sample briefly illustrates the diversity of purposes, key performance indicators, and the methodological approaches adopted to monitor aspects of judicial reform. Each framework performs a distinctive function, monitoring aspects of integrity and/or corruption in different ways. As has already been seen, this is because the rationale for these frameworks has been variously conceptualised for economic, political, social, and human purposes. Consequently, each framework differently monitors aspects of integrity and/or corruption: some focus on promoting economic development, while others examine effectiveness in upholding the rights of poor people and poverty reduction, improving community security, dispute resolution, protecting human rights, enhancing criminal justice, harmonising international regulatory standards, or protection from bureaucratic caprice.

In addition to demonstrating the proliferation of existing frameworks that monitor aspects of integrity and corruption involving the courts around the world, the above overview is also useful for illustrating the multiplicity of different approaches which serve a diverse range of purposes. Most significantly, it demonstrates that the existing frameworks utilise an array of indicators to represent the broader concept of integrity, including institutional soundness (including the separation of powers), judicial independence from the executive and efficiency of court operations. TI's *Global Corruption Barometer*, among others, includes questions about corruption in the courts, while some monitor the existence of mechanisms to reduce opportunities for corruption, such as the publication of judgments, asset declarations and merit-based appointment procedures.

The proliferation of monitoring frameworks displaces the earlier problem of insufficiency of data; the new challenge is to select which – if any – indicators may be useful for UNCAC, and to avoid confusing or conflicting data. This overview is also useful in noting the data collection methodologies and sources of data for monitoring purposes. Most, but by no means all, of the existing initiatives rely on the perceptions of key informants – that is, subjective assessments of credibility and confidence in the integrity of the courts – of a range of key informants, judges, court users, representatives of civil society, business and media. It is important to note, however, that a number of frameworks monitor

²² <http://www.courtexcellence.com/pdf/IFCE-Framework-v12.pdf> and http://www.ncsconline.org/D_Research/CourTools/tcmp_courttools.htm

²³ <http://info.worldbank.org/governance/wgi/index.asp>

more objective measures, such as the existence of anti-corruption laws or codes, or the incidence of bribe-paying.

7. Indicators

- *Lesson* – Experience in implementing the Paris Declaration on Aid Effectiveness has demonstrated that there are numerous challenges in selecting appropriate reform indicators. Care must be taken to avoid indicators that are meaningless, irrelevant, redundant, overly burdensome, misleading or prone to misuse.

To the extent that it is necessary to build a new framework to directly monitor judicial integrity and opportunities for corruption for the purposes of UNCAC Article 11, consideration must be given to the selection of the most appropriate indicators.

Indicators may be numbers, statistics or ratios that try to capture a more or less complex reality (OECD 2002).²⁴ This can include qualitative data which has been reduced to quantifiable scales. Given that indicators may be seen as a proxy measure of a larger reality, there is a need to ensure that they adequately represent that reality. The use of a proxy requires assumptions to be made about the link between the behaviour that the proxy measures and the actual behaviour sought to be measured. Proxies for judicial integrity and corruption fall into two broad categories: perception data based on surveys of different groups (such as the population at large, lawyers or court users); and various kinds of operational data (such as the number of complaints filed and dispositions). Each approach has strengths and weaknesses. Moreover, it is often a major challenge to reduce complex phenomena to simple measures – made all the more so for Article 11 in attempting to monitor often-covert behaviour.

The selection of appropriate statistical measures as performance indicators is a matter of ongoing debate for political as much as technical reasons, as illustrated in relation to the Millennium Development Goals:

Indicators are a powerful tool for building the political will needed to lift one billion people out of abject poverty by 2015. They provide a focus and stark clarity to shock governments into addressing poverty and civil society into demanding this. Easily understood indicators are also needed to mobilise public opinion in donor countries, whose citizens have become cynical about aid, to support international development and to persuade them that it can work and can reduce poverty (Williams and Bradford Smith 2000 cited in de Vries 2001:316).

In essence, this challenge pits the imperative for simple measures to communicate clear compelling messages against the rival imperative for adequate levels of detail to ensure validity. The political and technical requirements of indicators do not always align: simple indicators may tell a strong but incomplete or misleading story. To address these challenges, it is generally recognised that indicators should conform to certain characteristics or principles, which generally include criteria such as relevance, validity, specificity, reliability, sensitivity, measurability, usability, and cost-effectiveness.²⁵

The selection of proxy indicators requires judgment and is often contentious. In the field of judicial reform, for example, statistics on crime and court delays have commonly been selected as key

²⁴ See also de Vries (2001:315).

²⁵ Commonly accepted criteria include: *validity* - does the indicator directly represent the result it is intended to measure? *objectivity* - is the definition precise and unambiguous about what is to be measured? *reliability* - is the data consistent or comparable over time? *practicality* - can data be collected easily, on a timely basis and at reasonable cost? *usefulness* - will the data have utility for decision-making and learning? and *ownership* - do partners and stakeholders agree that this indicator makes sense to use? (Binnendijk 2000:6). See also UN (1999:26).

measures of performance; case disposal rates are often used as an indicator of court efficiency. The virtue of these indicators is their relevance to the day-to-day operations of the courts. Yet, many argue that these indicators fail to capture any of the qualitative dimensions of justice. Clearly, the broader the reform objectives, the wider the scope of indicators to be monitored. This imposes mounting costs and burdens on local capacity, which should be built in step with the monitoring framework – usually when donors support the introduction of additional indicators for their, rather than the courts', purposes. While calls for a few key performance indicators are common, this is often difficult to put into practice. In the Papua New Guinea experience, for example, 2–3 key indicators were initially expected, but once the reform programme had been fully scoped, more than 150 specific indicators were proposed. A final balance was attained in a scorecard of 75 key indicators, which required significant capacity to support.

In relation to selecting specific judicial integrity and corruption performance indicators, the work of Transparency International (TI) and the Vera Institute are particularly relevant. TI has observed, for example, that while corruption is often difficult to detect, it is not altogether covert and can be directly measured, citing as an example its *Kenyan Urban Bribery Index* which asks people whether or not they have paid or been asked for bribes.²⁶ Beyond that, TI has developed a *Diagnostic Checklist for Assessing Safeguards against Judicial Corruption*, which synthesises international standards on judicial independence, accountability and corruption into criteria for ensuring the existence of a systemically “clean”, corruption-free judiciary. This checklist is based on research of the most common factors believed to contribute to or cause judicial corruption, identified to include failures of non-merit-based judicial appointments, poor terms and conditions such as lack of security and arbitrary promotion, inadequate accountability and discipline, and the lack of public transparency. The checklist monitors a range of indicators which relate to the existence of entrenched safeguards for the independence of judges, good conditions of service for judges, fair and independent appointments processes, judicial accountability and transparency (TI nd).

This checklist was built on work by Hammergren, among others, who developed a methodology for diagnosing possible causes of corruption rather than for evaluating judicial performance. This is of direct relevance for monitoring Article 11 of the UNCAC. The checklist measures judicial performance in terms of institutional integrity, independence, transparency, and accountability, identifying a range of criteria relating to the selection of judges, management of the judicial career, internal administration, resources, judicial processes, and the legal profession. Hamnergren described the exercise as being less easily realised than might be imagined, citing USAID's eventual publication of some 75 illustrative indicators as an example. She identified four core criteria of performance (efficacy, transparency, accountability, and independence) and adopted principles for their use (Hammergren 2002b:19-22).

Separately, the Vera Institute (2008) has recently developed and piloted an index of 60 performance indicators to measure justice and the rule of law, which relate to safety and security, access to justice, policing, ministries of justice supervising prosecution and legal aid, judicial performance, non-custodial sentencing mechanisms, prisons, accountability mechanisms and non-state institutions. Sub-factor 12.3 of this index is most relevant for the UNCAC, as it assesses judicial integrity:

The integrity of the justice system is upheld by competent, impartial judges who have a duty to exercise independent judgment and are broadly representative of the communities they serve, are adequately trained, are of sufficient number, have adequate resources, abide by high ethical and professional standards, and are selected, promoted, assigned, compensated, funded, dismissed, and subject to discipline in a manner that fosters both independence and accountability (2008, see also Vera Institute 2003).

Vera has thus distilled judicial integrity into five principles: good conduct, competence, independence, sufficient resources, and accountability – an expansive treatment that equates integrity as the synonym

²⁶ http://www.tkenya.org/documents/urban_bribery_index.doc [accessed 3 July 2009].

for almost any positive judicial quality. These principles translate into a basket of 6 proxy measures or indicators of judicial integrity. They include the percentage of cases involving “small claims”, perceptions of judicial independence, the extent to which government does not overturn judicial decisions, the number of judges per population for rich versus poor areas, the existence of special procedures for hearing gender-based violence cases, and the ability to appeal judicial decisions in serious cases. The Institute is continuing to develop and refine this monitoring approach, which is still to be piloted (Vera 2008:9). However, there is clearly a danger of losing focus when so many issues are bundled together.

More broadly, it is timely to note that the validity, reliability, and utility of these and other monitoring frameworks are still subject to ongoing technical debate. Arndt and Oman (2006:49-58), for example, review what they describe as the “explosive growth” in governance indicators, and express misgivings about the legitimacy of much of this data and concerns over their misuse. Even the most carefully constructed and most widely used governance indicators – the World Bank’s *Worldwide Governance Indicators* – continue to generate much dispute. In brief, it may fairly be observed that basic technical issues relating to the selection of indicators and methodologies remain contested.

The scope of debate over indicator frameworks is at once philosophical, conceptual, technical and operational. At the philosophic and conceptual levels, there are the challenges of legitimacy, adequacy and reducibility of complex, often highly qualitative, human-focused change processes to proxies of outcomes and impacts. At the technical and operational levels, there are the endlessly vexing challenges of selecting which indicators are appropriate and sufficient to meet this challenge when we consider the issues of development, justice, corruption, and the like. In practice, no single indicator allows for a comprehensive measurement of complex phenomena such as governance, justice or corruption. Using one indicator can produce a false assessment, but too many will become confusing. For this reason, frameworks usually cluster indicators to measure specific areas of governance such as rule of law, corruption, human rights, electoral laws, public service delivery, civil society, and gender equality. However, the wider the framework, the more onerous the demand for additional indicators becomes.

An important implication of the survey above for the purposes of UNCAC implementation is that none of the existing frameworks can be directly adopted at the national level to monitor progress with respect to Article 11. Instead, these indicators and methodologies may be used as inspiration for identifying an appropriate approach for tackling those problems, which in-country stakeholders agree, require attention.

8. Emerging lessons from reform experience

This section reviews country experience and literature on monitoring judicial and related reforms to identify a number of key issues and challenges.

Judiciaries have often addressed the challenge of promoting integrity and reducing opportunities for corruption through training. For example, the judiciary in Cambodia, which has long been criticised for significant vulnerability to corruption, has conducted extensive training that focuses on the core values of the *Bangalore Principles* (UNODC 2002). This approach has aimed to promulgate the values of judicial integrity through training activities which, by proxy, are then monitored as an indicator of awareness-raising. This has been perceived as a feasible start to addressing contentious and often very sensitive issues.

In Papua New Guinea, it was found that facilitating consensus over the articulation of clearly-defined objectives and specific measurable indicators was foundational to performance monitoring. This required an inclusive and participatory design process for stakeholders from both the formal sector and the community. With a view to sustainability, the framework was refined in view of the availability of reliable data, which required an earlier information management assessment of the adequacy, quality, and accessibility of data and reporting systems. It was also found that building both local and donor

capacity to monitor and evaluate judicial performance and reform endeavours was required over an intermediate period, so that they could manage and integrate the monitoring framework into operational and policy decision-making. In the real world, most decision-makers consider themselves too busy to read detailed reports: accordingly, the data needed to be presented in a highly succinct form which could be readily interpreted and applied for practical use. While there is always a risk of over-simplification, diagrams and tables have helped to make dense data more visually accessible. To be successful, the effort also required a number of organisational champions to promote a more evidenced-based approach to decision-making. Overall, the experience has demonstrated that an extended transitional period was required to foster and sustain a culture of change.

On the whole, the examples from Papua New Guinea and Cambodia, as elsewhere, emphasise the need to invest further in developing capacity in monitoring and evaluation. More broadly, the lessons from experience to date highlight the need to clarify development objectives from the outset, focus and refine the selection of performance indicators, improve the quality and accessibility of data, ensure the existence of incentives to promote the organisational culture shift to evidence-based decision-making, and adopt realistic timeframes for change.

The experiences also demonstrate that establishing and building the capacity to monitor judicial integrity and corruption requires long-term support from development partners: in Papua New Guinea, for example, some five years were needed to design a framework, take baseline measures, and enable performance trend analyses. The transition from output-monitoring to outcome-monitoring also required a paradigm shift for both courts and donors.

Two related case studies of judicial reform offer additional lessons. The first is Nepal's recent experience in strengthening judicial integrity and accountability, in particular through the establishment of a judicial council. While this provided the judiciary with a mechanism to address unethical conduct as much to protect from arbitrary interference from the executive during a transitional period of massive constitutional and political change, limited resources and powers were allocated, with no provision for monitoring. The impact, thus, was deemed limited (Phuyal 2009:187-205). On the other hand, the provision of accessible and transparent monitoring data through the introduction of simple information management systems at the Supreme Court of Indonesia has been transformative over the past decade in empowering judges to better manage their lists and to become more responsible for their performance (Lotulung et al 2009:110-133). The Indonesian experience illustrates that judges may become champions in their own cause once a monitoring framework provides the means for transparency and accountability.

Elsewhere, experiences in judicial reform offer a range of related lessons.

8.1. Empiricism and the need for a robust theoretical framework

- *Lesson* – There is an overarching need to invest in ongoing empirical research of causal factors of judicial corruption, the nature and relationship of incentives, and the proven effectiveness of reform counter-measures, with which to inform and guide systemic evidence-based policy intervention to promote judicial integrity and reduce opportunities for corruption.

One of the most important lessons to emerge from judicial reform experience is the need to focus endeavour on robust empirical research. This lesson is relevant for reform efforts around the world in general, including addressing judicial integrity and corruption in particular.

Hammergren has written extensively on the need to adopt a more rigorous diagnostic and knowledge-based approach to judicial reform. While judicial reform endeavours are relatively new – as are anti-corruption reform ones – she argues that they are not so new as to elude questions about their intellectual and practical value. She argues that poor knowledge management in four core elements – assessment, monitoring, evaluation, and research – constitutes a serious impediment both to disciplinary development and to its application in the resolution of real problems. In effect, poor

knowledge management breeds poor results. Her assessment of reform practice is scathing: “[I]t is a matter of record that ... diagnosis is guided entirely by what people think about the system with little effort to test this empirically” (2002a:21).²⁷ In relation to monitoring and evaluation, she observes that:

Until the recent emphasis on results management, monitoring of judicial reforms was conspicuous by its near absence. When it was done, the emphasis was on tracking inputs or outputs delivered, not the impact on overall goals and objectives. ... There is, most would agree, considerable room for improvement here. Much of it rests on the other elements of better knowledge management, including improved analyses of country specific problems (assessments), a better use of the lessons of past experience (starting with more systematic evaluations to bring them forth) and a concerted effort to explore hypothesised linkages for which empirical evidence is scant (research) (2002a:13).

In relation to evaluation, she observes:

While it is commonly acknowledged that evaluation is essential to program development ... evaluations are remarkably few, and all too often neither widely consulted nor even available. Whatever the reason for the inattention to evaluation, it may be the largest single contributor to this situation and an obvious place to work immediate changes. A first lesson and recommendation is thus that systematic evaluations must be done, because without them there is little way of determining whether programs are producing results and how they might be improved (2002a:14).

The lessons from nearly 50 years of judicial and legal reform experience are equally important to the new challenge of promoting judicial integrity and tackling corruption. The particular experience of judicial and legal reform indicates that the effectiveness of policy interventions rests on the robustness of their empirical foundations, rather than on ideology or intuition. The nature of these relationships is often obscure, complex, multidimensional, and on occasion conflicted, and our understanding of the key relationships is often incomplete. This is equally the case in the arena of anti-corruption, which leaves much to be understood about the major issues of causes, the effectiveness of counter-measures, and incentives for reform.

Recognising that monitoring fits within a cyclical reform management process involving research and design, implementation, monitoring and evaluation, and ongoing refinement, it is argued from this experience that there is an overarching need to invest in ongoing empirical research of causal factors of judicial corruption and the effectiveness of reform responses as the means of developing a systematic approach to managing the promotion of judicial integrity and the reduction of opportunities for corruption.

²⁷ See also: Hammergren, L 2003. International Assistance to Latin American Justice Programs: Towards an Agenda for Reforming the Reformers. In Jensen, E and Heller, T (eds), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law*. Stanford: Stanford University Press, 2003; Hammergren, L 2006. Latin American Experience with Rule of Law Reforms and its Applicability to Nation Building Efforts. *Case Western Reserve Journal of International Law*, 63; Hammergren, L 2000. *Fifteen Years of Judicial Reform in LA: Where we are and why we haven't made more progress*. Available from <http://www.pogar.org/publications/judiciary/linn2latin.pdf> [accessed: 14 March 2009]; Hammergren L [undated]. Uses of Empirical Research in Refocusing Judicial Reforms: Lessons from Five Countries [www.worldbank.org] (accessed: 14 March 2009); Hammergren L 2002. Reforming Courts: The Role of Empirical Research. *PREM Notes*, 65. Hammergren L [nd]. *Diagnosing Judicial Performance: towards a tool to help guide judicial reform programs*. Available from <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/hammergrenJudicialPerf.pdf> [accessed 1 October 2008].

8.2. Reform management

- *Lesson* – In development practice, monitoring frameworks fit within a reform management cycle intended to systematically link identified needs with reform objectives and implementation of activities with outcomes. While cause-effect relationships in complex reforms involving judicial integrity and anti-corruption are rarely entirely linear, this approach is rigorous in integrating the planned targets of reform with clear and specific indicators for results which can be monitored.

A review of development practice shows that monitoring frameworks can take any number of forms, but their form is typically prescribed by their role in a reform management cycle, which comprises four main phases: research and assessment, design, implementation and monitoring, and evaluation. This cycle supports a systemic process of evidence-based managerial decision-making, and enables continuous refinement into the next reform cycle.

The logical framework approach, or *logframe*, is an integral tool of most development management, including judicial reform. It is used to chart the anticipated chain of cause and effect in reform activities. It is a management tool used to improve the design of interventions, which involves identifying strategic elements (inputs, outputs, outcomes, impact) and their causal relationships, indicators, and the assumptions or risks that may influence success and failure. It thus facilitates planning, execution, and monitoring and evaluation of a development intervention (OECD 2002).

The logframe usually consists of a simple matrix which breaks down a project or programme into its component parts, namely *inputs*, resulting in activities or *outputs*, immediate *objectives* (or project purpose) and wider objectives (or project *goal*), together with the *risks* and *assumptions* involved and indicators of progress towards the achievement of objectives. Its underlying logic is that if certain inputs are supplied and activities are undertaken, then intended outputs will result (given certain assumptions), which will make a contribution towards the achievement of certain wider objectives – sometimes termed the means-end relationship or vertical logic. This tool ensures a clear statement of objectives, the introduction of indicators against which progress toward objectives will be measured, and the identification assumptions or risks to maximise control of project management (DFID 2005).

There are a number of concerns among development evaluators over the limits of this instrument and the risks of over-reliance. In essence, these concerns arise from the risk of over-simplifying complex change phenomena, and the tool's tendency to represent change as being tightly cause-effect linked, essentially linear, inherently predictable and thereby controllable (Cracknell 2000). Real life, and the political economy of change, is rarely as simple as the logic-model suggests, however, as most development practitioners have experienced. Moreover, in practice, logframes are often misused to “retro-fit” predetermined activities by starting with activities and building up to the goal, rather than starting at the agreed goal and working downward to determine what activities are required to reach it.

Despite these risks, monitoring frameworks are a regular feature in most development programmes, and are commonly used by donors to plan, manage and monitor the implementation of reform activities. In the Papua New Guinea and Cambodian case studies, as elsewhere, logframes were routinely used at the programmatic level by donors and governments alike to track the delivery of support activities and to chart the performance of the law and justice agencies, even if their terminology and formats varied.

8.3. Grappling with practicalities: data, reporting, capacity-building and cost

- *Lesson* – Establishing a monitoring framework will, from the outset, require local capacity-building which not only recognises the importance of training, but also develops the institutional, organisational, technological, and human dimensions of capacity.
- *Lesson* – A cost-benefit analysis of monitoring options should be undertaken at the outset.

As has already been seen, monitoring and evaluation systems require the periodic collection and analysis of performance data. At first, this aspect of performance monitoring appears relatively straight-forward. In practice, however, it is often quite challenging to develop in environments which lack comprehensive reliable performance data and functioning reporting systems.

In Papua New Guinea, for example, a preliminary audit of information management capability revealed extensive gaps in the reporting of routine operational data, widespread non-standardisation in data collection protocols across the spectrum of indicators of judicial integrity and soundness (e.g., is a criminal offender convicted of two offences a single statistical unit or a double unit?), and numerous qualifications to data validity and reliability. In establishing the performance monitoring framework, this presented unexpected challenges requiring resource allocation, systems-development, and capacity-building.

Cost is another significant factor and, in practice, a major determinant of the monitoring approach. It is among the most common reasons why monitoring is either not done or not done adequately. In the Papua New Guinea example above, for instance, the estimated cost of establishing and managing a monitoring framework is in the order of six percent of the total development cost of USD 15 million. In practice, only major programmes can support such substantial investments (Armytage and Miller 2008:155).

Commentators generally acknowledge that conditions in the real world of development are often starkly different from the academic realm of clinical trials, and therefore impose practical constraints on what is feasible, often requiring compromise and adaptation in approach.²⁸ Moreover, evidence-based policy and managerial decision-making – being the ultimate end-goal of managing for development results – requires organisational cultures and established information management systems and procedures, which in turn may need concerted capacity-building over extended periods of time. Consequently, in the years of implementing the *Paris Principles* – with a new emphasis on monitoring for results and operating within local systems – there has emerged recognition of the need to provide adequate resources and time to build capacities. As Mackay (2006, 2007) observes, the development of capacity in local evaluation systems is increasingly recognised as a means to support sound governance and improve public sector performance. Despite this growing recognition, however, he notes that there is as yet no “best” model of what a local monitoring and evaluation system should look like.

This concept of capacity in development practice is defined by OECD (2002) as the ability of people, organisations and society as a whole to manage their affairs successfully. Capacity building has traditionally focused on training to strengthen skills, leadership, planning and monitoring. Increasingly, however, understanding of capacity-building is becoming seen as extending into the political-economy dimensions of power and the analysis of incentives and barriers to change.²⁹ Adopting this broader approach, the Asian Development Bank is, for example, exploring capacity-building in three dimensions: organisationally, institutionally, and inter-organisationally to include client relations, networks, and partnerships in its reform activities throughout Asia (ADB 2007).

The implication for establishing a monitoring framework for UNCAC is the need to integrate a capacity-building approach which not only recognises the importance of training, but also increasingly engages in four key dimensions of support: *institutional* capacity (moving from less efficient to more efficient accountability rules and incentives); *organisational* capacity (adapting to the new and more efficient accountability rules and incentives); information and communication *technology* capacity

²⁸ See Bamberger et al. (nd). and Cracknell (2000).

²⁹ *Political economy* is defined here to generally describe the interdisciplinary study of economics, law, and political science in explaining how political institutions, the political environment, and the economic system influence each other.

(strengthening systems for better and more timely information on results); and *human* capacity (through training in monitoring and evaluation).³⁰

8.4. Methodology

- *Lesson* – While it is generally recognised that there is no single right answer with regard to the design and methodology of monitoring frameworks, consideration should be given to combining objective and perceptions-based data in a process that is inclusive and relevant to local stakeholders.
- *Lesson* – Consideration should be given to whether the judiciary or external stakeholders manage the monitoring function.

In addition to the question *what* to monitor, there is the associated question of *how* to monitor judicial integrity and corruption for the purposes of the UNCAC. The answer to this question must address an unresolved debate across the development community over what has been termed “the paradigm war” of methodology. The outcome of this debate will determine whether monitoring methodology should rely primarily on the assessment of the perceptions of stakeholders and experts – as is frequently the case in existing practice – or whether it should appraise other arguably more elaborate indicia, such as performance counterfactuals, as a more robust means of determining which reforms work best.

This debate pits those who may be called the *positivists* against the *constructivists*, and is essentially concerned with how monitoring and evaluation find truth and contribute to knowledge about improvements in integrity and corruption. While seemingly philosophical, it has direct bearing on the answer to the question *how* to measure. On the one hand, the positivists advocate a highly formalised scientific approach. They are concerned with the validity and reliability of data, and utilise experimental methods, causality, random-control trials, and the counterfactual as means to monitor, assess and measure integrity and corruption. On the other, the constructivists concern themselves mainly with the perspectives of those affected – particularly court users and alienated non-court users among the poor. While it is over-simplistic to reduce this debate to the classic contest of quantitative versus qualitative data, there is some correlation, though many exceptions (Guba and Lincoln 1989). Interestingly, the World Bank – arguably an exemplar of the positivist approach to robust (i.e. quantitative) research – uses highly qualitative perceptions-based data for many of its measures, including both its *Governance* and *Doing Business* indicators; meanwhile the Vera Institute is pursuing scientific evidence as the basis for its ongoing piloting. Quantitative scales are commonly used as a means to systematise qualitative data.

The centrality of this debate is evident in calls for increased methodological rigour and, simultaneously, calls for more participatory evaluation and stakeholder analysis. There is little argument that the positivist approach to monitoring and evaluation requires more rigorous research-based experimental design but has been immensely influential in providing empirical foundations for policy development (Mauro 1995:681-712). However, as Cracknell (2000:128) observes, while the scientific approach seems compelling, it is “well nigh impossible” to set up a robust experimental control in development settings, and often too expensive to be feasible. Constructivists also object that foreign donors and their expensive technical advisers have hijacked local ownership and control of the reform monitoring process and call for a more inclusive and empowering approach (Cracknell 2000:349). In practice, some of these concerns can be addressed, as evidenced by the frequency with which courts around the world have introduced locally-administered case management systems in recent years.

Some donors, such as the UNDP, consider that there is no right answer to the objective versus subjective debate in the development context (UNDP 2008:22). This is similarly recognised by the World Bank, perhaps the foremost advocate of the scientific approach in promoting empirical rigour

³⁰ See for example: Schiavo-Campo (2005:3).

as the basis of its institutional approach to knowledge. The Bank notes that while it may be possible to objectively measure case processing times or legal expenditures per case, it is much harder to objectively measure how *just* or *fair* the court system is, or whether it is legitimate in the eyes of the general population. Unavoidably, at some point, this discussion conflates issues of *how* to measure with *what* to measure. Significantly, it acknowledges that the use of index scores to quantify subjective expert evaluations creates an illusion of objectivity and precision, and recognises that qualitative evaluations allow for more nuanced assessments of complex phenomena, such as integrity and corruption. Ultimately, acknowledging there are drawbacks with any methodology, it concedes that “a mix of indicators is probably the best way to handle this problem, but there is no magic formula” (WB nd).

While it may be that there is no right answer to this debate over methodology, it is useful to highlight the options which are available in configuring design approaches, data sources, and collection methodologies for UNCAC to ensure optimal outcomes.

Finally, there is the important question: *who should manage the monitoring process?* There are choices in answering this question. On the one hand, there are capacity-building advantages in vesting this responsibility in the hands of the judiciary – an argument made all the stronger by the imperative to consolidate judicial independence through systems of accountability and transparency. On the other hand, there are impartiality and credibility advantages in vesting this responsibility in the hands of stakeholders external to the judiciary, possibly the local ombudsman or an international agency of the UN. This is clearly an important and sensitive issue to be addressed at an early point.

9. Conclusion

Summing up, while numerous frameworks that monitor aspects of judicial integrity and corruption already exist, most are too broad and insufficiently focused for the purpose of UNCAC monitoring. This raises other questions about what to measure and the adequacy of the framing of Article 11 to promote judicial honesty, or whatever the ultimate goals may be. From a review of the parallel experience of monitoring integrity and corruption in the arena of judicial and legal reform, a number of relevant lessons emerge.

Resources are required to strengthen the available information management and reporting systems of courts, and those which exist will need to refocus on judicial integrity and corruption for purposes of monitoring the implementation of Article 11. Introducing a framework to monitor judicial integrity and corruption will require capacity-building and a review of incentives to promote culture change, ownership and sustainability. There is a need to facilitate a consensus on the purpose, scope, and methodologies for monitoring to ensure an inclusive participatory process that builds a manageable framework of useful indicators. This will require dedicated resources to establish and operationalise, which should be allocated between the monitoring and evaluation functions. A concerted focus will be required to harmonise and integrate these frameworks with or within the court systems of States Parties, supported by coordinated and continued donor support. At the level of each court system, an oversight body of senior judges and civil society representatives should be established to ensure that these frameworks are transparent, manageable and sustainable.

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Abstract

This U4 Issue Paper translates lessons related to monitoring judicial reform to the specific requirements of UNCAC Article 11. Taking the Paris Declaration's requirement to monitor for development results as a starting point, it asks what this might mean with respect to measures aimed at increasing integrity and reducing corruption. The need to clarify what to monitor, who to monitor, at what cost, and for what purpose, is elaborated. The Paper also highlights the links between effective monitoring and an appropriate selection of indicators, capacity for data collection and analysis, and a feedback mechanism to support ongoing evaluation and fine tuning of the reform process.