The IMF's Role in a Post-Conflict Situation

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The International Monetary Fund (the "IMF") is frequently called upon to assist countries facing financial crises, and recent experience demonstrates the extent to which such crises can be precipitated by a civil war or an international conflict. In some cases, conflicts have resulted in the establishment of a new government facing enormous challenges in the area of economic reconstruction. Iraq is a recent notable example. In other cases, the conflict can actually involve the dissolution of a state, as was the case with the former Federal Republic of Yugoslavia. In all these circumstances, the Fund provides financial and technical assistance in support of reforms designed to achieve macroeconomic adjustment and sustainable economic growth. Not surprisingly, in circumstances where these reforms are being introduced in a post-conflict situation, such measures include legal and institutional reforms.

Before discussing in greater detail the nature of the assistance we typically provide in these areas, I would like to identify an issue that has arisen in this context that is of general relevance from an international law perspective. As has been demonstrated over the years, circumstances may arise where the sovereign debt of a country may become unsustainable; i.e. where there is no feasible set of macroeconomic policies that would enable the country to resolve its crisis and regain medium term viability without a significant reduction in the net present value of its debt. However, care needs to be taken to ensure that any actions in this area does not result in the introduction of a doctrine of "odious debt", a doctrine that could have severe consequences for access by emerging market and developing countries to future financing.

The concept of state continuity is one of the most fundamental principles of international law. As a general matter, a state's rights and obligations under international law are not interrupted by a change in government (or the establishment of a new constitution). For this reason, a new govern-
ment is generally bound by the debt obligations of the preceding government, whether such debt is owed to private creditors, official bilateral creditors, or international organizations. Although attempts have been made to establish exceptions to the state continuity doctrine for "odious" debts incurred by predecessor regimes, these attempts have not been successful. For example, in 1996, Iran requested the U.S.-Iran Claims Tribunal to invalidate debt contracted by the previous government with the United States on the grounds that such debt was "odious" and, therefore, was not transferable to the Islamic Republic of Iran. The Tribunal rejected this argument, stating that international law did not allow for such an exception to the general concept of continuity.

One of the reasons why the "odious debt" doctrine has not become a well-established principle under international law is that, being both difficult to define and to implement, there is a concern that it will create considerable uncertainty in the international financial system. Is debt odious simply because it is judged to be immoral by the successor regime? Or is it odious because it is inconsistent with some standard established by the international community? If the latter criterion applies, which institution will be responsible for making this judgment? From a policy perspective, the introduction of an "odious debt" exception would most likely do considerable damage to the capacity of developing countries to borrow responsibly and access to capital markets. When faced with the possibility that debt that has been legally contracted could be nullified ex post on the grounds that its proceeds were used for purposes that may be considered immoral by the successor regime, investors will be less willing to either provide new financing or purchase claims on the secondary market.

As indicated earlier, there may be circumstances where creditors—both private creditors and official bilateral creditors—will have no choice

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1 The international law principles applicable to changes in government should be distinguished from those relating to state succession. In the former case, the state continues to exist and its rights and obligations remain unaltered. In the case of state succession, however, a new state emerges. The responsibility of the new state for all of the debt owed by the predecessor is complicated by a number of factors, including the fact that there may be more than one successor state; e.g., the successor states of the former Yugoslavia. Although the concept of odious debt has been given greater consideration in the context of state succession, it has not been recognized by the Vienna Convention on Succession of States in Respect of State Property, Archives and Debt.


3 The concept of "odious debt" needs to be distinguished from debt that has been illegally contracted. Where a government official signing a debt agreement has not obtained the necessary authorization that is required under domestic law, the state will not be bound by such an undertaking if the creditor knew—or should have known—that proper authorization had not been obtained.
but to agree to a reduction in the net present value of their claims given the economic circumstances of the sovereign debtor. Consistent with existing practice, however, whether this is necessary should be based on an assessment of the sustainability of the country's debt and the amount of reduction should be negotiated between sovereign debtor and its creditors.

Turning to the type of assistance that is provided by the Fund in these circumstances, the Fund has established a financing facility that is specifically designed to assist member countries that are emerging from conflict situations. Referred to as Emergency Post-Conflict Assistance ("EPCA"), the Fund is prepared to provide financing to a country in a post-conflict situation in circumstances where, as a result of the conflict, the country's institutional and administrative capacity has been disrupted and, accordingly, it is not in position to develop and implement a comprehensive economic program that could be supported by a more traditional IMF arrangement. Nevertheless, as a condition for receiving support from the Fund, the member would need to demonstrate sufficient capacity for planning and policy implementation, which would normally be evidenced through the establishment of a quantified macroeconomic framework. The financing provided under EPCA, which may not exceed fifty percent of a member's quota in the IMF, is designed not only to rebuild reserves and help the country meet essential external payments, but also to generate support from other official sources. Consistent with its traditional "catalytic" role, Fund support for an economic program is designed, in part, to encourage other donors or creditors to provide assistance.

In addition to its financial support, the IMF also provides a considerable amount of technical assistance to its members, a service that it typically provides free of charge. In the post-conflict context, such assistance has involved helping countries develop—or reconstruct—the legal and institutional framework that underpins the operation of a market economy. Areas where the Fund is particularly active include central and commercial banking, taxation, insolvency and payments systems. For example, over the past two years the Fund has provided extensive technical assistance to Iraq, helping it prepare its new currency legislation and its new central bank and commercial banking laws. Of course, experience demonstrates the effectiveness of any legal framework depends on the quality of the institutions that are charged with implementing these laws. Reforming weak institutions is a long term process and an area where other international institutions—and, in particular, the World Bank—play a pivotal role. For this reason, it gives me great pleasure to participate in this symposium with Ms. Linn Hammergren, who has a wealth of valuable experience in the area of judicial reform.
LATIN AMERICAN EXPERIENCE WITH RULE OF LAW REFORMS AND ITS APPLICABILITY TO NATION BUILDING EFFORTS

Linn Hammergren

I. INTRODUCTION

In the early 1980s, the Latin American region began a judicial and rule of law movement that has lasted till this day. This was not the first time the region had seen this kind of cross-national effort to improve the justice sector, but it does represent the most concerted, self-conscious, and sustained example in its history. One reason for this difference is doubtless the participation of foreign donors (bilateral and multilateral agencies working with grants, loans, and supervision missions) and the involvement of a variety of civil society, advocacy, and special interest organizations from outside the region. Over the twenty year period, the combined efforts of national and international actors have substantially changed the shape and political weight of the sectors' organizations (first courts, but then a variety of other public and private actors), altered the legal framework, and brought sector operations to public attention. Whether this has improved performance is another question. Although their observations differ substantially,

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1 This term is increasingly used to denote the shift from purely judicial to related types of legal and institutional reform. What is included in the justice sector remains a matter of debate, but as I will focus on the core organizations, I don’t intend to pursue that issue here.

2 In the 1960s and 1970s various Latin American countries had received donor assistance under the Law and Development movement. See, e.g., James A. Gardner, Legal Imperialism: American Lawyers and Foreign Aid in Latin America 53 (1980). While beginning as an attempt to update methods for teaching law, the program eventually incorporated many of the themes (and individuals) of the post-1980 experience. Throughout their independent history, the region’s nations have undergone, often simultaneously or sequentially, various waves of updating codes. Since the 1960s there had been a regional group dedicated to promoting model codes. Javier Llobet Rodriguez, La Reforma Procesal Penal (1993).

3 By special interest organizations, I mean entities like the international arms of the ABA, the AFL-CIO, and other domestic associations that took their programs afield.
none, I believe, would say that the answer is absolutely “no.” The question is just whether the improvements achieved matched the resources invested, whether more could have been accomplished, and whether what has not been achieved is more likely to occur now, building on the foundations already established.

Most of these efforts did not occur in a “state” or “nation-building context,” that is to say, in a situation where political society had collapsed and was being rebuilt, or where the very existence of a nation was contested by a substantial portion of its population. In fact, the one case that most closely approximates that model, Haiti in the second half of the 1990s, is the one universally considered a failure. However, there are other examples of operations in post-conflict countries (if not collapsed societies) where the results have been more positive, and in any case, the entire experience is relevant for nation-building efforts because it has become a model for all rule of law programs, including those in countries embarked on constructing or reconstructing their national identity or state.

As I know the Latin American experience well but have far less familiarity with contemporary nation building efforts, I will have to divide this essay into several parts: a first section reviewing the context and the efforts in the majority of Latin American reforms; a second looking at the Latin American experience that comes closest to a nation building effort; and a third, and most speculative, attempting to tease out the lessons for other regions and other challenges. I would only note in passing that although nation and state building were not considered problems at the initiation of the region wide reforms, they are in some sense emerging issues now. In several of the region’s countries, indigenous ethnic groups have begun to demand a reinterpretation of the national identity to include a multi-cultural component, and in these and others, many pre-existing notions about the nature of the state are also being called into question. The level of violence and the threats of dissolution of former national pacts associated with these movements are still not great, and probably will not become so. In any event, the recent events do suggest that such questions are rarely resolved once and for all.
II. THE POST-1980 LATIN AMERICAN RULE OF LAW REFORMS AND THE CONTEXT IN WHICH THEY HAVE OPERATED

Most observers agree that these reforms emerged as part of the nearly region-wide democratic opening, following a period in which the majority of the region’s countries operated under military or military-civilian dictatorships. In some countries, resistance to these regimes had taken a fairly violent form, producing open civil wars in Nicaragua, El Salvador, and Guatemala; militant resistance movements in the Southern Cone and Brazil; and sporadic outbreaks of violence or civil disorder in many of the other countries. Ironically, among the countries escaping that characterization, two—Colombia and Venezuela—entered into periods of chaos and violence later. To be fair, they may simply be harbingers of a still later, in fact contemporary, regional trend toward the reopening of conflicts presumably resolved decades before. It should be noted as well, that Latin America’s nation building crisis was faced far earlier, from the first part of the 19th century until roughly the mid 1850s. With the exception of sporadic millennialist campaigns and some contemporary ethnic movements (which no one yet sees as threatening national unity), the national identity of all the region’s countries has not since been in question. Instead political battles have tended to focus on the nature of the state (how it would operate, what it would do, how powers would be divided among the parts), and control of whatever state apparatus existed at any given time. These are important questions, especially in a region with one of the highest levels of inequality in the world, but at least they were made easier by the prior acceptance of the definition of the nation. Latin America’s recent crises, even the few raising issues of national identity, have likewise been precipitated by the discontent of key sectors of the population with how the state operates and what benefits it provides to whom. This is true; it should be mentioned, even of our prime example of a failed state, Haiti.

There is now a large descriptive, analytic, and often critical literature covering these programs. See, e.g., Jorge Correa Sutil, Judicial Reforms in Latin America: Good News for the Underprivileged?, in The (Un)Rule of Law & the Underprivileged in Latin America 255-277 (Juan E. Mendez et. al. eds., 1999); Rule of Law in Latin America: The International Promotion of Judicial Reform (Pilar Domingo & Rachel Seider eds., 2001); Linn A. Hammergren, The Politics of Justice and Justice Reform in Latin America (1998); Linn Hammergren, International Assistance to Latin American Justice Programs: Toward an Agenda for Reforming the Reformers, in Beyond Common Knowledge: Empirical Approaches to the Rule of Law (Erik Jensen & Thomas Heller eds., 2003); William C. Prillaman, The Judiciary and Democratic Decay in Latin America (2000); Mark Unger, Elusive Reform: Democracy and the Rule of Law in Latin America (2002), among others.

Colombia in some sense experienced the “transition” violence earlier, in the mid-twentieth century civil war called “la Violencia,” and the following three-year dictatorship under Rojas Pinilla.
Within this context, the post-1980 rule of law movement must be seen as part of a general effort at state reform. It was accompanied in most countries by the rewriting of constitutions to reverse prior presidential centralism, recognize more political and civil rights, and dedicate state efforts to resolution of social problems. Many of the constitutions of this era (and some from before where the military dictatorship took a leftist bent), defined a social market or social welfare state (estado de bien estar social), incorporating a long series of second and third generation rights to which citizens or, in fact, any resident was entitled. They generally enhanced the courts' role in ruling on the constitutionality of laws and government actions, increased the mechanisms through which aggrieved citizens could access their rights, and attempted to enhance judicial independence through guaranteed budgets, new appointment and career systems, tenure in office until retirement, and a prohibition on reducing judicial salaries. Judicial governance was entrusted either to the Supreme Court or a Judicial Council. In the few countries (Argentina, Colombia, and to a lesser extent, Peru) where the Ministry of Justice had played any role in governance or appointments, its participation was eliminated. Haiti here remains the sole, and major exception. Simultaneously, there was a drive toward reforming criminal justice systems, long the subject of criticisms, but especially objected to because of their use by authoritarian regimes to repress opposition, and the belief that poor citizens suffered disproportionately from their "normal" operations—that is to say they were universally the "usual suspects" and when they were the victims of crimes, they were most often ignored.

Although donors were aware of these problems, and had an interest in addressing them, the solutions tended to come out of the national environment, usually forwarded by groups of concerned jurists who had been waiting for some time for an opportunity to introduce the changes. Most of the designers were independent scholars, not members of the state judicial apparatus. Judges and other sector officials were usually seen as products of a problematic system, often were not all that interested in reform, and had they been, were discredited by their suspect origins and actions. The criminal and criminal procedure reforms, for example, derived from a movement, with origins in the 1960s or before, aimed at introducing more accusatory criminal processes, recognizing due process rights, and altering some basic understandings about the nature and definitions of criminal actions. The

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6 Ecuador and Peru during the 1970s are the two examples.
7 See generally THE (UN)RULE OF LAW & THE UNDERPRIVILEGED IN LATIN AMERICA, supra note 4.
models drew on European and U.S. experience, but very much through the Latin American lens. Subsequent claims that the U.S. "forced" its criminal justice models on the region are simply erroneous. It is true that training and other assistance subsequently offered by the U.S. are based on practices in that country. Unfortunately, many of these practices are inconsistent with the revised codes, which in most cases have a more European content.

Other measures, the introduction of budgetary earmarks for courts in particular, the creation of judicial councils to manage the appointment system and in some cases all judicial governance, or the creation of separate constitutional courts, were either complete innovations (the earmarks) or built on local understandings of European developments, in some cases, like the constitutional tribunals, duplicate provisions and institutional designs from those of the old continent. Interestingly, in these areas as well, Spanish speaking Latin America was more influenced by German trends than by those in Spain, in part because Spanish academics themselves tended to prefer the German models. There was also a process of sequential imitation. One Latin American country imitated a European model, and others in turn imitated the imitation. Like the game of gossip, the imitations grew less accurate with every round. Also, as is often mentioned, the imitations tended to pull practices out of a broader context which did not hold in the adopting country. Selection mechanisms were adopted with no regard for the larger environment in which they functioned in Europe—the better legal preparation of candidates, the presence of strong bar associations capable of disciplining their members, the well established understandings as to what judges would do and what skills they needed to do it.

Donors were important in introducing additional elements—especially an emphasis on court administration, delay reduction and automation, judicial training, and eventually alternative dispute resolution ("ADR"), legal aid, and civil society participation. While some of these additions were strongly resisted by the region’s courts, most have come around to accepting them, in some cases (ADR and automation) with remarkable enthusiasm. Whereas the local input emphasized judicial independence and new procedural rules, donors added the elements of efficiency and access. Today, the elements have become so merged that no one re-

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9 It is not clear that all the initial local reformers recognized this fact, but they are becoming more sophisticated as to the variety of accusatory models, and the strengths and weaknesses of each. Chile appears to be moving toward a U.S. version, but the majority of the region’s countries can be considered to have more Germanic codes. One very strong Germanic influence is the insistence that the various stages of a criminal trial be overseen by different judges so as to remove any bias originating in earlier interventions. Paraguay recently added a fourth first-instance judge and now has a judge to oversee the police investigation, one to handle indictment proceedings, one (or a panel) to preside at the trial, and still another to supervise enforcement of judgments. Here it outdoes even its German mentors.
members who authored what, and the region now has a fairly standard reform recipe, what some critics have called a template, a list of activities that seem to figure to a greater or lesser degree in every reform attempted.

Over the ensuing twenty years or so, the experience has transformed what was once called the “Cinderella” branch of government. Although the donors financed technical assistance, buildings, and computers, it bears mentioning that the national governments’ investment was far greater, as they paid for virtually all of the substantially increased operating costs. The concerted attention and significant investments from all sources have brought dramatic changes in the structure and operations of the sector, including:

- Higher budget levels and salaries, especially for the judiciary, but also for other sector organizations
- Consequent expansion in organizations’ national coverage, and changes in their internal structure
- Changes in the legal framework, aimed at bringing procedural and substantive laws into line with modern needs and values
- Strengthening of organizational administrative systems, especially regarding a better means for tracking workflow, budgets, and employees
- Expansion of information made available to the public both for their own cases and on general operations
- Creation of new organizations—public defense, prosecution, human rights ombudsman, anti-corruption offices, constitutional courts and chambers
- Provision of alternative services (ADR) including those aimed at expanding access to the poor in particular (legal assistance, legal information, small claims courts, multi-door services, justice centers, etc)
- In general, more attention to court performance as a result of the information they release, better media coverage, and the kinds of cases they are receiving
- Growth in caseloads, changes in types of cases and clients using courts
- Increased involvement of courts in protecting constitutional rights and deciding on the constitutionality or legality of executive policies

No one who knew the sector two decades ago, in any of the region’s countries, would deny these changes. Nor would they deny that some of them represent improvements in their own right. However, the other side of the coin is that dissatisfaction with sector performance has not disappeared.

and may even have worsened. In fact, public opinion surveys conducted over the past six or seven years show a slight decline from already low levels of public support and confidence. Lacking data from earlier periods, we cannot say whether this is a recent trend or, still more ominously, a longer term tendency. Whichever the case, it is also likely that the enormous publicity given to these reforms and some of the real changes have had their own negative impact on perceptions. When no one cared about the sector or expected much from it, it is possible no one had much of an opinion about it. Today everyone does, and is well aware, as they were not before, of its many failings.

III. CRITICISMS OF THE EFFORT AND POSSIBLE NEGATIVE LEGACIES

That the reform efforts begun less than twenty years ago have not achieved their promoters’ most ambitious visions and promises should not be unexpected. As several have noted, twenty years is not much time to reverse vices accumulating over nearly 200. Moreover, despite the attention given by donors, international NGOs, and local champions, these programs were never national priorities, nor, in the scheme of things, did they receive an enormous share of external or internal funding. Those not accustomed to reviewing budgets of assistance programs may regard the latter as a curious statement, but total donor contributions to regional programs over the twenty year period may only equal the amount of one year’s structural adjustment loans to one of the larger countries. While Latin American judicial budgets are high as compared to other regions, they never get into two digit figures, and in most cases are still less than 3 percent of central government expenditures. However, by the same token, with the exception of the police, we are looking at small organizations, with relatively few employees and “service units,” which should be easier to turn around than say, a national education or health system. Thus, any failure to do so or to make what many regard as a more reasonable degree of progress, cannot be blamed on the amounts dedicated to the task. The explanation must be sought in other factors. Here we look at two sets of explanations, both relating to how programs were designed, managed, and implemented. The first set comprises factors affecting all reform efforts, and not only those in justice. The sec-

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11 See Pedro Galindo, Indicadores Sujectivos: Estudios, Calificaciones de Riesgo y En-
cuestas de Percepción Pública sobre los Sistemas de Justicia. Resultados Recientes par alas
Américas, 3 SISTEMAS JUDICIALES 4, 4-35 (2003).

12 Public ratings of the courts, like all public institutions, have also taken a universal nose-
dive. See José Juan Toharia, Evaluating Systems of Justice Through Public Opinion: Why,
What, Who, How, and What For?, in BEYOND COMMON KNOWLEDGE: EMPIRICAL
APPROACHES TO THE RULE OF LAW, supra note 4 (offering some comparative figures and
some cautions about the use of opinion polls to rate institutional performance).
ond, while possibly also more generalizable, relates specifically to rule of law programs.

A. The usual problems and their usual effects

A few factors, common to reforms in other sectors, deserve some of the blame for the limited returns: inadequate coordination among the donors and other external actors; a steep learning curve for those attempting to work in a wholly new area; frequent changes of leadership within the court systems and the national executives and their inevitable impact on program continuity; the external proponents' own shifting agendas and priorities, even within the sector; and the occasional opportunistic capture of the programs for unrelated or even contradictory ends. I do not plan to spend more time on these elements than is required to flesh out the telegraphic listing above.

As regards donor coordination, this is of course mostly a problem in countries where donors provided the major impetus and where the reforms wouldn't have occurred, would have occurred much later, or would have proceeded much less rapidly had donors not been involved. This is the case for much of Central America, the least developed Andean countries, and some Caribbean nations. The problem is now recognized, especially as regards the larger donors, but that doesn't make it any easier to fix, owing to its underlying causes—donors' different structures and operating procedures, internal incentive systems (which put a premium on staff members' developing their own projects), and the weight of national as well as institutional interests. Donors frequently lay claim to certain countries or regions, or to certain functional areas, and also have an inevitable preference for doing things their way. As has been observed repeatedly, this provokes clashes, redundancies, and even some amazing tactics to undermine each other's programs. However, the input from the NGO or civil society family should not be overlooked. In attempting to gain a foothold in the process, they have been equally insistent on doing things their way, on promoting their often narrow agendas, and on doing whatever it takes to get a piece of the action (including lobbying with their respective governments and congresses). It is interesting that despite the emphasis on building local capacity, relatively better funded external NGOs sometimes compete, quite successfully, with local organizations for the funds of the larger donors. They also compete with for-profit consulting firms, and have hardly been adverse

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13 See generally Hammergren, supra note 4 (offering some anecdotal examples). See also Luis Salas, From Law and Development to Rule of Law: New and Old issues in Justice Reform in Latin America, in The (UN)Rule of Law in Latin America: The International Promotion of Judicial Reform, supra note 4. (offering a discussion of conflicting agendas among donors and particularly within the less than monolithic U.S. Government).
to denigrating the latter's material motives and presumably lesser expertise. In short, in judicial reform, as in all other areas, altruism is not the only force at work, and politics and institutional interests work against coordinated efforts as much as some simple structural incompatibilities.

The learning curve phenomenon is often ignored, but as most of those involved at the beginning would admit, knowledge of how to reform a judicial sector was virtually zero when the movement got started, and all parties had to adjust their initial visions considerably over the ensuing twenty years. On the donor side, the challenge was usually defined over simplistically, as demonstrated by the first El Salvador project which proposed to resolve the perceived problem of impunity (especially of abusive state actors) with a judicial protection unit, a forensics laboratory, and training of investigative police. Of course, as the funders quickly recognized, impunity was hardly the system's only problem, and itself was less a question of inadequate training and tools than of motives, incentives, and the important interests served. On the local side, a tendency to see the problem and the challenge as one of inadequate laws, and the solution thus as legal drafting also took its toll.

An understanding of the complex nature of institutional change has evolved gradually, but operating on this basis continues to be impeded by the vested interests in routines already developed and the constant entrance of new actors who often replicate the early mistakes.

It would certainly help if newcomers (including those in organizations with a longer track record) paid some attention to the movement's now fairly well-documented history; but enthusiasm, self-confidence, and the rush to be included seem to discourage anything so sensible.

Changes in leadership and priorities are also a constant obstacle to reforms (and also compound the tendency to repeat the same mistakes). New leaders often want to put their own mark on programs, meaning that efforts begun by their predecessors may not be followed through. This is true at all levels, across the board—whether we are talking about donors,

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14 See Michael D. Goldhaver, Basics Training, AM. LAW, Nov. 2004, at 107 (offering an interesting review of the consultant-NGO battle, this time involving the ABA).

15 Donors to some extent also bought into this vision, and continue to do so as regards rule of law contributions to a “market friendly environment.” Even after the somewhat later experience in Eastern Europe and the former Soviet Union demonstrated that a new legal framework has little impact on institutionalized behaviors, we continue to promote isolated legal change in other regions.

16 For example, only a few years following a GAO report roundly criticizing its support to a regional center for justice reforms (the Costa Rica based ILANUD), the US government, as part of the Hemispheric summits, backed the creation of another such center, this time in Santiago Chile. The organization (CEJA, Centro de Estudios de la Justicia de las Americas) exists to this day, facing many of the problems those involved with ILANUD foresaw. Currently, the ABA and the International Committee of the Federal Judicial Conference are proposing still a third center, to be located in Puerto Rico.
national presidents, court leaders, or even civil society groups. Only the for-
profit consultants may be more immune to the tendency—as they get paid to
do what others have ordered. Rule of law programs also compete for atten-
tion with numerous higher priority initiatives in other sectors and may suffer
either from a resultant decline in attention or measures to shift their direc-
tion. Finally, the donor community never seems to stay in one location very
long, shifting its resources and attention en masse to the next crisis site. This
obviously impedes long-term efforts, and seems to be an increasingly com-
mon phenomenon in recent years. For example, one wonders how much of
the donor investments recently recommitted to Haiti will actually material-
ize in the face of the subsequent shift of attention to East Asia in the wake
of the December 26, 2004 tsunami. Given that commitments often seem in
excess of what a country can absorb, the upside to this practice may be to
force a focus on priorities, assuming sufficient funding can be maintained
for this purpose.

Finally, as rule of law programs have become more widely
accepted, those opposing them have often found their best tactic is
undermining from within. Accept the new appointment system, but find
ways to introduce the same political interference it was intended to mitigate.
Acknowledge the new legal rules, but simply work around them. Introduce
the new mechanism but do not give it the necessary funding. Again this is
not unique to judicial reform programs, and has occurred even in areas
where reforms apparently had a higher priority among donors and national
leaders. The financial management and privatization reforms conducted in
the '90s are a prime and increasingly recognized example. Countries took
the hardware, complied with the conditions, but did so in a fashion that too
often undermined the intended effects. Die-hard proponents of the
Washington Consensus, underlying these actions, often complain that the
failings were not in the recommendations but in their insufficient
implementation. If that is true, then they themselves should have paid more
attention to the details of execution—a plan after all is only a paper product
until it is enacted.

Rule of law reforms also were impeded by some problems of their
own, or at least their exaggeration to a point where the differences seem
more qualitative than quantitative. Critics interested in improving future
performance have thus begun to focus on them and three characteristics in
particular: an over-reliance on technological and other quick fixes; a reform
strategy which seemed to accept the underlying system as adequate, and
only in need of better implementation; and excessive promises as to the
beneficial results. Given the weight of the Latin American model in shaping
reforms elsewhere, these merit further discussion.
B. Tendency to rely on structural, technological, fixes and overlook the political and political will elements

It has become conventional wisdom that too many programs have been what are uncharitably called "equipment dumps," a host of technological elements introduced as a means of building capacity in the target institutions. The larger problem however, and one characterizing other proposed remedies, has been a tendency to see reform as the nearly automatic result of the provision of selected inputs—whether material, structural, or normative. As the list of standard remedies has grown, critics now speak of Christmas tree reforms—collections of measures, often introduced in no particular order and with little internal coordination, the adoption of which is assumed to constitute all that is needed. Collectively called "capacity building," the underlying notion is that once the capacity is installed, courts, public defenders, police, and prosecutors will use it to improve their performance.

The phenomenon is not attributable only to the donors, and it has produced some results. It would be ludicrous to believe that several hundred million dollars invested only in equipment, buildings, and laws would leave the systems unchanged. While the emphasis on technology is often blamed on large donors, there are countries which have done this on their own—especially the larger and more developed nations like Brazil, Argentina, Chile, and Mexico. Automation and related technological innovations (video-conferencing, barcodes on case files, internet filings) have helped their courts (and other sector organizations) handle larger caseloads and reduce some causes of delay, as they have in the less developed court systems where the donors financed the investments. Similarly, purely structural reforms (reorganizations and the creation of new agencies like public defenders offices, independent public prosecutors, judicial councils), introduction of new services (common intake centers, multi-door courthouses, ADR), and legal change have emanated from local and external sources, and have also produced some improvements in productivity, access, and the quality of output. Results vary by and within countries, but to deny the impact of these innovations would be to ignore the weight of the accumulating evidence.

The problem, as critics have begun to note, is that enhanced capacity needs to be used. Where judges and judicial leaders are more interested in getting the new equipment, personnel, and offices than in producing the results they are supposed to permit, the latter may be quite limited. Judges who see computers as a way of reducing their own workload or embrace new codes as a sign of being modern, are unlikely to feel the need to do anything differently, possibly believing that any improvements will be automatic. Some proponents of these changes may have believed the same. Others may have been reluctant to deliver the bad news (you have to change
what you are doing) with the good (we are giving you 5,000 computer work stations), trusting that once the new elements were in place they would spontaneously cause their users to alter their behavior in the desired directions. Resistance to the downstream changes may also come from outside the courts, from the private bar, from the political leaders, and from others benefiting from business as usual. Resistance may be motivated by contradictory agendas or by simple inertia.

We take for example the frequent failure of courts to use the new automated systems (whether established in individual courtrooms to help judges process their cases, or in the administrative systems to simplify management of resources) to generate management information systems to track organizational performance at either level. Where they did not do this manually before (and many judiciaries in the region are sufficiently small enough to allow this) giving them the tools to do this automatically often produced no further change. It is still rare to find a judicial leader who can cite the caseload handled by his courts, knows what individual judges receive and process, or can explain the relationship of resource allocation to production. If the purpose of these changes was to improve management, the forgotten element was the often near complete absence of managers to use them. In the court systems or individual courts where more happened, this was inevitably because leaders and staff recognized and embraced the potential. However, this was also true of the occasional court which even in an otherwise dysfunctional traditional system, worked above the norm before any changes were made.

The fate of other kinds of innovations (new laws, new organizations, new services) has all too often had similar effects for similar reasons. Where nothing is changed but the law, nothing may actually change. Colombia recently put into effect its third new Criminal Procedures Code since 1991. It and its predecessors were introduced as a means of fighting impunity, reducing human rights abuses, and combating crime—responding to the three most common public complaints. This time the law’s drafters again say they have a better product, but again seem to be relying on legal change to improve well entrenched behavior patterns, inadequate organizational structures, irrational distribution of resources, scant coordination within or among institutions, and a host of other problems. Aside from a mass training program for judicial operators in the principles of the new code and a push to build rooms for oral hearings, there appears to be no concerted plan for addressing the other long-standing weaknesses.\(^\text{17}\)

\(^{17}\) In fact some of the weaknesses continue to be denied or ignored. One of the Colombian code’s authors, Jaime Enrique Granados Pena, speaking in a World Bank course Reforma Judicial para Bolivia, Ecuador y Guatemala on January 19, 2005, noted that the country the country was indeed increasing its number of public defenders over the current 1,000. Jaime Enrique Granados Pena, Address at the World Bank Course: Reforma Judicial para Bolivia,
In other countries, a push to expand access seems to overlook one of the biggest obstacles—the legal requirement than anyone heard by a court be represented by counsel. Programs have been mounted to provide free legal services, but in countries with high degrees of poverty and many competing budgetary demands, there are few that seem capable of providing enough. However, the private bar has frequently opposed any waiving of the requirement inasmuch as it would cut into its own income. While lawyers and judges eventually accepted ADR, much as they did automation, court annexed and stand alone programs all too frequently become another expensive obstacle for anyone attempting to access the courts. Access is a major problem in Latin America, but it has been attacked in an entirely non-strategic fashion, defining the solution as simply getting more people to courts or alternative services. Given the size of the population of potential beneficiaries and budgetary limitations, this clearly is not an adequate strategy, either in terms of how many will be benefited or in ensuring that the most important needs are met.

In just about every area where programs usually focus, similar stories could be told. Donors have contributed by giving the impression that such targeted additions would resolve problems automatically. In most cases, it appears they believed this was so. Courts have gone along because they often shared the same impression that improvements only required adopting a new mechanism, often fully funded by donor programs. And national governments have often cooperated in their own fashion, buying the argument that the main obstacle to improved performance was the lack of adequate funding. As Latin American judicial budgets now approach world record levels (as percentages of total government expenditures) and user satisfaction shows little or no improvement—in some cases it appears to have declined—Ministers of Finance are beginning to ask the obvious questions, for which the courts’ usual answer is “we still don’t have enough.” Insuring that inputs are better coordinated, that output goals are understood, and that judicial operators move toward meeting them by changing how they act would be an important step in realizing the potential of the newly installed capacity. However, there are also indications that even this will be insufficient because of how the goals themselves have been understood.

Ecuador y Guatemala (Jan. 19, 2005). However, as World Bank and USAID consultants who have reviewed Columbia’s public defense system note, all defenders are contracted, allowed to do outside work, and consequently handle an average annual workload of between 30 and 80 cases. This is between one eighth and one third of international standards. It is also believed that as defenders select their cases, they pick the easy ones.

Brazil, the one country in the region that introduced pro se representation in a new level of small claims courts, continues to face resistance from the national bar association (Ordem de Advogados do Brasil, OAB) which many believe will eventually reverse the policy.
C. Tendency to see performance improvement as a question of doing more of the same better

Even in systems which have used the changes to raise production levels, tracking the performance of individual judges and pushing them to move their caseload along, user satisfaction has often not improved. This is explained by two additional features: the demand has risen still more rapidly than system capacity to respond and many of the traditional factors lowering the quality of decisions and impeding their final resolution remain in place. The logic of the traditional reforms, whether aimed at reducing delay or increasing access, had been to help judicial systems produce more of the same more rapidly. Usually no one asks whether what the courts always saw represented the best use of their resources, both as regards the demands entered and their often convoluted trajectories, given the ample opportunities, for those who could afford them to register protests against trial court judgments. Courts everywhere are currently facing these questions, and having to consider some difficult trade-offs among the values involved—access, delay, costs, and quality. The very notion of addressing them also faces resistance because of its apparent contradiction of the right to justice. This resistance seems especially strong in Latin America where even the notion of justice as a “public service” is roundly opposed by many judges, lawyers, and jurists. Outside allies usually had never thought to

19 Examples include Brazil, Mexico at the federal level, and Colombia. Brazil’s system is the most developed and also includes an effort to measure quality—judges up for promotion are invited to submit examples of their written opinions. A perverse turn here is that trial judges, assuming their rulings will always be appealed, sometimes pay less attention to the outcome than to the creativity they can insert. The current President of Brazil’s Constitutional Court (Supremo Tribunal Federal) cites an example from his days as a lawyer where a judge ruled against him and was horrified to learn he would not appeal what even the judge believed was an unfair, but highly creative decision. Nelson Jobim, O Processo de reforma sob a ótica do Judiciário, in REFORMA DO JUDICIÁRIO 13-40 (Armando Cautelar Pinheiro ed., 2003).

20 The new criminal and criminal procedures codes represent an exception on the first count in regards to their efforts to decriminalize certain actions and provide alternative abbreviated proceedings. However, if anything, they have augmented the potential for questioning decisions, an intentional benefit for the mass of ordinary defendants who suffered the most abuses, but one which has arguably worked most to the advantage of those accused of white collar crimes.

21 An earlier World Bank publication, Maria Dakolias, The Judicial Sector in Latin America and the Caribbean: Elements of Reform (World Bank, Technical Paper No. 319, 1996), has been the focus of considerable criticism in Brazil for just this approach and its emphasis on economic impacts, deemed to be a World Bank effort to force globalization and put the judiciary at its service. As the World Bank does not have a judicial reform project in Brazil, the criticism seems somewhat exaggerated. For a different type of criticism of the efficiency approach, see Lawrence Tshuma, The Political Economy of the World Bank’s Legal Framework for Economic Development, in GOVERNANCE, DEVELOPMENT AND GLOBALIZATION: A TRIBUTE TO LAWRENCE TSHUMA 7-27 (Julio Faundez et al. eds., 2000).
ask about content—assuming this was none of their business or was no different from what courts received everywhere. And finally, the lack of good statistics even on the basics of caseload meant that at best one had to rely on anecdotes to make any evaluation.

Our increasing familiarity with the region’s courts, the efforts of a few judiciaries to examine their workloads, and the work of a few academics, research foundations, and donors have begun to suggest that the supply-demand gap is not going to be fixed with efficiency measures alone, and that if one really wants to increase access to nontraditional users, some of the traditional ones may have to be discouraged or lose their rights to endless reviews. The situation varies by country, and indeed in the least developed ones, any supply-demand gap could be addressed over the short run by redistributing caseloads and monitoring performance better. In countries where judges average only a few hundred filings a year, poor work habits, incentives, and insufficient supervision are the best explanations of why productivity is so low, and also go a long way toward explaining additional problems—poor quality of decisions, corruption, and highly inequitable access. However, even here patterns evident in the more overloaded court systems give pause for thought. The following list indicates some recent findings as to what Latin American courts process and how they do this, and comprises a starting point for asking how both might be changed.

- Many filings never progress further than admission, abandoned by the parties for a variety of reasons. However, they usually remain in judicial offices for some time and are counted as part of the normal caseload—meaning inter alia, that real workload is often far less than claimed.
- A majority of filings often represent very simple cases, collection of small debts, noncontroversial actions requiring only judicial recognition of a title or other document, and in a growing number of countries, routine claims against government agencies or consumer complaints.
- In more congested systems, judges may reach initial decisions fairly rapidly, but final disposition is delayed by multiple appeals. Delays in reaching initial rulings may be a result of the common practices of attending to interlocutory appeals first.
- Final disposition in cases where a payment is due are often held up by a judicial collection process which may take longer than the judgment, if it actually results in payment. Court backlogs often have a large component of adjudicated cases awaiting enforcement and most of these are in turn paralyzed (i.e. require no judicial action) because of problems in identifying debtors’ assets (usually the responsibility of the creditor).
- Although they frequently complain about court delays when they are the plaintiffs, large repeat users, including the government, public utilities, non-financial commercial firms, and banks increasing use the opportunity for dilatory practices to their advantage as defendants.
Although current law often allows judges to refuse obvious dilatory practices, fear of complaints or accusations of corruption as well as simple inertia discourage them from doing so. Government attorneys often enter appeals they know they will lose because the law requires them to do so, or makes it more difficult not to.

Default judgments and settlements are either not allowed or not encouraged. Cases may go through a full "trial" even when the defendant never appears. As one U.S. judge put it, speaking of another region, but equally applicable to Latin America, the judges "work too hard," putting equal effort into cases not meriting that much attention.

The situation varies and some of the examples given above have only been tracked in a few countries. However, across the board, judicial caseloads in Latin America tend to be largely composed of a few types of very simple conflicts, some of which arguably should not require judicial treatment, and others of which do not benefit much from it, given that the underlying issue is neither legal nor factual but instead is the defendant's inability or unwillingness to honor a debt or other obligation. The normal efficiency measures (courtroom reorganizations, automated case files and tracking systems, improved archiving systems, even internet filings) might make some difference, especially in courtrooms so overloaded that cases simply get lost in the shuffle. They can do little against delays caused by legal procedures, litigant abuses, or defendants unable to pay obligations.

This suggests several conclusions. First, further procedural reforms may be required, but ways to ensure they are enforced are also needed. So long as judges have no incentive or power to discipline bad faith litigation, this is not going to happen. Latin Americans have resisted some of the obvious changes (e.g. restrictions of appeals, their concentration at the end of a case, judges ability to declare parties in contempt) because they believe the existing proceedings protect due process rights. In effect they seem to protect them only for those able to hire a good lawyer, and are often used, quite blatantly to avoid rather than obtain justice. These same protections, expanded in the new criminal procedures codes, have met similar criticisms and have further reduced public confidence in the system when they see a
notorious "crook" get off because his lawyer managed to string out the proceedings until the legal deadlines expired.

Second, judges, citizens, and politicians are going to have to take a second look at what courts are handling and what they ought to handle. In countries where up to a fourth of the judicial workload is composed of non-controversial registration of documents, this arguably should be treated in some other way. Where debt collection, routine administrative protests, and consumer complaints increasingly congest the courts, administrative or extra-judicial handling should be considered. In a majority of these cases, the defendant is at most buying time, as the direction of the ruling is not in question. In Mexico’s debt collection proceedings, we found 90 to 95 percent of the rulings in favor of the creditor.24 In São Paulo’s (Brazil) small claims courts seeing federal pension cases, the presiding judge estimated that only one quarter of the cases involved real conflicts—the rest were simply a result of the Social Security Office’s efforts to control its cash flow by not recognizing legitimate claims.25 A study conducted by Rio de Janeiro’s state Superior Court produced similar findings on consumer complaints directed against public utilities and banks.26 These complaints do need resolution, but handling them on a one-by-one basis within the courts is a recipe for judicial gridlock. Legal change including provisions to fine agencies that indulge in routine abuses, better administrative dispute mechanisms, and strengthening of administrative regulatory agencies might all be considered, but simply hoping that increased judicial efficiency will overcome the problem seems unrealistic.

Third, before proceeding with the non-strategic access policies, courts and political leaders need a better handle on the needs of non-traditional users. Here, again the goal of giving every citizen his or her day in court for whatever conflict he or she might like resolved is not realistic. The questions are what the courts can and should see, and how other types of conflicts might be handled and other needs resolved. This leads to a third error of the current strategies, the expectation of a judicial solution for every social ill, as discussed further below.

D. Tendency of over-reliance on judicial/rule of law reform to resolve deep seated socio-economic and political problems

These programs owe their existence and persistence to the many promises their promoters have made, from their beneficial results in jump-starting an economy to their ability to undo deep-seated social injustices. The promises have brought enormous benefits for those of us working in the areas, but we are facing an equally enormous problem—the failure to deliver. Moreover, efforts to realize them, especially in the social justice area, may now be adding their own complications.

As regards the entire argument, I agree with a Peruvian expert, Luis Pásara, who has warned several times that we are creating false expectations. In the economic area he argues, apparently in a contradictory fashion, that judicial reform has no necessary connection to economic growth, although there are clearly areas where specific judicial practices may create obstacles. The apparent contradiction disappears on closer examination. What he is really saying is that anything that we may choose to call reform will not necessarily improve the “market enabling environment.” To the extent we want our reforms to do so we need to understand and attack the context-specific impediments. His argument as regards to social and political problems is a bit broader, but boils down to the following. Such problems are complex, have deep societal roots and will not be resolved by legal or judicial fiat. Societies’ abilities to address these problems are limited by available resources, the countervailing power structure, and simple human possibilities. Many “judicial reformers” are not really interested in judicial reform, but rather in using whatever judicial structure exists to advance social agendas. They are issue advocates, not proponents of institutional development and in fact often believe they can achieve their goals with stroke of the pen reforms (much like the economists enamored of the one-off changes of the Washington Consensus). Despite the terminology, social injustice has less to do with justice than with politics, and will be best addressed through the latter. Revolutions by judicial order are few and far between, and usually only legalize trends that are already underway.

The consequently excessive optimism about the benefits of rule of law reforms is an increasing concern to those promoting them because of the danger of the chits being called in. As regards the economic benefits,

27 Not the least of which is not having to justify the programs. We start with the mantra that a well functioning court system is a precondition for a well-functioning economy and the economists leave us alone.
29 Recent discussion in the U.S. over the implications of Brown v. Board of Education of Topeka offers a good example.
China remains the favorite contrary example, but there are others as well. Brazil’s judicial system is certainly problematic, but Brazil has been the poster child of direct foreign investment for many years. Chile’s better judicial system may appear to support the thesis, but critics argue that the key there is a markedly, possibly excessively, pro-business cast. Peru grew spectacularly during the 1990s when its judicial system was pervaded by corruption and political intervention. Even Singapore, the entrepreneur’s darling, has a very efficient system, absolutely controlled from the top. The general rule is that business goes where it can make a profit, and resolves its legal problems by avoidance, or with the help of a good local lawyer, and if need be, a few well-placed bribes. One critic has in fact suggested that well-meaning reformers will only complicate the situation by introducing practices and laws businesses neither want nor need.\(^3\) Certainly, until neo-institutionalism’s discovery of the importance of institutions,\(^3\) most interpretations of pro-market legal change suggested that historically, the enlightened businesses came first and then promoted the changes they wanted. No one had ever argued that the process worked in the reverse direction. It might, but that remains to be demonstrated.

Social justice is a more complex problem, with equally mixed results. Latin America saw, as part of the democratic transition, the drafting of a mass of constitutions promising rights unimagined anywhere, and certainly not in the region’s own history. More independent courts, and in some cases, Public Ministries (Brazil) have begun to order their enforcement, although often on a case-by-case basis. Further complications originate from a tendency to recognize a series of acquired rights—in effect the entitlements gained by social groups, often members of the middle class, under prior regimes. With these rights left in force, and new rights more often recognized, the countries are finding themselves in a financial trap—ordered to recognize new claimants but unable to touch the benefits of established groups. The possibility of renegotiating acquired rights is usually not admitted, although a few countries (Brazil) have found a judicial solution by denying that certain entitlements (in this case the tax-exempt status of pensions) are actually rights.\(^3\)

As more countries are adopting class-action like proceedings, the resulting financial liabilities from rights cases are becoming still more problematic. The old, highly unfair system of case-by-case resolution is gradually disappearing, but greater justice imposes greater costs on


\(^3\) See Douglass C. North, Institutions, Institutional Change and Economic Performance (James Alt & Douglass North eds., 1990).

\(^3\) For Brazil, absent constitutional change, this may be the only realistic tactic as the Constitution specifically protects acquired rights.
government. Again in Brazil, the government recently (November, 2004) made a last ditch, and unsuccessful, effort to oppose a constitutional amendment it had originally backed—whereby a decision by the Constitutional Court on a common complaint would be binding on all similar cases, and in fact on the administrative offices involved. If enacted as intended, this apparently minor change is likely to bankrupt the government, which until now had depended on claimants having to litigate the cases one-by-one. Brazil, if an extreme case, is hardly unique. Litigation to gain constitutionally guaranteed rights is a growing phenomenon throughout the region and governments are increasingly pressed as to how they will deal with the consequences. Courts have outlawed changes to pension plans (Colombia), ordered provision of housing to the homeless (Argentina), reversed reductions in force associated with privatizations (Peru), and nullified civil service legislation intended to link pay and tenure to performance and facilitate dismissals of redundant or non-performing employees (Paraguay). The legality and "justice" of the decisions are usually above question. The problem is how governments will respond without breaking the bank.

The familiar refrain (also evoked by courts requiring higher budgets) that more efficient use of resources will provide the solution is just not good enough. There are limits to what a country, and especially a very poor one, can provide. There are also limits to how much it can demand from the better off citizens without provoking a coup or their simple departure. In many of the region's countries, anyone with a fortune worth protecting has already sent as much as they can to foreign banks or off-shore investments. Redistribution of wealth, income, and opportunities to gain each are clearly needed, but history tells us this must go slowly. Turning the matter to the courts, unprepared to foretell the consequences, often uncertain of the issues at stake, and themselves with a questioned legitimacy does not appear to be the best answer. However, politicians have sometimes been willing to do so, largely because they do not want to have the responsibility themselves.

Thus, the final element of the exaggerated promises has been a tendency to judicialization of politics in the absence of political mechanisms to make the hard choices. Courts have varied in their willingness to jump into the breech. Three years after the fact, Argentina's Supreme Court has yet to decide on the legality of the De la Rua administration's freezing and then pesification\(^3\) of bank accounts in dollars. It is predicted that Brazil's Constitutional Court will be very wary about its new ability to fix interpretations of laws involving constitutional rights given the enormous financial repercussions. However, until recently, it decided on conversion rates for state

\[^3\] Pesification means the conversion of dollar amounts, originally calculated at par to roughly 1.4 pesos to the dollar (in the face of an official exchange of roughly three to one).
pensions and mortgages (affected by devaluations) entirely on its own and without any input from the Ministry of Finance.\textsuperscript{34} Costa Rica's Supreme Court had no problem nullifying the national traffic law (for two years) but resisted declaring the Central Bank's setting of the exchange rate a violation of the Congress' law making monopoly. Courts are learning, but the existing rights-rich constitutional framework does not allow them a lot of leeway. From the Cinderellas of the public sector, Courts are emerging to a central position, but without much opportunity to adjust to the new demands, and in many cases without much internal reform. Not only are they being pressed to put their own houses in order; they are increasingly made responsible for major political decisions. This may be only a Latin American syndrome (one hopes). It is a cautionary lesson for those building judicial systems in other regions. A too rapid increase in responsibilities without time to absorb the consequences can be a recipe for political and economic as well as judicial chaos.

IV. EXPERIENCE IN LATIN AMERICAN POST-CONFLICT COUNTRIES

Latin America offers several examples of judicial reforms used in a post-conflict context, among them Haiti, El Salvador, and Guatemala.\textsuperscript{35} As I am most familiar with the first two, I will focus this discussion on them. I simply have not followed the Guatemalan situation closely enough to assess its advances. The Haitian and El Salvador cases are especially interesting in that they represent respectively, a clear failure and a relative success. Both occurred in the context of state failure and extensive civil conflict (in El Salvador a civil war, in Haiti, a long period of repression, followed by the externally facilitated reinstatement of an elected government). Both received substantial amounts of external assistance and in both cases, donors emphasized the central role of the justice system in the state (re)building exercise. In neither case can we speak of nation building, as the national identity was not in question. The problem was how to erect a state apparatus that would be recognized by the majority of the population and capable of responding to their needs.

That said, Haiti was clearly the more difficult situation, and therein lie many of the differences in results. In El Salvador, the civil war's conclu-

\textsuperscript{34} This rather surprising revelation was made in interviews with Brazilian judges, who said they also corrected their own "mistakes," again without Finance's input.

\textsuperscript{35} Published accounts, often critical, of donor programs in these countries are growing, but El Salvador has been the most thoroughly studied. See MARGARET POPKIN, PEACE WITHOUT JUSTICE: OBSTACLES TO BUILDING THE RULE OF LAW (2000), for one of the most thorough treatments. See also Reed Brody, International Aspects of Current Efforts at Judicial Reform: Undermining Justice in Haiti, in THE (UN)RULE OF LAW & THE UNDERPRIVILEGED IN LATIN AMERICA, supra note 4, at 227–42 (offering a somewhat biased, advocate's criticism of U.S. programs in Haiti).
sion did not unseat the old elite (their party, ARENA in fact remained in power through all but the most recent presidential elections), but simply forced their sharing of power with the insurgent groups. In Haiti, the reinstatement of the Aristide government in 1994, ousted the former military leadership and many of their political allies. El Salvador's state apparatus was in better shape prior to the regime shift and was not seriously damaged by it. In Haiti, a poorly functioning bureaucratic apparatus was further devastated by the change. Finally, El Salvador's economy, while hurt by the civil war, was relatively strong. Haiti comes close to a country without an economy, the poorest nation in the Western Hemisphere and one of the most disadvantaged in the world. Although both economies rely heavily on remittances from displaced populations, in El Salvador these have reached the furthest corners of the country and produced more productive investments.

The emphasis on the justice sector in both countries was largely a donor choice. There was a demand in both cases for attention to the security forces, and an effort to recreate them with substantial donor assistance. However, the attention to the courts and other sector agencies was largely a donor priority, although in El Salvador, there were local groups supporting broader justice reform. In both countries, the entire justice sector was known for corruption, political intervention, inefficacy, and inadequate resources of every type, although again, the Haitian situation was far worse. Given these initial differences, the varying outcomes are perhaps no surprise. What is surprising is that the donor tactics in each were so similar: substantial attention to recreating the police forces, combined with the usual recipe of remedies for the courts. It also bears mentioning that the process took 10 to 15 years in El Salvador, beginning in the early 1980s. Defeat was declared in Haiti after only five, and of course was not solely a question of failure in the justice sector but of the overall donor assistance programs and worsening relations between the Haitian government and the main sources of external assistance.

One would not want to paint too rosy a picture of El Salvador. Some twenty-plus years after donor assistance began and twelve or so after the peace accords were signed, its civilian police clearly function better and its courts are less rife with corruption than before. Still, neither entity, nor the new public defenders office, public prosecution, or the ombudsman are models of how such agencies should operate. Citizens' concerns with crime, public sector and even judicial corruption, poor services, limited access, and inefficient resource use remain. However, the base is there and there are local groups working to promote improvements. After donor attention turned elsewhere, including to Haiti, the Salvadors have managed to continue their own reforms, modifying the appointment systems for judges, combating corruption in the courts and elsewhere, and improving monitoring of performance. The results are not only far better than those in Haiti, but also than those in the neighboring Guatemala and Nicaragua,
where the initial conditions were more similar. So what accounts for the relative success?

First, the process was gradual, beginning years before the peace accords were signed (1992) and thus giving the local and international reformers more time to understand the problems. By the time of the peace accords, the early mistakes (some mentioned above) had been recognized and steps taken to correct them. Second, there were the limited problems of donor coordination because one donor, the U.S., got there early and maintained the dominant role in the process for most of its duration. The U.S. certainly made many mistakes. It was easier to recognize and correct them in the absence of pressure to compete with other sources of assistance. Instead, it was international NGOs and UN observers who did most of the monitoring—a more objective, or at least less self-interested source of criticism. Problems did occur when both types of entities began to seek to build their own programs, but this came relatively late. Third, although the lion’s share of funding went to police, there was a simultaneous and well funded effort to build the sector’s other institutions. And fourth, because this was grant funded, there was necessarily less emphasis on the big ticket items (computers and buildings) and more on structural and behavioral change. There was a heavy use of on-site advisors who worked with the individual institutions to identify and resolve performance problems, and an enormous emphasis, especially on the non-police side in making do with existing resources. By the time the IFIs got there with their large loans, much of the structural change had already been introduced, so attention was only diverted to the development commodities after the fact.

By the time the same donors got to Haiti, and the early steps there were again led by the USG, they seemed to have forgotten some of the obvious lessons and armed themselves to affect the same reforms in record time. “Standing up the Haitian justice system” became a political priority, with the emphasis on producing externally visible results as quickly as possible.\textsuperscript{36} Much was done quickly, but without the benefits of a lengthy period to understand the overall situation, and in many cases without advisors who even spoke the local language (French or Creole).\textsuperscript{37} In El Salvador, local advisors could and did go out drinking beer with their counterparts at the end of the day. In Haiti, the majority retired to one of a few tourist hotels

\textsuperscript{36} As an anecdotal example, in a meeting of U.S. advisors, one State Department official noted the need to televise Haitian criminal trials. When it was mentioned that most Haitians don’t have televisions, he simply said, with a wink, that the televised proceedings were not for Haitian audiences.

\textsuperscript{37} Although some Haitian-Americans were used as advisors, there were rumored to be problems with their preservation of contacts in the country. As has proved to be the case elsewhere, members of the diaspora, while sensitive to local politics and fluent in the language, can also bring their own baggage with them.
where they hung out with each other. Those who could mix with the locals often regarded their logical counterparts, probably accurately, as part of the problem, sometimes referring to them as MRE’s, or, morally repugnant elites. This was less true of the police advisors, but was an unfortunate fact of life for those who worked with other sector institutions. Perhaps motivated by the harsher Haitian realities, perhaps by the changed political climate in the U.S., Haiti’s justice reforms during the late 1990s encompassed a perplexing mix on the donor side of a high profile political agenda combined with greater moral outrage.

Ironically (but perhaps of some consolation now), El Salvador’s reforms under a U.S. government not noted for its dedication to soft ideals may have done more than those in Haiti with the collaboration of idealists drawn from the NGO community. However, it should also be noted that the more dominant role of police and prosecutorial advisors in Haiti may not have been an asset as neither group, however skilled in their ordinary functions, seemed to have much of a grasp of institutional reform. It has been said by others that insufficient attention to creating police management capabilities accounts for subsequent police abuse. Prosecutors sometimes seemed more intent on helping Haitians resolve specific cases than on building a functioning prosecutorial agency.

The real question in Haiti is whether different tactics might have produced better and more lasting results. Following the donor exit in the late 1990s, initial achievements in all areas quickly dissipated. The recreated police force became its own source of corruption and was furthermore understaffed and under-administered for the tasks it faced. Whatever improvements were made in court operations seem not to have lasted any longer than the computer equipment sent to the Ministry of Justice (and why anyone would give computer equipment to a country with enormous problems providing electricity, not to mention controlling inventory, is a good question). As the donor exit was provoked by much broader problems, a longer term judicial effort was probably foreclosed, but we can still consider what might have been done, and what might be done now, given donor interest in resuming support.

First, Haiti’s judicial system is clearly broken from the top down. Thus, simply providing the normal court administration support and judicial training is hardly going to be sufficient. Bottom-up sounds fine but, absent

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38 A play on words from the military’s “MRE,” or “meals ready to eat.”
39 Until well into the program, no one had bothered to calculate how much the new force would cost. When they did, the result was 65 percent of the national budget. Judging by those who responded to recruitment calls (a heavy complement of lawyers and even trained doctors), the “planners” might have guessed they had overestimated salaries, but the realization came too late. In Haiti, $300 a month was a princely fee, and one beyond the ability of government to pay.
the conversion of leadership, will not achieve much. Much more effort needs to go to activating leadership in the Ministry of Justice (which currently still oversees courts, prosecution, police, and prisons) and the Supreme Court. In Haiti, the donors worked to some extent with the Ministry, but largely ignored the Court, arguably a critical oversight in their program. Second, the judicial problem is simply too large to resolve over even the medium run. Hence, efforts must be made to distinguish the essential from the “merely” desirable. The essential in this case was creating a counterbalance to the new police force (and also strengthening the latter’s own administrative and oversight capabilities) and a system that could handle major crimes. This might imply a focus on Port-au-Prince and a few other urban centers to the detriment of the dream of providing an honest justice of the peace in every hamlet. This is my own guess in the Haitian situation; others might differ, and certainly it is not intended as a general rule. However, in Haiti in the mid 1990s and today, crime and especially violent, organized crime is the largest concern, seconded by a police force which is allegedly involved in its perpetration.

Third, and although this has not been a major line of thought in Haiti, as of yet, the creation of special reconciliation or truth commissions might be put on the back burner. This is again my personal prejudice, but such activities appear to take more time and absorb more resources than they might merit. Resolving the problems of the past may be important, but for any country facing a nation or state building effort, the present and the future are more critical. Finally, and as some consolation to those who may have objected to my second point, if one wants to have a national organization (or as in Haiti, already has one, however poorly functioning) one needs national presence and the creation of an institutional monitoring capacity. In Haiti, both were logically unrealistic, but this means that the bulk of judges (justice of the peace, often untrained, sometimes illiterate) were still “out there,” doing whatever they had normally done. Standing up this system was a logistical nightmare, but some early attention should have gone to detecting the worst problems and taking some steps to resolve them. This, however, requires time, and there simply was too little of that.

It is interesting that in Haiti (and in El Salvador) while the donors insisted on the recreation of the police, the judges and prosecutors were left in place. In El Salvador the Truth Commission had in fact strongly recommended the replacement of the Supreme Court. The government refused to do so on the grounds that the move would be unconstitutional. Over time, but well into the 1990s, a new appointment system brought the selection of

40 When the head of the UN Observer Mission (ONUSAL) arrived at the Court with the names of 40 judges “known to be corrupt” and thus requiring immediate dismissal, he got the same reaction—judges are entitled to due process, the same as all other citizens.
a new Supreme Court and added more judges, while the worst of the lot were eventually removed for cause through the new evaluation and disciplinary system. In conjunction with reforms attempted in other countries (Peru, the Dominican Republic), seated judges at all levels have been forced to recompete for their positions in order to hold legal appointments under the new system. It is hard to draw any conclusions from such a short and disparate set of examples, but in these and other countries, efforts to fix the system by replacing all the judges have generally not been very successful. Of the four mentioned, only the Dominican Republic seems to contradict that finding, and even here, the process was gradual. Peru seems to have made a habit of massive judicial purges and each time judicial credibility declines further. Because the problem often is not just the judges, but the entire legal culture, newcomers quickly adopt old vices unless the rest of the system is changed as well. Hence, despite the frequent sense that the judges are too corrupt to keep, it may be best to take the logical corollary actions more slowly.

V. LESSONS FOR EFFORTS IN OTHER REGIONS AND FOR NATION BUILDING PROGRAMS

So, what does the experience tell us for the much more difficult task of nation as well as state building in other regions? The first and most obvious lesson is to assume this is a slow process. Even with all its additional disadvantages, a program in Haiti with adequate funding over a 15 year period might well have provided more lasting results. The same amount of funding spread out over that long a period would arguably have been more effective. The usual donor tendency to congregate in a country and insert enormous amounts of funding all at once is simply counter-productive, and the waste is compounded by an equally rapid exit. When there is so much money to spend, much of it goes for less necessary items—buildings, expensive training programs, extensive automation—none of which, as we have seen, automatically leads to improvements in output, and some of which might be more productively invested in other sectors or in other countries. More time is not a sufficient condition. It certainly is a necessary one.

A second lesson, visible in the two examples, and strengthened by comparisons with past and on-going efforts in other state or nation building programs,41 is that while the ultimate objectives may be similar, countries start in very different places and with very different complements of re-

41 My own experience here is limited to brief experiences in Cambodia and the Democratic Republic of the Congo. It has been enriched by conversations with World Bank and USAID colleagues working in other regions, especially Afghanistan, Iraq, Kosovo, East Timor, and Bosnia.
sources and obstacles. The programmatic context is critical and should be understood to include not only the situation of the justice sector, but also the overall socio-political environment and the contributions of the outside participants. Ignoring these contextual variables can lead to serious strategic errors (e.g. attempting an accelerated, Salvador style program in a country like Haiti). The list of potentially relevant factors is virtually limitless. A few worth special attention are as follows:

- Has political power actually changed hands or are those who formerly held control still on top? This is the difference between a Salvador or a Cambodia and a Haiti, but there are a range of additional variations. They will affect the program’s ability to make major changes in the structure, operations, and values of the justice sector.

- How much change has occurred in the overall state apparatus? How strong was it to start, and how strong is it now? It is one thing to work in the context of a functioning, if flawed state, and another to do so where the state has collapsed or has never had much national reach beyond a few urban centers.

- Is there a functioning judiciary or conflict resolution mechanism, and is it regarded as legitimate, and by whom? Given the political and economic costs of building a new system, it may be more practical to work with what is there, and what is there should be taken to include less formal dispute resolution arrangements. Over the short to medium run, the latter may be the best services for rural populations, and eventually may be more formally appended to the official system. Special problems may occur in divided nations where what exists is regarded as legitimate only by a part of the population—or as in some countries, there are multiple systems each regarded as legitimate by only part of the population.

- Is there a demand for modifying, expanding, or altering the operations of whatever justice system exists, from whom does it come, and is there a consensus on the new directions? Are there additional needs, possibly not automatically connected to justice operations that might be addressed under the existing or new system? Often the demand for change comes from small, if powerful groups, while those with needs that might be addressed do not articulate the connection.

- What goals and visions do donors bring to the table, and what resources lie behind them? Donors and other outside participants often, it should be mentioned, assume they are working with a tabula rasa or with a

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42 Local and foreign participants sometimes ignore or denigrate such systems, preferring a more “modern” arrangement. For years the Peruvian judiciary opposed the country’s lay justices of the peace, recommending their replacement with accredited attorneys. However, the lay justices remain the most popular part of the country’s justice system, and arguably a turn to a more lawyerly approach would be less attractive to the communities who use them.
mandate for change that may be far shallower than they imagine. They also can be overly ambitious about what can be charged or built and about the legitimacy that may be accorded to their visions.

There are two common errors as regards the reform context: to assume it is like any other or to assume it is so unique as to obviate lessons from elsewhere. What is similar and what is unique are judgment calls, and making them requires knowledge of both the immediate context and of others' experience. The only certainty is that once someone starts making either of the extreme claims, they are probably on the wrong track.

A third lesson is the need to prioritize. Although Latin America has not faced a nation building challenge, the state building efforts do contain some of the former’s elements—the need to create a judicial system that responds to the preferences and demands of a very diverse population. Failure to do so in Latin American would not have meant the dissolution of the state; it might have meant the illegitimacy of the system created. However, everything cannot be done at once. In El Salvador, the emphasis on the criminal justice system, while first responding to a less deeply based interest in protecting human rights, turned out to be fortuitous because of the post-civil war increase in criminal activity. The codes were not designed for this purpose, and subsequently suffered some modifications (to make them “less soft on crime”). However, the organizations created to apply them were very much needed. This was a popular priority and it was one that maintained interest in and support for the program. The emphasis on combating judicial corruption and depoliticizing appointments also touched local concerns and thus generated another constituency for sustaining the changes. While Haiti’s police rebuilding efforts did constitute a priority, the judicial part of the program never seemed to find its principal focus. Instead, the goal was capacity building, with the “for what” part of the formula left unanswered. Capacity building is not an objective; it is a means, and there the “for what” question is the key.

A fourth lesson thus is to select priorities on the basis of local demand, and not what outsiders prefer. If the concern is crime, then crime should be the emphasis; if it is resolving a myriad of smaller disputes that might escalate into major conflicts then it should be there. If it is land ownership, because of multiple claims on the same pieces of real estate or lack of title, then that should be the focus. It is important to know what citizens expect to get from their justice systems and what they believe they are not receiving. The answers to those questions (see below) may not have feasible solutions, but they are a start. However, two further cautions are in order. One is to avoid building greater demand for justice before the system is capable of providing a response. The second is to avoid building a demand for services it does not offer.

The fundamental role of judicial systems is resolving conflicts in an authoritative fashion and so reducing their chances of further escalation.
Secondary functions, not recognized in many countries, are restricting government abuses of its authority and helping citizens access positive rights guaranteed to them by government. Where these latter functions have never been acknowledged, it is advisable to move into them slowly to avoid harm to the plaintiffs or to the judicial officials who try to break new ground. As one example, in El Salvador, where the rights discourse was more accepted, the new public defenders quite successfully contested illegal detentions and got their clients out of jail, even while awaiting trial. During the same period (early 1990s) in Cambodia, the defenders’ goal was to get judges to sentence their clients for time served in pre-trial detention. Getting a judge to admit that the defendant was not guilty, let alone securing a pre-trial release, was simply too much to ask. The advocate’s approach is usually full speed ahead. Building sustainable institutions is a more incremental process. The idea should be to start with what works now, gradually expand it, and over time add new functions. Demand building also should be incremental so as to ensure it pushes institutions forward by steps, rather than over the brink. Outside observers are sometimes reluctant to admit that some things do work in a local justice system—they may not work as the outsiders would prefer, but it is local preferences that count first. One does not build legitimacy by rejecting all local values, hard as some of them may be to swallow.

A fifth, related lesson is not to overburden the system with responsibilities for resolving essentially political disputes. If the courts still lack legitimacy, they are not going to get it by weighing in on matters where the rules of the game are not yet established. Even if they enjoy legitimacy with the locals, if not with the external advisors, they will be limited as to how far they can go into the political arena. In Latin America, politicians have recently taken to passing political disputes on to the courts, because they do not want to face the hard issues. As discussed earlier, entering into this arena is a bad choice for the judges. The issues are usually not fundamentally legal ones, and the courts are neither empowered nor prepared to decide on any other basis. It is a little disturbing that external advisors con-

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43 Information from the author’s experience in El Salvador with the defenders program; Interview with Defenders in Cambodia, Cambodia (1995).

44 As another anecdotal example, when Costa Rican staff from ILANUD first went to Bolivia to start a public defenders program, they decided to emphasize gender sensitivity first. The Bolivian audience (largely male) laughed them off the podium. As defense was in itself a new concept, it proved more practical to skip the gender elements initially and focus on establishing the principle that defendants, of which ever gender, deserved counsel. It also bears mentioning that the Costa Ricans had no prior experience in Bolivia, didn’t understand the gender situation there, and thus had no idea as to the real problems or the resistance they would face. A similar tack was tried by USAID in Cambodia, where the first incursion into police reform (and police in Cambodia need lots of it) was to be a course in gender sensitivity. I unfortunately have no idea whether it was pursued, and if so, with what effects.
continue to see justice reform as a means of effecting social revolution. The presumed opportunity to right decades if not centuries of social and political wrongs simply flies in the face of historical experience, and is increasingly resisted in countries where it is attempted by outsiders. Much like the old saw about giving a person fish or teaching her to catch them, there is a choice between building institutions or using what is there to pursue other objectives. The alternatives are not entirely compatible, and those preparing programs should be aware of this fact.

A sixth and final lesson is not to undertake anything a country cannot sustain financially once the donors go home. The more aid money is available the more grandiose the donors' plans, but they will leave sooner or later and the question is what the country will really be able to support. Salaries are the fundamental issue here. There are also details like upkeep on buildings and equipment, or even the cost of materials (gas, toner, paper) needed to use them. Even in Latin American countries with wealthier governments, sustainability of many innovations has been a problem, and this is not only because of executive priorities, but also because of how the courts manage their own funds. Unfortunately, countries lacking adequate justice systems usually have any number of other urgent needs, many of which will (and possibly should) take precedence over the courts when funding decisions are made. If justice reforms are designed on the basis of what donors will fund, not what will be financed afterwards, the danger is not only that services will decline. The entire logic of the reformed system may also collapse leading to still further problems.

Because Latin America was the first of the developing regions to embark on the latest round of justice reforms, it provides a variety of increasingly documented examples of what can be done, with what immediate results, and with what longer term impacts. Not all of this may be easily transferable to the current group of nation and state building efforts. However, greater familiarity with the Latin American experience may help avoid some common mistakes and also provide ideas as to alternative ways to tackle common problems. The Latin American challenge was in many senses far easier—not only because of the acceptance of a common national identity and some sort of state authority—but also because it often had longer to work its changes, and of course could usually do so in a relatively peaceful environment. It may be most useful at the level of designing inputs, the famous building blocks of reform. However, it is also well to remember that after twenty years of "capacity building" the potency of the building blocks is now very much in doubt. Latin American reformers too often forgot the importance of politics, culture, and hidden agendas in their fascination with delivering inputs. They are now facing the additional challenge of making those inputs work to produce improved services. In nations under threat of further collapse such luxuries of a second chance may not be available. Hence, it may be well from the start to understand that while
buildings, computers, new laws, and training can advance a reform agenda, they are not the heart of the matter. The real challenge is to change behaviors within and outside the sector, and for that to function, it is important to understand what the various stakeholders want and to work on changing their perceptions of their needs and possibilities.