Prepublication praise for Model Codes

The *Model Code of Criminal Procedure* provides a global response to a question of global concern: how to translate international human rights and criminal law standards into everyday practices in post-conflict societies? Based on the work of hundreds of experts from across the world, this model code is an important guide to the critical tasks of establishing or reestablishing democracy, fighting impunity, providing justice, and promoting a more peaceful future for all mankind.

—**Paul Hernández Balmaceda**, Poder Judicial, Costa Rica

The *Model Code of Criminal Procedure* offers not only valuable guidance on conducting legal reform within post-conflict societies but also insightful commentary on two issues of concern to every state: adapting national legal systems to meet the challenges presented by new crime patterns, and ensuring that domestic law meets the criteria laid down in international human rights law. Furthermore, because it draws on a variety of legal cultures, the *Model Code of Criminal Procedure* presents a flexible, open-minded approach to tackling these common problems.

—**Héctor Hernández**, Alberto Hurtado University, Santiago de Chile

The *Model Code of Criminal Procedure* is a very important piece of work in the area of post-conflict justice. With its practical orientation and comprehensive coverage, it is in effect a user's guide to constructing justice systems in societies that are rising from the ashes of war and conflict. This volume should be read and reread not only by policymakers and practitioners tasked with rebuilding post-conflict justice systems but also by students of criminal law, criminology, and criminal justice.

—**Ali Wardak**, United Nations Development Programme (UNDP), Afghanistan

The *Model Code of Criminal Procedure* represents a significant step forward in the struggle to establish the rule of law in post-conflict environments. This volume does far more than lay out a procedural system, constituting nothing less than a crystallization of the principles at work in a modern criminal justice system. Not merely an invaluable tool for post-conflict situations, the *Model Code of Criminal Procedure* is also a rich resource for every country looking to develop better standards in its protection of human rights.

—**Gonzalo Medina Schulz**, Guest Professor of Criminal Law, University of Chile

The publication of volume I of *Model Codes for Post-Conflict Criminal Justice* marks an advance of great international significance for post-conflict societies—the arrival of a criminal code drafted in admirably clear and uncomplicated language, supported by detailed commentaries, and designed explicitly for such societies. This code, with its

measured approach, will enable jurisdictions emerging from conflict to move quickly toward reestablishing the rule of law and a fair criminal justice system, without the need to start the reform process afresh. It is an outstanding piece of work.

—**Andrew Ashworth,** Vinerian Professor of English Law, University of Oxford

Countries in transition from conflict routinely face seemingly irreconcilable challenges: extremely limited capacity of the criminal justice system, the need to establish law and order in the midst of rising crime, and the need to comport with international human rights standards—all of which have to be tackled while respecting local culture and traditions. These challenges have vexed local governments and those in peacekeeping missions alike. *Model Codes for Post-Conflict Criminal Justice* provides, for the first time, an invaluable guide to addressing these multiple demands—and should help shorten the path to consolidated peace, functioning state institutions, stability, and the rule of law.

—**Ambassador Lakhdar Brahimi,** former Special Representative of the Secretary-General for Afghanistan, Haiti, and South Africa; and former Chairman, Panel on United Nations Peace Operations

Many post-conflict states, including Liberia, find it necessary to reform their judicial systems so that their laws deal effectively with crimes, address gender and human rights issues, and conform to international norms and standards. I am, therefore, grateful for the opportunity to have participated in this admirable project, which, after years of arduous legal research and drafting, has culminated in the publication of *Model Codes for Post-Conflict Criminal Justice.*

Model Codes for Post-Conflict Criminal Justice will be an immensely useful resource for reformers in Liberia and elsewhere as they engage in the development and reform of their criminal justice system. Its provisions, drawn from the laws of different states and drafted in plain English, may be used in drafting new criminal laws or amending existing provisions. The accompanying commentaries, as well as the references and other resources contained in this volume, provide invaluable background information and guidance.

—**Felicia V. Coleman,** Counselor-at-Law, former Associate Justice of the Supreme Court of Liberia, and a Member of the Task Force for the Establishment of the Law Reform Commission of Liberia

In post-conflict countries, the challenges involved in rebuilding the judicial system are great. A model penal code seems particularly necessary to ensure compatibility between national criminal laws and international norms and standards. More than merely reflecting cultural diversity, such an instrument would enable the harmonization of national and international norms around common values.

—**Mireille Delmas-Marty,** Professor and Chair of Comparative Legal Studies and the Internationalization of Law, Collège de France

The importance of this work for societies in transition from conflict and oppression to freedom and democracy cannot be overemphasized. It is a model of clarity, and the commentaries on each section are a valuable resource not only for practitioners

concerned with societies in transition but also for students. I also recommend it to journalists who work in the field of law enforcement.

—**Richard Goldstone,** former Judge, Constitutional Court of South Africa; and former Prosecutor, International Criminal Tribunals for the former Yugoslavia and for Rwanda

Model Codes for Post-Conflict Criminal Justice is a valuable resource for criminal law reform in post-conflict states. Its contents reflect recent advances in international criminal law instruments and draw on the accumulated knowledge and experience of the international criminal law community. Moreover, *Model Codes* takes into account the particular challenges presented by post-conflict countries, making it both a targeted and a practical tool.

—**Ma Kechang,** Professor of Law, Wuhan University, People's Republic of China

This first volume in the *Model Codes* series displays not only a remarkable depth of thought but also a commendable breadth of perspective. In this time of sharp cultural clashes, publics in the Middle East and elsewhere may regard *Model Codes* skeptically, as yet another Western export intended to supplant Muslim traditions. To its credit, however, the Model Codes Project has gone beyond the borders of Western legal expertise and sought substantive contributions from legal experts in the Muslim world. Such teamwork between scholars and practitioners from both Western countries and Muslim-majority countries is all too rare, and I hope that publication of *Model Codes* will help pave the way for an open, inclusive discussion on the dilemmas facing post-conflict societies, particularly those in the Middle East. And in Muslim-majority countries emerging from conflict, we now need to approach the lawyers working in the Islamic seminaries and further integrate them and the language of Islamic law into the dialogue. By doing so, we will help facilitate the process by which such states can transition from violence to an enduring peace rooted in the rule of law.

—**Mohsen Rahami,** Professor of Criminal Law and Criminal Policy, Faculty of Law and Political Science, University of Tehran

Model Codes for Post-Conflict Criminal Justice provides excellent guidance for the implementation of new criminal laws in post-conflict states. The statutory offenses as well as the general rules for criminal liability and the proposed catalogue of penalties, including alternative sanctions and measures such as asset confiscation and victim compensation, reflect the state of the art in international standards and best practices.

—**Dmitry A. Shestakov,** Professor, Doctor of Law, and President of St. Petersburg Criminology Club, Russia

It is axiomatic that conflict destroys: it destroys people, their institutions, and the law in whole or in part. But conflict also breeds new companions who evolve, thrive, and finally outlive the hostilities: welcome to the world of the war-profiteer. Organized and wealthy, these individuals, and their illicit networks, often emerge from conflict with political and social power, which they use to accumulate enormous fortunes, siphoning off the money pouring into the country and basking in the absence of regulatory

and enforcement mechanisms that could check their rampant corruption and criminality.

Any attempt by the international community to rebuild a shattered society will lie in peril without the presence, early on, of institutions that promote and safeguard the rule of law. And central to the maintenance of the rule of law is the existence of a criminal code. In societies emerging from conflict, the local authorities may well deem part or all of the old code unworkable, resulting in a need to refashion some provisions of the existing code or identify a stop-gap measure to adopt until a new code can be established. After all, even from the earliest days of recovery, police, prosecutors, judges, peacekeepers, and most importantly the citizenry need both the assurance that there is a law and clarity as to what that law is.

Model Codes for Post-Conflict Criminal Justice provides a crucial resource to address this need. It reflects clearly the input of hundreds of experts and practitioners drawn from across the globe. The codes and their commentaries will be invaluable to local governments and peacekeeping missions involved in law reform, providing a clear legal framework that meets with international standards and is cognizant of the challenges that come with post-conflict environments.

—**H.R.H. Prince Zeid Ra'ad Zeid al-Hussein,** Ambassador of the Hashemite Kingdom of Jordan to the United States, former Permanent Representative of the Hashemite Kingdom of Jordan to the United Nations, and former President, Assembly of States Parties, International Criminal Court

Model Codes for Post-Conflict Criminal Justice

Volume II
Model Code of Criminal Procedure

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Edited by Vivienne O'Connor and Colette Rausch

with Hans-Joerg Albrecht and Goran Klemencic

UNITED STATES INSTITUTE OF PEACE PRESS
Washington, D.C.

The views expressed in this book are those of the editors and authors alone. They do not necessarily reflect views of the United States Institute of Peace.

United States Institute of Peace
1200 17th Street NW, Suite 200
Washington, DC 20036-3011

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First published 2008

Printed in the United States of America

The paper used in this publication meets the minimum requirements of American National Standards for Information Science Permanence of Paper for Printed Library Materials, ANSI Z39.48-1984.

Library of Congress Cataloging-in-Publication Data
Model codes for post-conflict criminal justice / edited by Vivienne O'Connor and Colette Rausch, with Hans-Joerg Albrecht and Goran Klemencic.
p. cm.
Includes bibliographical references and index.
ISBN-13: 978-1-60127-015-3 (pbk. : alk. paper)
ISBN-10: 1-60127-015-1 (pbk. : alk. paper)
ISBN-13: 978-1-60127-016-0 (hardcover : alk. paper)
ISBN-10: 1-60127-016-X (hardcover : alk. paper)
1. Criminal justice, Administration of—International cooperation. 2. Criminal law—International cooperation. 3. Reparation (Criminal justice). 4. Restorative justice. I. O'Connor, Vivienne M. 1977– II. Rausch, Colette. III. Albrecht, Hans-Joerg, 1950– IV. Klemencic, Goran. V. Title.

K5001.M63 2008
345–dc22

2008008930

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Foreword

Louise Arbour, United Nations High Commissioner for Human Rights

Antonio Maria Costa, Executive Director of the United Nations Office on Drugs and Crime

Conflicts do not end suddenly. Even when violence stops, peace often remains fragile and will not become durable unless there is justice and a readiness to address not only the aftermath of a conflict but also its root causes. Many conflicts erupt because of perceptions of discrimination and injustice. Restoring the rule of law is, therefore, an important dimension of peacebuilding, one that requires sustained and patient engagement until the rule of law is strong. Where the rule of law is weak, public security is threatened and criminals feel empowered. Such a situation undermines efforts to restore respect for human rights and build democracy and civil society, fuels crime and corruption, and risks triggering a return to conflict. Criminal justice that is based on human rights is thus indispensable for making and sustaining peace.

The classic peacekeeping model brings to mind blue-helmeted soldiers working under the United Nations flag to restore order and maintain security. That kind of peacekeeping, while essential, will not by itself build durable peace. Long-term security depends first and foremost on the creation or restoration of the rule of law. The rule of law requires not just rule by law, but rule by laws that reflect fundamental principles of criminal responsibility and due process, including guarantees of transparency and clarity of the criminal justice process, nonretroactivity, fair and independent adjudication, and proportional punishment.

The United Nations Office on Drugs and Crime and the Office of the High Commissioner for Human Rights have therefore welcomed the initiative launched by the United States Institute of Peace and the Irish Centre for Human Rights to strengthen criminal justice in post-conflict societies, and have supported the project in several ways, including facilitating a number of experts' meetings to review the draft Model Codes.

Publication of *Model Codes for Post-Conflict Criminal Justice,* the product of five years of work involving hundreds of experts from across the world, is a significant contribution to the United Nations' efforts to strengthen peacebuilding. Based on United Nations standards, the Model Codes provide practical guidance on how to translate international human rights and criminal law standards into everyday practice.

There is no single recipe for effective criminal justice. The Model Codes are not a one-size-fits-all solution. On the contrary, they have been devised to be adaptable to a variety of post-conflict societies and situations in ways that are flexible yet consistent with international norms and standards. The Model Codes are a resource that should be used by all those engaged in building peaceful societies based on the rule of law. ■

Preface

Neil Kritz, Director, Rule of Law Program, United States Institute of Peace

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According to the *Oxford English Dictionary,* a code is a systematic collection or digest of laws, a body of laws so arranged as to avoid inconsistency and overlapping. The first extant code, the Code of Hammurabi, was composed nearly four millennia ago. Justinian created a code with which to rule the Roman Empire. Many countries still operate with the legacy of these early efforts at legal codification. Historically, codes were an instrument of law reform, often intended to make the law more accessible and coherent. Over time, it has become universally recognized that an effective framework of criminal law and procedure is essential to the development of a stable society.

Although the codes presented in *Model Codes for Post-Conflict Criminal Justice* share many of the same objectives as other codifications, they also have some unique and original purposes. Essentially, they are designed as a tool for what is today often referred to as "post-conflict justice." It is only recently that this has become a priority of the international community. Interest in the subject seems to have begun during the late 1970s and early 1980s, when human rights bodies began to focus on the duties of the state in terms of criminal justice. Soon, reports were circulating within the United Nations about the rights of victims, the need for accountability, and the fight against impunity. International standards and treaties were adopted to elaborate the human rights protections that had to be reflected in the administration of criminal justice.

In parallel, peacekeeping operations began to be increasingly robust, assuming responsibilities in a range of areas beyond the peacekeepers' traditional role of policing cease-fire lines. Human rights divisions began to figure in peace support operations, as did a growing agenda for various measures to promote peace, stability, and political and economic recovery. One important item on this agenda was ensuring some degree of accountability for the crimes of the past while promoting a sense of security and law and order in the present. Stabilization efforts had to maintain social order as conflict was winding down, deal with the general breakdown of authority, and confront the criminal vultures who routinely descend upon the disorganization of the post-conflict environment while still promoting values of tolerance, fairness, and transparency and adherence to international human rights standards so as to help nurture the beginnings of democracy.

The idea of creating model codes for post-conflict justice was much discussed at the end of the 1990s by rule-of-law practitioners working with United Nations peace operations in places such as Cambodia, East Timor, and Kosovo. In each of these environments, professional jurists found the criminal justice system in disarray and a need not only for infrastructural renewal but also for substantive law reform. The confusion as to what constituted the applicable law in these and other post-conflict settings and

how that law would be applied resulted in the loss of many crucial months in the stabilization effort. Public confidence in a peace process will be weak as long as that public faces rampant crime and an unfair justice system. Clearly, new tools were needed.

The model code concept received official recognition in the *Report of the Panel on United Nations Peace Operations,* often called the "Brahimi Report" after its distinguished chair, veteran diplomat Lakhdar Brahimi. The report saw model codes as an off-the-shelf legal system that could, if necessary, be applied as part of a peace support mission. Ambassador Brahimi's proposal did not sit well with everyone, however, apparently because of concern that model codes would be a creeping form of judicial imperialism. At the very least, the proponents of the model codes concept needed to refine its focus, emphasizing the flexibility of what was intended as a palette of options rather than a prescriptive, one-size-fits-all package.

Inspired by the Brahimi Report recommendation, in 2001 the United States Institute of Peace and the Irish Centre for Human Rights, in cooperation with the United Nations Office of the High Commissioner for Human Rights and the United Nations Office on Drugs and Crime, launched what soon became widely known as the "Model Codes Project."

Initially, a small group of experts was convened to create a draft of the Model Codes. In recognition of the critical importance of widespread consultation and participation, the expert group soon mushroomed into a network of three hundred experts from all regions of the world, encompassing both academic and practitioner communities. The experts included comparative and international law experts, judges, prosecutors, defense counsel, police, human rights advocates, and military officers. The meetings were a stimulating venue for debates and exchanges about comparative criminal law, involving the differing perspectives of the prosecution, the police, the defense, and the judiciary.

What began as a single code soon morphed into four separate but complementary instruments. Published in three volumes collectively known as *Model Codes for Post-Conflict Criminal Justice,* these instruments include a Model Criminal Code, a Model Code of Criminal Procedure, a Model Detention Act, and a Model Police Powers Act.

The Model Codes reflect elements drawn from all of the major criminal justice systems in the world. They are strongly influenced by the comparative law discourse of the international criminal tribunals, as well as the practice of post-conflict justice in countries around the world. The vision of no single criminal justice system is allowed to predominate. Indeed, it was deemed essential that jurists from a variety of traditions would, so to speak, recognize themselves in the finished product, finding familiar concepts and terminology—which means, of course, that there is also much that is unfamiliar for practically everyone.

The Model Codes are a tool of assistance and not imposition. They expand the range of options available to drafters of post-conflict criminal laws. Of singular importance, the Model Codes are especially useful because they are tailored to the exigencies of the challenging post-conflict environment.

With apologies to Winston Churchill, this is not the end of the Model Codes Project, but rather the end of the beginning. Tools to be used in building post-conflict justice, the Model Codes are very much a work in progress, to be refined and amended,

more or less like all other codes. They will grow with our experience in this important endeavor of promoting justice, democracy, and peace.

We would like to express our appreciation to the editors, our partner organizations, and all those who have contributed to Model Codes Project. ■

Acknowledgments

The Model Codes for Post-Conflict Criminal Justice Project was launched in 2001 by the United States Institute of Peace and the Irish Centre for Human Rights, in cooperation with the United Nations Office of the High Commissioner for Human Rights (OHCHR) and the United Nations Office on Drugs and Crime (UNODC). For their unwavering commitment to such an ambitious project, from its initial conception to the publication of this volume, we are deeply grateful to the president of the United States Institute of Peace, Ambassador Richard Solomon; to the Institute's associate vice president and director of its Rule of Law Program, Neil J. Kritz; and to the director of the Irish Centre for Human Rights, Professor William Schabas. Neil Kritz and William Schabas are due particular thanks for the wise advice and constant encouragement they provided throughout the project's development.

We would like to thank our project partners, OHCHR and UNODC, for sharing the vision of creating a set of model codes to assist in the reform of the criminal justice systems in post-conflict societies. We are particularly grateful to David Marshall and Tiyanjana Maluwa of OHCHR and to Jo Dedeyne, Mark Shaw, Slawomir Redo, Eduardo Vetere, Dimitri Vlassis, and Catherine Volz of UNODC, all of whom worked directly with us and shared their time and expertise.

The work of translating the project's ambitious goals into reality brought together a large community of experts in a truly collaborative effort. Each of these experts lent his or her skills and expertise freely, seeking no other reward than assisting national and international actors in rebuilding the rule of law in post-conflict societies. We often talk fondly of the "Model Codes family" that grew from a small group to encompass some three hundred people. The consultations and regional meetings that helped to clarify and amplify the text of the codes provided a unique opportunity for us to meet and become friends with a remarkable group of people dedicated to building peace. Every comment made, every question raised, and every suggestion put forward contributed to the breadth and depth of the final product. For this, we are grateful to everyone involved.

Our heartfelt thanks go also to those who acted as partners in regional consultation meetings, provided forums in which drafts of the codes were reviewed, gave presentations on the project, chaired consultation meetings, provided research assistance, reviewed the text of provisions, drafted commentaries, or facilitated our field research and consultations. This list of these generous and gifted people includes Ebba Abdon, Stuart Alford, Diane Amann, Kelly Askin, Louis Aucoin, Mohamed Abdel Aziz, Clive Baldwin, Elaine Banar, Cherif Bassiouni, Karen Belgiovine, Krisna Bovornratanaraks, Roger Clark, Tonya Cook-Pedersen, John Cubbon, Lynn Cuddington (who sadly passed away), Sylvia De Bertodano, Knut Doermann, William Durch, Rania El Gamal, Ken

Gallant, Fiana Gantheret, Jonas Grimheden, David Guinn, Michael Hartmann, Christiana Hoffman, Reyko Huang, Agnes Hurwitz, Pernille Ironside, Mark Kroeker, Istvan Lipniczki, Manuel Mazuelos, Daniel Nsereko, Jennifer Oades, Clementine Olivier, April O'Neill, Bruce Oswald, Giovanni Pasqua, Phillip Rapoza, David Reddin, Annamyriam Roccatello, Ali Saleem, Stephanie Smith, Adelina Sokoli, Charles Steenson, Janez Stusek, Christie Warren, Abla Williams, Gerard Winter, Renate Winter, and Lawrence Woocher.

We are thankful to the United Nations departments, agencies, and missions that allowed their representatives to work with us, to attend meetings, and to contribute in various other ways to the development of the Model Codes. In particular, we would like to thank Rob Pulver and Isabel Hight of the United Nations Department of Peacekeeping Operations for their wisdom and guidance.

We are grateful to our coeditors, Hans-Joerg Albrecht and Goran Klemencic. It has been a great pleasure to work with them and share ideas during the many long hours spent in meetings and conference calls over the past five years. They have become colleagues, friends, and wonderful comparative law teachers. Nigel Quinney, our developmental editor–extraordinaire, deserves particular mention for his patience, guidance, and support throughout the publication process.

Finally, we are forever thankful to our friends and family who have endured our seemingly never-ending immersion in the Model Codes Project. In particular, we want to thank Patrick and Calvin, and Declan and Bernadette—you are the best.

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As the following lists of organizations and individuals who contributed to the Model Codes Project make clear, great efforts were made to obtain the input of a diverse community of experts with knowledge and experience relevant to the post-conflict criminal law reform process. In all, some three hundred people from more than one hundred organizations and over fifty countries contributed to the Model Codes Project. Some helped to create the broad framework for the project, others drafted specific provisions and commentaries, still others critiqued and refined those drafts; all of them gave generously of their time and considerable expertise.

International and Regional Organizations

- African Commission on Human and Peoples' Rights
- Council of Europe
- European Commission and European Council
- Organization for Security and Co-operation in Europe (OSCE)
- United Nations
  - Children's Fund (UNICEF)
  - Department of Peacekeeping Operations (DPKO)
  - Department of Political Affairs (DPA)
  - Development Fund for Women (UNIFEM)
  - Development Programme (UNDP)
  - International Criminal Tribunal for Rwanda (ICTR)
  - International Criminal Tribunal for the former Yugoslavia (ICTY)
  - Office of Legal Affairs (OLA)
  - Office of the High Commissioner for Human Rights (OHCHR)
  - Office on Drugs and Crime (UNODC)

Civil Society and Non-Governmental Organizations

- AIRE Centre
- Amnesty International
- Asian Human Rights Commission
- Cambodian Defenders Project

- Criminal Defence Resource Centre, Kosovo
- Foundation for Law, Human Rights and Justice, East Timor
- Informal Sector Service Centre, Nepal
- International Center for Transitional Justice
- International Committee of the Red Cross
- International Development Law Organization
- Minority Rights Group
- National Forum for Human Rights, Sierra Leone
- Open Society Justice Initiative
- Penal Reform International

Professional Associations, Training Institutions, and National Commissions

- African Bar Association
- American Corrections Association
- Association of Female Lawyers, Liberia
- Commission for Reception, Truth and Reconciliation, East Timor
- International Association of Prosecutors
- International Corrections and Prisons Association
- International Criminal Defence Attorneys Association
- Joint Advisory Committee on Legislative Matters, Kosovo
- Justice Council, Institute of Training and Law Reform, Sudan
- Law Reform Commission Task Force, Liberia
- Liberian National Law Enforcement Association
- Kosovo Chamber of Advocates
- Magistrates School, Cambodia
- Nepal Bar Association
- National Human Rights Commission, Nepal
- Southeast Asia Regional Centre for Counter-Terrorism, Malaysia
- West African Bar Association

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- Max Planck Institute for Foreign and International Criminal Law, Germany
- National University of Rwanda
- National War College, Nigeria
- Örebro University, Sweden
- Rabat University, Morocco
- Raoul Wallenberg Institute, Sweden
- Rutgers University, United States
- The Henry L. Stimson Center, United States
- Umea University, Sweden
- United Nations Association of the United States
- United States Institute of Peace
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- United Nations Border Relief Operation, Thailand (UNBRO)
- United Nations Mission in Kosovo (UNMIK)

- United Nations Mission in Liberia (UNMIL)
- United Nations Mission in Sierra Leone (UNAMSIL)
- United Nations Mission of Support in East Timor (UNMISET)
- United Nations Operation in Mozambique (ONUMOZ)
- United Nations Stabilization Mission in Haiti (MINUSTAH)
- United Nations Transitional Administration in East Timor (UNTAET)
- United Nations Transitional Authority in Cambodia (UNTAC)

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- Australia
- Bangladesh
- Belgium
- Bosnia and Herzegovina
- Cambodia
- Canada
- Croatia
- Democratic Republic of the Congo
- East Timor
- Egypt
- Fiji
- Germany
- Ghana
- Haiti
- Hungary
- India
- Iraq
- Ireland
- Jordan
- Kosovo
- Liberia
- Malawi
- Malaysia
- Mauritius
- Mozambique
- Nepal
- The Netherlands
- New Zealand
- Nigeria
- Pakistan
- Philippines
- Poland
- Romania
- Rwanda
- Sierra Leone
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- Slovenia
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- Sri Lanka
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Abbreviations

ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IPTF	International Police Task Force
KFOR	Kosovo Force (NATO-led international military force)
OHCHR	Office of the United Nations High Commissioner for Human Rights
OHR	Office of the High Representative
OSCE	Organization for Security and Co-operation in Europe
UNAMIS	United Nations Advance Mission in the Sudan
UNAMSIL	United Nations Mission in Sierra Leone
UNDP	United Nations Development Programme
UNDPKO	United Nations Department of Peacekeeping Operations
UNICEF	United Nations Children's Fund
UNIFEM	United Nations Development Fund for Women
UNMIK	United Nations Mission in Kosovo
UNMIL	United Nations Mission in Liberia
UNMISET	United Nations Mission of Support in East Timor
UNODC	United Nations Office on Drugs and Crime
UNTAC	United Nations Transitional Authority in Cambodia
UNTAET	United Nations Transitional Administration in East Timor

User's Guide

Introduction

This User's Guide introduces the *Model Codes for Post-Conflict Criminal Justice,* a three-volume series designed to assist those working in criminal law reform in post-conflict states. The series is the product of a five-year project spearheaded by the United States Institute of Peace and the Irish Centre for Human Rights, in cooperation with the United Nations Office of the High Commissioner for Human Rights and the United Nations Office on Drugs and Crime.

This volume, volume II, contains the second of the model codes—the Model Code of Criminal Procedure. Volume I contains the Model Criminal Code, while volume III contains the Model Detention Act and the Model Police Powers Act.

This User's Guide is divided into four chapters. Chapter 1 outlines the need for criminal law reform in post-conflict states, the evolution of interest in the topic among the international community, and the drafting and consultation process used to create the model codes. Chapter 2 discusses the many potential uses of the model codes in post-conflict criminal law reform efforts. Chapter 3 provides a synopsis of the Model Code of Criminal Procedure. Chapter 4 sets out guiding principles for those involved in the process of criminal law reform.

Chapter 1
The Model Codes Project
A Response to Post-Conflict Criminal Law Needs

For national and international actors involved in post-conflict peacebuilding, the reestablishment of the rule of law is vital. Criminal justice systems are often shattered or severely debilitated in the aftermath of conflict. Prisons, police stations, and courthouses may be destroyed. Lawyers and judges may have fled the country. The police force may be nonexistent. In some cases, as United Nations peace operations have discovered to their dismay, the criminal justice system has ceased to function completely.

Such an environment can be a breeding ground for serious criminality, with criminals and criminal gangs operating freely in a climate of impunity. While war crimes and crimes against humanity may come to a halt as a cease-fire or peace agreement takes effect, crimes such as rape, extortion, murder, and kidnapping often continue unabated. Ethnic tensions may reemerge in the post-conflict period and manifest themselves as revenge attacks, hate speech, and attacks on personal and cultural property. Sexual violence is also prevalent in post-conflict states. In addition, organized criminal groups are often involved in a wide variety of serious crimes, including trafficking in persons, drugs, and weapons; smuggling; and money laundering.

Violent conflict and subsequent criminality in the post-conflict environment create a climate of fear, mistrust, and insecurity. Humans suffer both from direct exposure to violence and from extreme feelings of insecurity, and crave an environment in which others can be trusted again. Trust is a major ingredient of the social capital of a post-conflict society. It is vital to fostering public compliance with both social and legal norms, to ensuring that post-conflict states do not revert back to conflict, and to building peace.

Reestablishing or reforming a fractured criminal justice system is also critical to the success of peacebuilding efforts, but it is typically a Herculean task demanding the commitment and expertise of many different national and international actors. It can involve a host of interrelated activities, from providing basic resources such as pens and paper and police uniforms to rebuilding courthouses and prisons, from recruiting and vetting new criminal justice personnel to restructuring the entire police force or court system.

It is also critical to look beyond resources and infrastructure, staffing and restructuring, to the laws to be applied in the pursuit of justice. Even a system that is well

resourced, well staffed, and institutionally robust will fail to serve the needs of the community unless its laws are adequate.

What constitutes an "adequate" legal framework? In practical terms, as discussed in the United Nations secretary-general's 2004 report *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (UN doc. S/2004/616, paragraphs 6 and 7), all domestic laws must be "consistent with international human rights norms and standards"; be "legally certain" (i.e., clearly defined, accessible, foreseeable, and neither contradictory nor overlapping); and comply with the principle of justice (i.e., protect and vindicate rights, punish wrongs, and protect the rights of the accused while taking into account the interests of victims and the well-being of society at large).

Unfortunately, criminal laws in post-conflict societies rarely meet these criteria. "Legislative frameworks" in post-conflict states, comments *The Rule of Law and Transitional Justice,* "often show the accumulated signs of neglect and political distortion, contain discriminatory elements and rarely reflect the requirements of international human rights and criminal law standards." For instance, legal certainty was conspicuously absent from Afghanistan after the fall of the Taliban, with the country subject to some twenty-four hundred overlapping and often contradictory bodies of law that had been allowed to accumulate over the preceding four decades and changing administrations.

Furthermore, criminal justice legislation in post-conflict states is often outdated. To take just a few examples: In post-conflict Angola, the penal code dated to 1886. In Liberia, human trafficking was widespread but not adequately addressed in the penal code, which had not been amended since the 1970s. In Kosovo, human trafficking, terrorism, organized crime, and the possession and use of illegal firearms were all prevalent but were poorly covered in the applicable criminal law. To make matters worse, while many post-conflict states are plagued with complex crimes such as trafficking and money laundering, those states' legal frameworks typically do not contain provisions for covert surveillance, witness protection, or other measures that are vital to the investigation and prosecution of such crimes.

Previous Post-Conflict Criminal Law Reform Efforts

The pronounced inadequacies of some post-conflict criminal laws have inspired several efforts to reform existing laws. In Cambodia, for instance, the dysfunctional criminal justice system bequeathed by the Khmer Rouge prompted significant legal reform both during the mandate (1992–93) of the United Nations Transitional Authority in Cambodia (UNTAC) and subsequently. Among other areas targeted by this legislation were criminal law and procedure, police powers, the prisons system, and the court system.

In Kosovo, the United Nations Mission (UNMIK) established in 1999 passed numerous regulations to fill gaps in the existing criminal law. Some regulations have been designed to ensure that the law complies with international human rights norms and standards; others have added new offenses, such as human trafficking; still others

have sought to give police and prosecutors the tools they need to investigate and prosecute serious crimes.

The United Nations Transitional Administration in East Timor (UNTAET), whose mandate ran from October 1999 to May 2002, deemed the Indonesian criminal procedure code to be overly complicated and unsuitable for application in post-conflict East Timor, and so promulgated new regulations on criminal procedure and the courts. It also promulgated regulations on firearms and election-related criminal offenses.

Such attempts to reform the criminal law have not met with universal praise, however, underlining the complexity of the task and the heavy demands it places on time, resources, and expertise. In Cambodia, for instance, the UNTAC code, the first piece of law reform introduced during the country's transition, has been widely criticized for lacking clarity, contradicting other laws, and being inconsistent with basic human rights provisions.

In Kosovo, during UNMIK's first years, the special representative of the United Nations secretary-general issued executive orders for detention of individuals, even after the courts—including in some cases courts composed entirely of international judges—had ordered individuals released for lack of evidence, and even when the releases had been proposed by international prosecutors. Criticism of the executive orders came from many directions, including from the Organization for Security and Cooperation in Europe, international human rights organizations, and the UNMIK ombudsman, who argued that the orders for detention violated the principle of judicial independence and failed to provide for judicial review.

In East Timor, individuals in the justice system noted several fundamental gaps in UNTAET regulations that served as the transitional criminal procedure code until 2006. The regulations did not include issues such as the requisite burden of proof and standards relating to the competency of witnesses. Criminal justice actors effectively had to make up their own rules and fill the gaps in the applicable legislation, which enhanced the legal uncertainty in East Timor.

Criminal Law Reform in the International Spotlight

The cases of Cambodia, Kosovo, and East Timor focused international attention on the importance of the rule of law in post-conflict states and, in particular, on the importance of criminal law reform. Many actors involved in the law reform process in these three places spotlighted the deficiencies in both the substance of some of the laws that were drafted and the process by which they were drafted. In the late 1990s and early 2000, the subject of criminal law reform was widely debated, with practitioners and policymakers looking to learn lessons from past mistakes and move forward confidently and effectively.

Recognizing the need to reconfigure the international community's approach to post-conflict peacebuilding in peace operations, including criminal law reform, in 2000 the United Nations issued the *Report of the Panel on United Nations Peace Operations,* otherwise known as the Brahimi Report. One segment of the report focused primarily on reform efforts in Kosovo and East Timor, where the United Nations had

executive authority to pass new laws. In light of the United Nations' immense difficulties in designating and speedily reforming the applicable laws in both territories, the report recommended the drafting of an interim criminal code to be used in future executive missions where confusion surrounded the applicable law. International personnel, such as United Nations Civilian Police and international judges and prosecutors, could familiarize themselves with the interim code before being deployed and could quickly apply its provisions pending reforms of the domestic legal framework.

The Brahimi Report elicited mixed reactions. While there was support from some quarters, many disagreed with the imposition of an interim code in a post-conflict state, even where the United Nations had lawmaking powers and where many international actors were working within the post-conflict criminal justice system. Others felt that the recommendation to create an interim code was not relevant, given that another executive mission was unlikely to be mandated in the near future.

In the years that followed the Brahimi Report, although no new executive mission was anticipated, post-conflict criminal law reform remained high on the international rule-of-law agenda. The discussion of the creation of an interim code morphed into a debate on the use of Model Codes as a law reform tool. This idea, which had been broached even before the Brahimi Report appeared, earned the support of the authors of the *Rule of Law and Transitional Justice,* who urged the international community "to eschew one-size-fits-all formulas and the importation of foreign models" and supported the creation of Model Codes as tools to inform a locally led reform process.

The Evolution of the Model Codes Project

Within a year of publication of the Brahimi Report, the United States Institute of Peace and the Irish Centre for Human Rights launched the Model Codes for Post-Conflict Justice Project (hereafter, the Model Codes Project) to explore the issues the report had raised. The United Nations Office of the High Commissioner for Human Rights and the United Nations Office on Drugs and Crime subsequently joined the project, lending their technical expertise in the development of criminal law provisions designed for post-conflict situations.

The original purpose of the Model Codes Project was to draft a set of interim criminal codes that could be used either in the manner suggested in the Brahimi Report or as a resource in the process of post-conflict law reform generally. In the early days of the project, the main focus was on the former use; over time, however, the project began to concentrate on creating model laws to act as tools in domestic criminal law reform.

Over the next five years, the project brought together some three hundred experts from around the world to develop a set of codes. There were three phases in the process of drafting and consultation. The first phase commenced in late 2001, when a core team of experts—practitioners, lawyers, police officials, military personnel, and academics from different regions and different legal backgrounds—convened to exchange ideas and write early drafts of the codes. Eighteen months later, the group had completed their drafts of the four Model Codes: a criminal code, a code of criminal procedure, a detention act, and a police powers act.

The second phase was a broad consultative process during which the draft codes were vetted by a diverse group of experts from around the world. These experts hailed from the academic and the practitioner communities and included scholars of criminal law, comparative criminal law, international law, international human rights laws, and police law; international and national judges; prosecutors; defense lawyers; police officials; prison officials; human rights advocates; and military lawyers.

The second phase involved individual consultations with experts and fieldwork consultations in places ranging from East Timor to Kosovo, Liberia, Nepal, and southern Sudan. In addition, consultations were held and presentations were made at various forums in Geneva, New York, Ireland, Vienna, Beijing, Washington D.C., Madrid, Canada, Berlin, and Sweden. Furthermore, a series of regional meetings were held to assess the potential utility of the codes in a regional context and test their compatibility with a variety of different legal systems. An Africa roundtable was held in Abuja, Nigeria, and a follow-on meeting was conducted in London. Asia roundtable meetings were held in Bangkok, Thailand, and Melbourne, Australia. A meeting of Islamic legal experts was convened in Siracusa, Italy. These meetings allowed a very broad range of opinions to be canvassed. (For a full list of individuals and organizations who contributed to the Model Codes Project, see the section "Contributors" near the beginning of this volume.)

In the third phase, a core group of experts collated and considered all the comments and suggestions made on the substantive provisions of the Model Codes. Some recommendations received during the consultation process required substantial changes to the text or the drafting of entirely new provisions. The group also expanded the commentaries based on suggestions received. Thereafter, a final round of expert review was conducted.

The value of the Model Codes as law reform tools derives in large part from the breadth and intensity of the consultation and review process conducted throughout the codes' development. The codes were developed through a rigorous, academically grounded process of research and drafting coupled with a vibrant and open discourse among a broad and diverse community of experts. Considerable comparative analysis, research, and debate went into the drafting of both the provisions and the commentaries.

The result of this process of collaborative drafting, extensive consultation, and thorough review was a set of four integrated Model Codes: the Model Criminal Code, the Model Code of Criminal Procedure, the Model Detention Act, and the Model Police Powers Act. None of these codes is the product of any one legal system or legal culture; to the contrary, each represents a blending of different legal elements, some drawn from international conventions or best-practice principles, others drafted specifically for this project.

Publication of *Model Codes for Post-Conflict Criminal Justice*

The completed drafts were readied for publication by the United States Institute of Peace Press. It was decided to publish the four codes in three volumes, collectively known as *Model Codes for Post-Conflict Criminal Justice*.

Volume I (published in spring 2007) contains the Model Criminal Code (MCC). The MCC is a criminal code, or penal code, that focuses on substantive criminal law. Substantive criminal law regulates what conduct is deemed to be criminal, general principles of criminal law, the conditions under which a person may be held criminally responsible, and the relevant penalties that apply to a person convicted of a criminal offense. A synopsis of the substantive content of the MCC is presented in chapter 3 of this User's Guide.

Volume II contains the Model Code of Criminal Procedure, which focuses on procedural criminal law, a body of rules and procedures that govern how a criminal case will be investigated and adjudicated.

Volume III features both the Model Detention Act and the Model Police Powers Act. The Model Detention Act governs the laws and procedures to be applied by the criminal justice system to persons detained prior to and during a criminal trial, and also those who are convicted of a criminal offense. The Model Police Powers Act sets out relevant powers and duties of the police in the sphere of criminal investigations, in addition to relevant procedures to be followed in investigating criminal offenses. Moreover, the Model Police Powers Act contains additional police powers and duties and the relevant procedures to be followed by police in the maintenance of public order.

Chapter 2

Potential Uses of the Model Codes in a Criminal Law Reform Process

A Tool Tailored to the Specific Needs of Post-Conflict States

A common practice in the process of post-conflict criminal law reform is to look for inspiration in bodies of laws from different states. This approach can significantly expedite the process of law reform and circumvent the need to draft new legal provisions from scratch. That said, a blind transplant of a legal provision from one state to another—without an assessment of whether the foreign legal provision is workable in another context and without consideration of whether the provision fits with the receiving state's culture and legal system—is unwise. But where it is considered appropriate and useful, the laws of other states may be used as the basis of new criminal provisions either by modifying them to fit the local context or by including them wholesale in newly drafted laws. Where an external legal provision is considered inappropriate for inclusion, it might still be useful as a source of inspiration or as a starting point in the drafting of entirely new legal provisions.

A yet more useful tool, however, is a source of law tailored specifically to the particular context of post-conflict criminal law reform. The four codes contained in *Model Codes for Post-Conflict Criminal Justice* are designed to be just such a tool. The term *model* is not meant to imply that a model law is the best or the only option in the criminal law reform process, or indeed that it should be used in whole. Instead, the term *model* is used in the sense of providing a sample law or a useful example. The Model Codes can be used along with any number of other sources in drafting new provisions of criminal law in post-conflict states.

The Model Codes as a potential tool of law reform are not meant to be imposed upon a post-conflict state; they are a tool of assistance and not a tool of imposition. Furthermore, if law reformers do opt to use the Model Codes, they can use them in any number of ways, from a means of sparking debate on one aspect of criminal law reform to the basis for drafting a new provision in a criminal law code.

Throughout the development of *Model Codes for Post-Conflict Criminal Justice,* the drafters asked themselves how the Model Codes could best assist actors working in post-conflict situations. For example, when they chose the sorts of criminal offenses to include in the Special Part of the MCC, the drafters focused not on the full range of criminal offenses found in many countries' criminal codes but instead on serious crimes, including those criminal offenses that occur most commonly in a post-conflict state and those that are often absent from existing criminal laws. Consultations and in-depth research resulted in the creation of a catalog of criminal offenses that reflects the specific needs of actors involved in post-conflict criminal law reform.

Filling the gaps in post-conflict criminal laws requires providing not only broad principles of law and specific legal provisions but also sufficient guidance on how to apply these principles and provisions. A common complaint about the criminal law framework in many post-conflict states, and indeed about newly drafted criminal legislation in post-conflict states, relates to the dearth of such guidance. Such shortcomings lead to confusion in the application of the law and sometimes result in the application of different standards by different actors, each interpreting the provisions in a different way. The need for specific guidance in criminal legislation is especially accentuated in post-conflict states, where criminal justice actors may have fled and criminal justice is often doled out by inexperienced or newly retrained police officers, judges, lawyers, and prison officials.

These oft-heard concerns about the need for clarity and guidance led to a specific style of drafting the Model Codes. First, the codes are drafted in a "plain-English style" that seeks to convey information in as simple and accessible a manner as possible. Obscure legal terms are replaced by more straightforward language without sacrificing the integrity of the text. Not only does this approach make laws more understandable to those applying them, but it also makes the laws more accessible to those to whom they are applied.

Second, the Model Codes are more detailed and prescriptive than most criminal laws. Often, criminal laws and procedures are supplemented by a "statutory instrument," "ancillary legislation," "implementing regulations," or "standard operating procedures" that fill the gaps in the more general text. To provide maximum guidance to criminal justice actors and to help close potential gaps that could lead to confusion or misapplication, the Model Codes contain both legal provisions and commentaries that contain guidance on the practical implementation of those provisions. The commentary to each provision elaborates on the purpose and content of the provision and explains how it should be applied.

These commentaries assist the reader in a number of other ways, too. For example, they explain wording choices. They also highlight other reforms or initiatives that may be necessary if a particular provision is introduced into law. These may include institutional reforms, other criminal law reforms, or reforms of bodies of law outside criminal law. They also provide comparative lessons drawn from other post-conflict cases.

In tailoring the Model Codes for use in post-conflict situations, the drafters were attentive to the fact that the existing criminal law framework in a post-conflict state does not always comply with international human rights norms and standards. In the aftermath of conflict, law reform efforts often focus on replacing old laws with laws that comply with human rights norms and standards. Many experts have cited the

difficulty of translating abstract norms of international human rights law into concrete provisions of criminal law. To assist in this translation, the Model Codes have been drafted so as to transform international standards into concrete provisions of law that are compliant with these standards while still taking into account the exigencies of a post-conflict state, such as a lack of resources.

The Model Codes were also drafted to take into account potential cross-cultural application in a variety of settings around the world. As discussed above, a series of regional meetings tested the thesis that the Model Codes could potentially be used universally as a law reform tool. The experts who took part in the meetings supported this thesis, while of course acknowledging that criminal laws should fit the environment in which they are applied. The substantive provisions of the Model Codes were inspired by a variety of international legal systems and legislation. The Model Codes do not follow one particular legal tradition but instead blend legal systems to create a hybrid body of laws—an increasingly common occurrence in many criminal law reform processes.

A Flexible Tool: Six Scenarios for the Use of the Model Codes

The practical uses of the Model Codes in post-conflict law reform are many and varied. The codes can be helpful to actors engaged in small-scale and ad hoc reforms of discrete sections of the existing criminal law, as well as to actors working on large-scale restructuring of an entire domestic criminal law framework.

In the rest of this chapter, we highlight six scenarios in which the Model Codes could prove a valuable resource:

- A post-conflict state is revising its existing criminal law framework (potentially including its criminal code, criminal procedure code, prisons legislation, and police legislation) to define new criminal offenses and include new tools with which to investigate those crimes and to update its existing criminal laws to replace provisions that do not comply with international human rights norms and standards.
- A post-conflict state is conducting long-term reforms of its entire criminal law framework (including its criminal code, criminal procedure code, prisons legislation, and police legislation) with a view to overhauling and modernizing it and wants to ensure that that legislation complies with international human rights norms and standards.
- Because of deficiencies in a certain segment of its criminal laws, a post-conflict state is drafting a transitional law (for example, a transitional code of criminal procedure) pending more long-term and substantial reforms.
- A post-conflict state has decided to update its criminal laws to adequately protect the rights of women and children, who have been deemed to be vulnerable groups in their society. The existing laws do not adequately address trafficking in persons and sexual offenses, which are being widely perpetrated.

- A post-conflict state that has decided to ratify the Rome Statute of the International Criminal Court is amending its existing legislation and procedures to comply with the various obligations arising from the statute (the introduction of the criminal offenses of genocide, crimes against humanity, and war crimes, for instance).
- A post-conflict state wishes to establish a new special chamber, tribunal, or court to deal with a specific crime problem (for instance, economic crimes, drug crimes, or organized crime) and needs to draft enabling legislation and the substantive and procedural provisions of law that the tribunal will apply.

Updating Existing Criminal Laws to Include New Criminal Offenses and Investigative Tools

With its justice system shattered after years of conflict, State A is experiencing unprecedented crime problems. Organized crime is rampant. Criminal gangs are involved in everything from money laundering to the trafficking of women from neighboring states to the smuggling of weapons, cars, and drugs over the state's porous borders. The police are well aware of these activities but are unable to effectively combat them because organized crime, money laundering, and trafficking are not offenses set out in the existing penal code, or because existing provisions are inadequate. Even if domestic law contained adequate criminal offenses to cover the conduct of organized criminal gangs, the police and the prosecutorial service would have difficulties investigating these offenses. For example, prosecuting a member of an organized criminal gang involves heavy reliance on witness testimony, but witnesses in trafficking or organized crime cases are often afraid to testify, fearing retribution from criminal gangs. The laws of State A do not have a mechanism for petitioning the courts for protective measures for witnesses. It is also difficult to gather evidence without sufficient means of surveillance—a common tool in investigating organized criminal activities—which is also not provided for in the law.

The scenario outlined above is commonplace in many post-conflict states. The Model Codes help in a number of respects. First, State A needs to enact new laws that make organized crime, trafficking in persons, money laundering, and smuggling criminal offenses; all these offenses are defined in the MCC. The commentaries to the provisions on these offenses contain discussions on other amendments to the law or other institutional arrangements required to effectively combat these crimes. For example, in the case of money laundering, it is essential to make amendments to other bodies of law, such as domestic banking law. Furthermore, the commentaries discuss other practical issues of implementation, such as the setting up of special task forces or special police units to tackle specific serious crimes. The commentaries further highlight the resource implications inherent in enacting such provisions.

State A also needs to modify its criminal procedure law to provide police with adequate investigative powers and tools and to provide adequate witness protection and confidentiality. Such measures hold the potential for impinging on the rights of a suspect or an accused, however, and require a delicate balancing act between these two imperatives. Many experts from dozens of countries were consulted to ensure that the

Model Codes strike this balance and provide sufficient guidance to criminal justice actors who may apply these provisions of the MCC.

Amending Laws to Comply with International Human Rights Norms and Standards

State B is emerging from a long conflict. Its laws date back to the nineteenth century, preceding the promulgation of international and regional human rights treaties and standards. The transitional legislative assembly wishes to amend its penal code, criminal procedure code, police laws, and prisons laws to comply with human rights standards.

The Model Codes can potentially save the drafters of new laws in State B from having to start from scratch in this process—a process that is both lengthy and research intensive. Drafting the Model Codes involved extensive research to ascertain applicable international human rights norms and standards in the sphere of criminal justice and to translate these standards into concrete provisions of law. In addition, accompanying commentaries discuss relevant human rights norms and standards in greater detail.

Suppose State B wishes to incorporate provisions on the right to challenge the lawfulness of detention (as enshrined in major international and regional human rights treaties). It must implement legal provisions to make the realization of this right practical and effective. In this scenario, it is not enough to include a broad and general principle on this right; a concrete mechanism must be created. In most states, this right is realized through the mechanism of habeas corpus or *amparo*, whereby a person challenges the legality of an arrest or detention. The Model Code of Criminal Procedure contains a number of provisions establishing a habeas corpus procedure to enable a person to challenge the lawfulness of his or her detention. These provisions may prove useful to those involved in reform of State B's laws.

Creating New Transitional Laws

Laws in State C are sparse. Rather than addressing the needs of the local population and the protection of their rights, the few laws that exist are geared solely toward the criminalization of behavior that was deemed subversive and threatening to the power of the former ruling regime. Prior to the conflict, the military acted as the police force, without reference to any laws. In the aftermath of the conflict, the authorities plan to reform and resize the military and develop a newly trained civilian police force. The authorities face a huge problem: the laws that exist are completely inappropriate for continued application. These laws provide no guidance on what standards and procedures should be followed in the investigation of offenses and the maintenance of public order. The laws contain a few provisions on criminal offenses but do not cover all the criminal conduct currently being perpetrated in State C. The legislative authority has decided to convene a judicial reform commission to enact a provisional criminal code, procedure code, laws on police, and laws on prisons.

The criminal legislation of State D is so closely associated with the prior dictatorial regime that it is politically and popularly discredited. Under public pressure, the legislative assembly in State D has decided to create a provisional penal code and criminal

procedure code that will apply until the state possesses the resources to completely overhaul the criminal justice system. The decision is made to create a rudimentary yet viable system of justice that protects the rights of accused persons while dealing with current crime problems. New offenses such as trafficking and smuggling will need to be added to the catalog of offenses contained in the new provisional penal code. Moreover, there is pressure in State D to get the provisional codes drafted and promulgated quickly.

Creating a body of law from scratch is a huge task: definitions of offenses need to be included, general principles of criminal law need to be drafted, and jurisdictional issues need to be addressed, as do issues related to penalties. Detailed procedures on basic investigative functions such as arrest, search of persons, and search of property need to be introduced. Provisions on detention of persons, both before trial and after conviction, need to be addressed, and relevant international standards must be incorporated into legislation. Public order powers may also need particular attention—for example, What procedures should the police follow in the use of force? When can police set up a roadblock? How should officers police public gatherings? Even if only rudimentary procedures and laws are introduced, there are still huge issues to be addressed.

Given that the Model Codes address all aspects of the justice system—criminal law and procedure, police and public order powers, and prisons standards—they may be a useful tool from which to borrow extensively in drafting provisional laws.

Amending Laws to Adequately Protect Vulnerable Groups

State E is currently experiencing an unprecedented rise in crimes committed against children. The criminal justice system has been greatly weakened by conflict. A legal vacuum, in which criminal elements operate freely, has emerged. Many criminal elements have targeted orphaned children for exploitation. Some of these children have been trafficked out of State E and sold into slavery in other states. Inside State E, many children are being forced into prostitution and used in a child pornography ring. The laws of State E do not contain any offense of child pornography. Nor do they contain the criminal offenses of trafficking in persons or sale of children. State E has laws on prostitution, but they criminalize the person being prostituted rather than the person forcing someone to engage in prostitution. The transitional government in State E is determined to tackle these crime problems.

In addition to removing the domestic provision of law that penalizes children for being prostitutes, State E needs to significantly augment its penal law to include activities such as child pornography, trafficking in children, sale of children, and child prostitution. The MCC contains a chapter on offenses against children that draws upon definitions of offenses contained in pertinent UN conventions.

The law of State F, a state just emerging from conflict, has never adequately addressed criminal offenses against women. Rape was widespread during the conflict and is still widely perpetrated. Sexual slavery is also common. Levels of domestic violence have risen dramatically since the cessation of the conflict. In consultation with local women's groups, the transitional government is seeking to implement a more expansive definition of crimes against women.

Many post-conflict states are deficient in their laws on offenses against women. Often, laws are outdated; definitions have never been introduced or have not been updated to keep pace with modern criminal law standards. Crimes against women, particularly crimes of sexual violence, are a common feature of conflict and often do not stop once a conflict stops. In fact, some post-conflict states have registered an increase in crimes against women in the aftermath of conflict. Many post-conflict states have moved to reform their laws to criminalize acts of violence against women.

The Model Codes may be useful in this sort of law reform process. First, they provide definitions of the criminal offenses of rape, sexual slavery, and domestic violence. In addition, the Model Code of Criminal Procedure contains specific evidentiary rules that protect the victims of sexual violence, in addition to other protection measures for victims testifying at trial. The commentaries to the codes are a key tool in that they provide broader policy recommendations on dealing with criminal offenses such as domestic violence and point to other initiatives, legal and otherwise (such as protection orders), that need to be brought into effect to adequately address the problem.

Amending Laws to Comply with the Rome Statute of the International Criminal Court

In State G, massive violations of international humanitarian law and international criminal law occurred during the course of a long-running conflict. Both crimes against humanity and war crimes were perpetrated on a large scale. State G is a party to the Rome Statute of the International Criminal Court and, after consultation with its civil society, has decided to prosecute these offenses through its domestic criminal justice system. State G's penal code, however, contains no provisions on crimes against humanity or war crimes. State G knows that, in accordance with Article 17(2) of the Rome Statute, it must ensure that the relevant substantive and procedural laws under which these crimes will be prosecuted comport with "general principles of due process recognized by international law."

The Model Codes may be a source of inspiration for State G. The integration of the substantive offenses of crimes against humanity and war crimes is not a huge task. The Rome Statute, combined with the document entitled *Elements of Crimes* that accompanies the statute, will be sufficient to provide provisions that the state's legislative authority can enact. But cleaning up State G's laws to comply with the "general principles of due process recognized by international law" will be more complicated. The Rome Statute of the International Criminal Court does not set out sufficiently clear guidelines on what is meant by this clause, although it has been interpreted to mean both binding and nonbinding international and regional instruments relating to international human rights standards.

In addition, other requirements of the Rome Statute need to be included in domestic legislation (for example, "command responsibility" as a ground of criminal liability). The Model Codes fully comply with the obligations on states parties to the Rome Statute. The relevant legal provisions have been included in the codes. The accompanying commentaries offer explanatory notes on the provisions and Rome Statute requirements.

Creating a Special Tribunal to Address Specific Crime Problems

State H has experienced significant organized crime problems, including human and drug trafficking. Instead of prosecuting the crimes through its ordinary criminal justice system, it has decided to set up a special tribunal to prosecute these crimes. It has decided to draft a new set of laws that will apply solely to the special tribunal.

In creating the laws and procedures that will apply to the special tribunal, and to persons detained or imprisoned by the tribunal, State H may look to the Model Codes to ensure that the laws of the special tribunal comply with international human rights norms and standards. The MCC may prove a useful source for the drafting of a statute of the special tribunal, which would need to include provisions on issues such as jurisdiction, statutes of limitation, *ne bis in idem* (double jeopardy), criminal participation, grounds of criminal liability, defenses, and penalties. The Model Detention Act may provide a useful framework for developing a law relating to persons detained and imprisoned by the special tribunal.

* * *

The scenarios presented above illustrate some of the ways in which the Model Codes can be used as a tool for post-conflict criminal law reform. There are, of course, many other ways in which the codes could be useful to a state, whether it wishes to replace or add one provision of law or to overhaul its complete criminal law framework. Many of the examples sketched above are not mutually exclusive; a state usually has more than one purpose in reforming its criminal laws. For example, a state may wish both to combat serious crimes problems and to ensure that its laws comply with international human rights standards and protect the rights of vulnerable groups.

While the Model Codes have been drafted specifically for use in a post-conflict environment, they may be equally usefully employed in the context of a developing state or state in transition that is reforming its criminal law framework. Indeed, the potential use of the Model Codes in these contexts was frequently suggested by the experts who reviewed the codes, particularly those from developing or transitional states who saw how the codes could be employed in criminal law reform efforts in their home states.

Chapter 3

A Synopsis of the Model Code of Criminal Procedure

The Model Code of Criminal Procedure (MCCP) provides model provisions that may prove useful to those updating or revising the domestic criminal procedure law in a post-conflict state. The provisions of the MCCP address all aspects of criminal procedure from investigation through to arrest, trial, and appeal of a criminal case, and include provisions on the investigation and prosecution of crimes with a transnational element.

One of the most frequently asked questions during the process of expert consultation on the Model Codes was whether the MCCP is a common law code or a civil law code. The MCCP—like the other codes in this series—is in fact neither one nor the other but a hybrid of systems. The MCCP blends different elements of domestic criminal procedure law from around the world with international norms and standards relevant to criminal procedure. The drafters drew on international human rights law for baseline fair trial and due process standards, and on international criminal law (in particular, treaties and conventions targeting transnational crimes such as organized crime, drugs offenses, and trafficking in persons) for standards and practices national authorities can employ in combating serious crimes. The drafters' ultimate aim was to balance respect for the fair trial and due process rights of suspects and accused persons with the need to address serious crimes problems plaguing post-conflict states.

The MCCP grew significantly in size over the course of the Model Codes Project, largely in response to requests from experts that the code provide comprehensive provisions on all aspects of criminal procedure law, ranging from search and seizure to the investigation of complex cybercrimes, witness protection measures, and victim protection. Many experts also recommended that the MCCP provide more detail in its provisions than that normally provided in a criminal procedure code. In some instances, this suggestion was sparked by concerns that a post-conflict criminal justice system may include personnel unfamiliar with international norms and standards who would appreciate additional legislative guidance in the execution of criminal procedure measures. Other experts were concerned that standard operating procedures or implementing regulations that are usually drafted to accompany a domestic criminal procedure code may be absent in a post-conflict state and that it would thus be

useful if the MCCP combined criminal procedure provisions and standard operating procedures.

The Model Code of Criminal Procedure

Chapter 1: General Provisions

Chapter 1 contains a preliminary list of definitions that are applicable throughout the MCCP. It also sets out the purposes and scope of the MCCP.

Chapter 2: Courts, Court Administration, and Provisions Relating to Court Proceedings

Because the MCCP was drafted outside of the context of a domestic criminal justice system, it was necessary to develop a skeletal criminal justice system to apply its provisions. Chapter 2 elaborates a criminal justice system consisting of trial courts and one appeals court, with a president, vice president, registries, and court staff. It provides details on the structure of trial courts and the appeals court and principles of judicial independence and judicial impartiality relevant to judges in this fictitious justice system. In addition, Chapter 2 sets out various administrative matters such as filing submissions before the court, the service of documents, serving summonses, maintaining court records, changes in the location of court proceedings, and control of court proceedings (contempt of court and other sanctions).

Chapter 3: Other Actors in Criminal Proceedings

Chapter 2 sets out a skeletal court system. Chapter 3, as a complement, expands upon the role of other actors in the broader criminal justice system. Chapter 3 starts out by providing a framework for the operation of a prosecution service, including provisions relevant to prosecutorial independence and impartiality, and creation of a defense service as a mechanism to provide legal assistance to persons who cannot afford their own counsel. The chapter concludes by setting out the duties and powers of the police—who, under the MCCP, work under the direction of the prosecutor—in the realm of criminal procedure.

Chapter 4: Rights of the Suspect and the Accused

Drawing upon relevant standards contained in international and regional human rights treaties and jurisprudence, Chapter 4 lays out a comprehensive list of fair trial rights that should be afforded to a suspect and an accused in the course of criminal proceedings. In addition to the items on this list, other fair trial rights are integrated throughout the MCCP as they relate to specific junctures in the criminal proceedings such as arrest and trial. Chapter 4 divides fair trial rights into general fair trial rights and those rights that specifically relate to legal assistance to the suspect and the accused.

Chapter 5: Victims in Criminal Proceedings

The extent of the involvement of victims in criminal proceedings varies from state to state. In some states, victims have extensive rights such as the right to mount a "private prosecution" against the alleged perpetrator of a criminal offense. In other states, a victim has much less active involvement in criminal proceedings (perhaps acting only as a witness at trial). The MCCP adopts a position between these two options. Chapter 5, drawing upon international and domestic standards on victims, sets out an array of provisions that protect the interests of victims in criminal proceedings and that allow victims to be informed of and, if appropriate, to participate in criminal proceedings.

Chapter 6: Criminal Proceedings against a Legal Person

Under the MCC, criminal liability may be asserted over legal persons (such as companies or corporations). In order to investigate and prosecute a legal person, who does not have human identity and therefore cannot "personally" take part in proceedings, a number of procedural measures are required. Chapter 6 of the MCCP contains provisions on appointing a representative for a legal person during criminal proceedings on how to serve documents on a legal person, on how a legal person should be charged in an indictment, and so forth.

Chapter 7: Provisions Relevant to All Stages of the Criminal Proceedings

Chapter 7 is an omnibus provision that addresses a number of different issues that are applicable at all stages of the criminal proceedings. The first issue addressed in Chapter 7 is "proceedings on admission of criminal responsibility," which in many systems is known as "entering a guilty plea." Chapter 7 then addresses the variation of time limits set out in the MCCP. Finally, the chapter sets out the procedure to be followed when the court, the prosecutor, or the defense seeks to enquire into the mental capacity of a suspect or an accused and assess whether he or she is fit to stand trial.

Chapter 8: Investigation of a Criminal Offense

Chapter 8 provides an array of provisions dealing with the investigation of a criminal offense. Part 1 of Chapter 8 addresses the role of the prosecutor and the police in the criminal investigation. It sets out the steps to be followed by the police and the prosecutor in conducting an initial investigation prior to the formal commencement of an investigation; it elaborates on the procedure and standards for initiating, suspending, or discontinuing a criminal investigation; and it includes provisions on the involvement of the victim during the investigation and the victim's right to appeal actions of the prosecutor in certain instances.

Part 2 of Chapter 8 contains a variety of requirements with regard to the recording of actions taken in the course of the criminal investigation. It requires that any investigative action be recorded and sets out detailed requirements on the recording of the questioning of suspects and other persons.

Part 3 deals with the collection of evidence. It first offers detailed guidelines and requirements on the questioning of persons and then sets out a variety of investigative tools that can be employed by the police and the prosecutor to investigate a criminal offense. These tools include provisional detention of persons at the scene of a crime; fingerprinting and photographing; search and seizure (including search of persons, premises, dwellings, vehicles, and computers and seizure of property); preservation of property and freezing of suspicious transactions; seizure of the proceeds of crime or property used in or destined for use in a criminal offense; covert or other technical measures of surveillance or investigation; the use of expert witnesses; forensic investigative measures (including physical examination of a suspect; DNA analysis; examination of the mental state of a suspect; autopsy and exhumation); and unique investigative opportunities (which provides a mechanism to record testimony of a witness who will not be available at trial).

Part 4 of Chapter 8 provides additional tools that may be used in the investigation of a criminal offense. These include measures that allow for the protection of vulnerable witnesses or witnesses under threat and, in exceptional cases, anonymity of witnesses under threat; they also include provisions regarding "cooperative witnesses" (also known as "collaborators of justice"), which allow a person suspected of a criminal offense to exchange his or her testimony at the trial of an accused person for immunity from a particular criminal offense or offenses (this does not apply to the perpetrators of very serious criminal offenses such as genocide, crimes against humanity, and war crimes).

Chapter 9: Arrest and Detention

Part 1 of Chapter 9 clarifies the standards that must be adhered to in the arrest of a person. The standards relevant to arrest without a warrant and arrest under warrant are set out in detail, as are the procedures for arresting a person and informing the person of his or her rights upon arrest and for questioning and detaining an arrested person. Part 2 of Chapter 9 requires that the arrested person must be brought before a judge for a review of arrest, and at that juncture the prosecutor may apply to the court to impose pretrial detention, bail, or "restrictive measures other than detention" upon the arrested person (although the prosecutor also has the power to apply for these measures at a later stage also).

Part 3 of Chapter 9 lays out the various standards for the granting of a motion for detention, bail, and restrictive measures other than detention. It also provides for a procedure for the oversight of detention of a person prior to trial; that procedure requires that a person be detained only upon the application of the prosecutor at three-month intervals and that the detained person may make an interlocutory appeal to the appeals court to challenge the legality or validity of pretrial detention. In order to avoid excessive pretrial detention—a common phenomenon in many post-conflict states—the MCCP puts the burden on the prosecutor to justify the continued detention and to show the court that the prosecutor is diligently pursuing the case. To this end, Part 3 of Chapter 9 also sets out maximum time limits for pretrial detention and detention during trial.

Chapter 10: Indictment, Disclosure of Evidence, and Pretrial Motions

Under the MCCP, once a criminal investigation has been completed, the prosecutor must present an indictment to the competent trial court whereupon the court must schedule a confirmation hearing to determine whether there are sufficient grounds upon which to proceed to trial. Where the indictment is confirmed, the "suspect" officially becomes the "accused" and a trial is scheduled. In addition to providing the mechanism for holding the confirmation hearing, Chapter 10 sets out a disclosure regime to be implemented after the confirmation hearing and prior to the trial under which the prosecutor must provide the defense with relevant incriminating and exonerating evidence and the names of any witnesses that it will call at trial. In turn, the defense must provide the names of witnesses it intends to call at trial and must disclose if it intends to enter a defense at trial or to allege an alibi. The final part of Chapter 10 allows for the determination of preliminary motions leading up to the trial.

Chapter 11: Trial of an Accused

Chapter 11 regulates the trial of an accused. Parts 1 and 2 of Chapter 11 set out the general provisions on trials, the trial procedure and the order of presentation of evidence and witnesses. Part 3 of Chapter 11 contains detailed rules of evidence, providing general provisions on the inclusion of evidence and describing situations where evidence must be excluded. Part 4 addresses the issue of witness testimony and regulates who may testify, the solemn declaration of a witness, the consequences of not appearing before the court, the principles of live and direct testimony, the presentation of prior evidence to the witness, witness impeachment, and the protection of witnesses. Part 6 elaborates a process for the deliberation of the trial court and the pronouncement of the judgment. Where a person is found to be criminally responsible (i.e., guilty), Part 7 details the separate penalties hearing that must be scheduled to determine what penalties or orders to impose upon the convicted person. The remainder of Chapter 11 addresses the execution of penalties and orders and the judicial supervision of imprisonment; it also provides a mechanism and broad guidelines on the conditional release of a convicted and imprisoned person who has served part of his or her sentence.

Chapter 12: Appeals and Extraordinary Legal Remedy

Chapter 12 provides an appeal mechanism by which a final conviction or acquittal may be challenged on the grounds of an error of law or an error of fact or on the penalty imposed or ordered upon the convicted person. Once a judgment of the trial court has been released, the parties have a limited time to lodge an appeal statement with the appeals court. Once an appeal is lodged, the opposing party is given the opportunity to file a cross-appeal, after which an appeal hearing is scheduled by the appeals court. Under the MCCP, the appeals court hears both sides' arguments and may, at its discretion, allow the introduction of evidence or the hearing of witnesses; however, unlike in some states, the appeal does not involve a full retrial of the case. After the hearing and

its deliberations, the appeals court may reverse or amend the judgment of the trial court or order a retrial.

Unlike an appeal, which involves the parties challenging a judgment that is not yet final, an "extraordinary legal remedy" consists of an application to the court to reopen criminal proceedings that are final. An application for an extraordinary legal remedy is based on the discovery of new evidence that was not available at trial and which might have influenced the outcome at trial or on the discovery of new facts that prove that there was a substantial violation of the MCCP. The appeals court, in determining an application for an extraordinary legal remedy, must first conduct a preliminary determination of whether the application has merit, whereupon it may order the hearing of the application either by the trial court or the appeals court. The trial court or the appeals court may reverse, amend, or affirm the original judgment of the trial court.

The final section of Chapter 12 allows for interlocutory appeals or appeals prior to the final verdict being delivered at trial. The MCCP sets out a finite list of different decisions or orders of the court that may be appealed through this mechanism.

Chapter 13: Confiscation

The MCC provides for the confiscation, first, of property used in or destined for use in a criminal offense and, second, for the proceeds of crime. Chapter 13 provides procedural provisions that regulate the confiscation of property or proceeds, including the rights of third parties who have a legal claim to property or other items that are the subject of a confiscation order.

Chapter 14: Mutual Legal Assistance and Extradition

Mutual legal assistance refers to the provision of legal assistance by one state to another state in the investigation, prosecution, or punishment of criminal offenses—for example, the taking of evidence from persons or the execution of a search of premises in the requested state. Part 1 of Chapter 14 sets out the legal framework (which can be applied absent a mutual legal assistance treaty or in place of an existing treaty) for the receipt of requests for mutual legal assistance from another state, for the determination of the request by court, and, where appropriate, for the execution of requests for mutual legal assistance.

Part 2 covers extradition, which is the formal process by which a person in one state can be sent to another state to be tried or to serve a sentence. Part 2 provides the legislative basis for extradition where no treaty exists. It details the extradition procedure, the extradition hearing, and the surrender of a person where extradition is approved.

Chapter 15: Juvenile Justice

Under the MCCP, a juvenile is a child between the age of twelve and eighteen years of age. International human rights law and domestic best practice standards in the field of criminal justice require that a juvenile who comes into contact with the criminal justice system receive greater protections than those accorded to adults. Chapter 15 sets out the range of rights that juveniles (in addition to those provided to adult sus-

pects and accused persons) are entitled to in the course of criminal proceedings. In addition, Chapter 15 establishes Special Panels for Juveniles to determine all matters relating to juveniles and provides guiding principles that the panels should take into account in their determination.

Chapter 16: Right to Review the Legality of Any Deprivation of Liberty

In some states, the right to review the legality of any detention exists in legislation outside of a criminal procedure code; however, for the purposes of the MCCP and to ensure that a mechanism to challenge the legality of detention exists within the framework of the Model Codes, this right has been integrated into the MCCP. Chapter 16 applies not only to the review of the legality of detention by way of arrest or other forms of detention sanctioned under the MCCP but also to all forms of detention that a person may be placed under by the police or the prosecutor. It establishes a habeas corpus mechanism by which a person who has been detained or another person representing the interests of detained person may file a motion with a court to contest the legality of his or her detention. The court must first make a preliminary assessment of the motion and assess whether it is a bona fide claim. If it is a bona fide claim, the competent judge is required to convene a habeas corpus hearing to examine the legality of the detention. Where a person has been illegally detained, the MCCP provides for his or her immediate release and an investigation into the circumstances surrounding the detention.

Chapter 17: Right to Compensation for Unlawful Deprivation of Liberty or Miscarriage of Justice

A person who has been unlawfully deprived of his or her liberty or a person whose conviction for a criminal offense represented a miscarriage of justice is entitled under international human rights law to compensation. Chapter 17 of the MCCP requires that the competent legislative authority establish an appropriate mechanism to give effect to this right.

Chapter 4

Guiding Principles for the Criminal Law Reform Process

Reforming criminal laws in any state is a time-consuming, intensive, and laborious process, requiring institutions and individuals with the requisite skills, expertise, and resources, as well as political will. Often, law reform efforts focus more on the final products than on the process by which laws are drafted. It is a mistake, however, to disregard the modalities of the law reform process as irrelevant. The process is integral to determining whether new laws are viable, practicable, and acceptable both to the general population and to the criminal justice community in the post-conflict state that is expected to apply the laws.

During the preparation of the Model Codes, in-depth research was conducted on the law reform process in post-conflict states, including extensive interviews with both national and international actors involved in past reform efforts. What follows is a summary of key recommendations for future processes, distilled into eight guiding principles.

1. Assess the existing laws and criminal justice system

The first step in law reform should be to assess both the applicable legal framework and the criminal justice system. This point may seem self-evident, but it is not uncommon in post-conflict states for law reform actors to draft a new law without even checking to see if a law on the same subject already exists.

Assessment of the legal framework involves gathering all applicable laws, which may include the state's constitution, legal codes, legislation, regulations, bylaws, standard operating procedures, relevant and binding precedents, and even executive or presidential edicts or decrees. (For a discussion of exactly what constitutes a state's legal framework, see chapter 3 of Colette Rausch, ed., *Combating Serious Crimes in Postconflict Societies: A Handbook for Policymakers and Practitioners,* published by the United States Institute of Peace.) This task can be far more challenging than one might expect, either because some post-conflict states possess a multitude of contradictory bodies of applicable law or because copies of the existing laws are simply very hard to

find (in some instances, researchers have had to look abroad to find a copy of a country's laws). The assessment of the criminal justice system should focus not on the law on paper but on the law in action. Investigators should determine how the criminal justice system is, or is not, functioning in the implementation and application of domestic criminal laws. As part of this effort, it is important to ascertain the types of crimes prevalent in the post-conflict state, so that the legal framework and the criminal justice system can be assessed in light of their respective abilities to tackle current crime problems; this assessment will help to identify which provisions need to be repealed, amended, or replaced and which new provisions need to be added. New provisions are often needed to ensure compliance with international human rights or criminal law treaties to which the state is a signatory. (See the section "Further Reading and Resources" in this volume for a list of those treaties.)

The Criminal Justice Reform Unit of the United Nations Office on Drugs and Crime has created a standardized and cross-referenced set of assessment tools for conducting a criminal justice assessment. The Criminal Justice Assessment Toolkit is designed for use both by UN agencies and by outside organizations and governments. Grouped by criminal justice system sectors (police, justice, and prisons), each tool provides a practical and detailed guide to the key issues to be examined and the relevant standards and norms. The toolkit is designed to be used around the world and with a variety of legal traditions and is particularly useful for countries undergoing transition or post-conflict reconstruction. (For details, see "Further Reading and Resources.")

All relevant actors—for instance, government institutions, national bar associations, faculty members of national law schools, non-governmental and international organizations that have been monitoring human rights abuses, and international legal experts—should be invited to contribute their perspectives on gaps and deficiencies in the legal framework and other impediments to enforcing criminal justice. It is also important to find out attitudes among the local public. Such sociological investigations can be conducted through a variety of means, including holding public meetings or organizing a campaign to solicit written opinions. (See also Principle 6, below.)

In evaluating the effectiveness of the existing legal framework and criminal justice system, it is important to be aware of any customary, nonstate, or traditional systems of justice that may exist in the country and to assess their role in the post-conflict state and their relationship to the state-run criminal justice system.

2. Criminal law reform is a holistic enterprise: a change to one part of the law may have side-effects in other parts of the law

Law reform actors must decide whether to work with the law as it is and postpone reform until a comprehensive program of reform can be conducted or engage in a small-scale reform process by pressing ahead immediately with ad hoc and minor reforms to specific elements of the law or reform of discrete segments of the legal framework (in hopes, perhaps, of a more holistic reform being conducted subsequently). Such small-scale, or targeted, reforms are often essential in post-conflict states (for instance, they may be necessary to deal with a particular crime problem that

is plaguing the state and is not adequately addressed by existing laws) and, indeed, are conducted on an ongoing basis in many states around the world. However, in a post-conflict context, where the entire criminal law framework is often grossly inadequate, a more holistic reform process may be required in order to be effective. This process should address all criminal law in the state, including the criminal code, the criminal procedure code, prison laws, and provisions governing police activities.

Where actors choose the small-scale, or targeted, option, they should recognize that making a change in one area of the law usually has side-effects in other areas of the law. In amending existing provisions of law or adding new provisions, reform actors should assess the relationship between new, amended, and existing provisions across the criminal justice continuum and the broader legal framework. For example, changes to criminal procedure laws may have implications for laws on police powers or laws on detention; changes in the criminal code, such as the addition of new criminal offenses, may require changes in criminal procedure laws. The commentary to many provisions in the Model Codes points out the linkage to other provisions elsewhere in the codes that would require a coordinated approach of this sort.

3. Coordination of reform efforts is often best entrusted to a single, independent body

Many states have a dedicated, permanent, and independent law reform commission or body tasked with studying existing domestic laws with a view to their systematic development and reform. Law reform commissions have worked effectively and dynamically in many states, providing policy advice to governments or legislatures on areas of law in need of reform or drafting legal provisions or larger pieces of legislation. Where they are independent, impartial, and have the ability to undertake an open, transparent, and inclusive process, law reform commissions are often considered good vehicles to drive fair and effective reform efforts.

If the decision is made to establish a permanent law reform commission in a post-conflict state, a variety of factors need to be considered. For example, new legislation needs to be drafted to establish the commission; budgetary, staffing, and operational plans have to be developed; and provision must be made for the full financing, housing, and outfitting of the commission. Strategic plans should set out the fundamental principles underpinning reform efforts (e.g., openness, inclusiveness, responsiveness, and multidisciplinary approaches) and determine the process by which the law reform commission will undertake its work. A secretariat and a research component of the law reform commission need to be established and staffed, and commissioners need to be appointed.

Where small-scale, rather than large-scale, reform efforts are undertaken in a post-conflict state, the task of coordination may be performed by an ad hoc, non-permanent working group focused on priority law reform in the immediate term. Such an arrangement requires adequate financial support, often including provision for a dedicated secretariat and a research component. Such a working group should be independent, impartial, and adhere to the same fundamental principles as a full-time law reform commission.

4. Set realistic time frames for large-scale reform efforts; expect the process to take years, not months

Given the inadequacies of domestic legislation in some post-conflict states, the urge to push ahead quickly with large-scale reform is perfectly understandable. But such urgency can lead to laws being drafted so hastily that when put into practice, they prove to be unworkable.

Large-scale law reform is an intensive and complex endeavor that requires time—often, five to ten years in the case of a functioning, peacetime legal system to conduct effectively. Post-conflict states that set deadlines of a few months or, at most, a few years for the completion of the entire reform process ignore this fact and, typically, pay the consequences. Given the length of time required, it is essential to prioritize the areas in need of reform and work on the most important first.

5. Examine other legal models but take care if engaging in transplantation of laws from one state to another

The transplantation of legal provisions from one legal system to another is not uncommon. Legal drafting frequently involves reference to other models, which can save the drafter from having to reinvent the wheel. The key to whether or not a transplant will be successful, however, is process. Among other factors, careful consideration must be given to local conditions and culture, and recourse should be had to a range of different legal models that could potentially be used. Foreign sources of law used in drafting new laws will likely require adaptation for use in the new context.

6. The process should be as broad and inclusive as possible

It is important to seek input from a wide range of criminal justice actors: police officers, judges, lawyers, paralegals, prosecutors, prison officials, court administrators, the staff of civil society organizations and victims' groups that focus on criminal justice issues, law professors, and so forth. Some of these actors should have a general knowledge of criminal laws and procedures, police laws, and prison laws, while others should be experts in specific areas such as organized crime or human rights. Many law reform bodies or commissions also engage the services of experts from different disciplines, including sociologists, anthropologists, political scientists, and psychologists.

7. Calculate the resource and financial implications of law reforms

Some new criminal laws have significant resource implications. For example, new laws on witness protection may require evidence to be given remotely or videotaped in advance; implementation of new provisions on covert surveillance measures may require the purchase of sophisticated electronic equipment; new laws on prisons may require substantial changes to prisoner registration systems and even infrastructural changes to prisons (such as the creation of separate facilities for juveniles). In some post-conflict states, new laws have not been implemented because of a lack of resources.

The resource implications of new laws should be considered both before and during the drafting process. Among other things, a financial analysis of the projected costs of proposed reforms must be undertaken to enable drafters to weigh the theoretical merits of a new law against its practical viability.

8. The law reform process does not end once laws have been enacted

Putting new laws on the books does not necessarily mean that those laws will be implemented. During and after the drafting and adoption of a new law, attention should be focused on its application. Perhaps the most important key to effective implementation is to ensure that criminal justice actors are aware of the new law and to train them in its provisions before they come into effect. Training institutes and universities will also need to adopt their curricula. It is also important to cultivate awareness of their new legal obligations and rights among the general population; public education campaigns are vital in this regard.

Some states have established oversight mechanisms for the implementation of new laws. In some states, a body originally tasked with reforming laws was transformed into implementation/oversight bodies to assess and oversee the application of new laws.

Model Code of Criminal Procedure

Chapter 1: General Provisions

Article 1: Definitions

1. *Accused* means a person against whom one or more counts in an indictment have been confirmed under Article 201.
2. *Application* means a written request made to a judge by a prosecutor or the police for the purpose of obtaining a warrant.
3. *Arrest* means the act of apprehending a person for the alleged commission of a criminal offense.
4. *Arrested person* means a person who has been apprehended for the alleged commission of a criminal offense.
5. *Child* means a person under the age of eighteen years.
6. *Competent* means possessing the power and legal authority to deal with a matter.
7. *Competent legislative authority* means the body with the authority to promulgate legislation in [insert name of state].
8. *Convicted person* means a person who has been tried and found criminally responsible by a trial court or the appeals court in a final court decision.
9. *Cross-examination* means the questioning of a witness by the party other than the direct examiner upon a matter that is within the scope of the direct examination of the witness.
10. *Day* means a calendar day, except when otherwise indicated as a working day in the MCCP.
11. *Defense* means the accused and counsel for the accused.
12. *Detainee* means a person deprived of his or her personal liberty, except as the result of conviction for a criminal offense.
13. *Detention* means the status of a person who is in custody.

14. *Detention authority* means the body responsible for the operation of detention centers in [insert name of state].
15. *Detention center* means a facility, authorized by law, where detainees and convicted persons are held.
16. *Direct examination* means the questioning of a witness by the party that calls the witness to testify before the court.
17. *Doctor* means a person who holds a degree in medicine at the university level and who holds a professional license or certification in [insert name of state] or in any other state.
18. *Document* means any physical embodiment of information or ideas.
19. *Evidence* includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved.
20. *Expert witness* means a witness qualified as an expert by his or her knowledge, skill, experience, training, or education in a particular area of scientific, technical, or other specialized knowledge.
21. *Forensic pathologist* means a medical doctor who holds a professional license or certification in forensic science in [insert name of state] or in any other state.
22. *Indictment* means the formal written accusation issued by the prosecutor against a suspect charged with a criminal offense.
23. *Interlocutory appeal* means an appeal under Article 295 that is heard prior to the final decision of a case.
24. *Investigation* means all activities conducted by the prosecutor or the police under the MCCP for the collection of information and evidence in a case.
25. *Jurisdiction* means the power to hear and determine a criminal proceeding.
26. *Juvenile* means a child between the ages of twelve and eighteen years.
27. *MCC* means Model Criminal Code.
28. *MCCP* means Model Code of Criminal Procedure.
29. *MDA* means Model Detention Act.
30. *MPPA* means Model Police Powers Act.
31. *Medical professional* means a person with specialized training and experience in one or more fields of health care, including but not limited to medicine, nursing, or emergency aid, and who holds a professional license or certification in such a field in [insert name of state] or any other state, such that the person is able properly to perform tasks relevant to such field or fields as specified in the MCCP.

32. *Motion* means a request made to the court by the prosecutor or the defense, and where applicable a witness or victim, for the purpose of obtaining an order in favor of the applicant.
33. *Nurse* means a person who holds a degree in nursing at the university level and who holds a professional license or certification in [insert name of state] or in any other state.
34. *Order* means an order of a court deciding on a measure that has been sought upon the motion of the prosecutor, the defense, and where applicable, a witness or victim.
35. *Premises* means any land or building.
36. *Probable cause* means an objectively justifiable and articulable suspicion that is based on specific facts and circumstances that it tends to show that a specific person may have committed a criminal offense.
37. *Psychiatrist* means a person who holds a degree in medicine at the university level and who holds a professional license or certification to practice psychiatry in [insert name of state] or in any other state.
38. *Psychologist* means a person who holds a degree in psychology at the university level and who holds a professional license or certification to practice psychology in [insert name of state] or in any other state.
39. *Public official* means:
    (a) a person who holds a legislative, executive, administrative, or judicial office, whether appointed or elected, whether temporary or permanent, whether paid or unpaid, irrespective of the person's seniority;
    (b) a person who performs a public function, including one for a public agency or public enterprise, or provides a public service as defined under the applicable law; or
    (c) any other person defined as a public official under the applicable law.
40. *Reasonable suspicion* means evidence and information of such quality and reliability that they tend to show that a person may have committed a criminal offense.
41. *Relative* means any of the following:
    (a) persons related to another by consanguinity (blood): a parent, a child, a brother, a sister, a grandparent, or a grandchild;
    (b) persons related by affinity (marriage): a spouse, the child of a spouse, the mother or father of a spouse, the brother or sister of a spouse, the grandparent of a spouse, the grandchild of a spouse, the spouse of a child, the

spouse of a parent, the spouse of a brother or sister, the spouse of a grandparent, or the spouse of a grandchild; and

(c) persons related through adoption: an adopted parent, an adopted child, an adopted brother, an adopted sister, or the grandparent of an adopted child.

42. *State* includes an organized area or entity, such as an autonomous territory or a separate customs territory.

43. *Suspect* means a person against whom there exists a reasonable suspicion of his or her having committed a criminal offense.

44. *Territory* means the land, coastal seas, and water surfaces within the territory of [insert name of state], as well as the air space over these areas.

45. *Victim* means a person against whom a criminal offense has been committed. When a criminal offense is committed against a child, his or her parents or legal guardians are also classified as victims. Where the person against whom a criminal offense is committed is killed or incapacitated, his or her spouse, parent, child, brother, sister, grandparent, grandchild, adopted parent, adopted child, adopted brother, adopted sister, adopted grandparent, adopted grandchild, or foster parent is classified as a victim, except if that person is accused of the criminal offense.

46. *Warrant* means an order of the court issued upon the written application of the prosecutor or the police that empowers the police to undertake the measure sought in the application.

47. *Witness* means a person who is summonsed or has relevant knowledge and may be summonsed to testify before a court in the course of criminal proceedings.

Commentary

Paragraph 1: The terms *accused* and *suspect* are both used throughout the *Model Codes for Post-Conflict Criminal Justice* (hereafter, the Model Codes). A *suspect* is a person against whom there is a reasonable suspicion of him or her having committed a criminal offense, as defined in Paragraph 43. A *suspect* becomes an *accused* when an indictment against him or her is prepared, submitted to the court, and confirmed by it under Article 201 of the MCCP. After the confirmation of the indictment, the accused must stand trial before the court. Reference should be made to Articles 193–203 of the MCCP and their accompanying commentaries.

Paragraph 2: During the course of an investigation, the prosecutor or (in certain limited and defined circumstances) the police may make an *application* to the court to authorize certain investigatory actions, for example, a search of premises and dwell-

ings (Articles 118–121) or covert surveillance measures (Articles 134–140). Where the court approves an application, it will grant a *warrant*. A warrant is defined under Article 1(46)

Paragraph 3: The definition of *arrest* used in the MCCP has been taken from the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment ("Use of Terms," [a]). Reference should be made to Chapter 9, Part 1, on "Arrest," and particularly to Article 170 ("Arrest without a Warrant") and Article 171 ("Arrest under Warrant"), which set out the standards applicable to the arrest of a person. In some states, the term *arrest* means that the person is apprehended but not detained. The person may be notified that he or she is under arrest. The person may be prevented from leaving the scene temporarily, may be handcuffed, and may even be questioned at the scene of arrest in a police car, for example. However, in order for the person to be moved from the scene of arrest to a police station for questioning, a separate warrant for detention is required. In other systems, the term *arrest* is taken to mean that the person is apprehended and may also be detained beyond the point of apprehension. In these systems, detention and removal from the scene of arrest are implicit in the arrest warrant (subject, of course, to the time limits on detention contained in the criminal procedure law). The latter meaning of *arrest* is the one that was favored by the drafters of the MCCP. Thus, under the MCCP, the power to arrest a person under Article 170 or Article 171 is taken to mean that the police, once they have arrested a person, may take that person to the police station and may, for example, question the person pending the arrested person's hearing before a judge under Article 175. Under Article 172(3)(f), an arrested person must be brought before a judge as soon as possible and no later than seventy-two hours after the moment of arrest. In order for detention to be legal after this time, a warrant for detention must be obtained from a judge under Chapter 9, Part 3, of the MCCP.

Paragraph 5: The definition of the term *child* as contained in Paragraph 2 is taken from Article 1 of the United Nations Convention on the Rights of the Child. It is important to stress the distinction between the terms *child* and *juvenile,* both of which are used throughout the Model Codes. A juvenile falls within the definition of a child (that is, he or she is under the age of eighteen years). However, the term *juvenile* has a distinct meaning for the purposes of asserting jurisdiction over the person. Under the MCC, a court may assert criminal jurisdiction over a juvenile, meaning a child over the age of twelve, but not over a child. Reference should be made to Article 7 of the MCC and its accompanying commentary, which deals with personal jurisdiction over juveniles.

International human rights norms and standards provide that a child (and by necessary implication a juvenile) who is involved in criminal proceedings not only should be afforded the same guarantees and protections as an adult but also is entitled to additional protections on account of his or her vulnerable status. Rule 2(2)(a) of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice specifically provides that a juvenile is a person who is tried "in a manner which is different from an adult." The protective legal framework aimed at safeguarding the rights of children consists of international conventions (e.g., the United Nations Convention

on the Rights of the Child and the African Charter on the Rights and Welfare of the Child) and a number of nonbinding instruments (e.g., the United Nations Standard Minimum Rules for the Administration of Juvenile Justice [the Beijing Rules], the United Nations Guidelines for the Protection of Juveniles Deprived of Their Liberty, and the United Nations Guidelines for the Prevention of Juvenile Delinquency [the Riyadh Guidelines]). The drafters of the Model Codes have sought to integrate these international norms and standards applicable to children into the codes' substantive provisions. Reference should be made to Section 14 of the MCC, on juvenile penalties, and Chapter 15 of the MCCP, which specifically deals with the procedural rights of juveniles involved in criminal proceedings.

Paragraph 7: The term *competent legislative authority* is used as a generic term throughout the MCCP to signify the relevant domestic state authority with the power to promulgate or adopt legislation. For example, Article 52 of the MCCP requires that the competent legislative authority establish a mechanism to provide for free legal assistance to an arrested person or an accused person who cannot afford his or her own lawyer. In some states, the competent legislative authority will be the parliament or legislature. In other states, the president may have the power to pass relevant legislation in the criminal sphere by way of presidential decree.

Paragraph 9: In some legal systems, a trial is predominantly led by the judge or panel of judges, who may also take the primary role in the questioning of witnesses before the court. A prosecutor and defense counsel may be present during the trial (in addition to a lawyer representing the victim); however, they may not take an active role in questioning the witness. In other legal systems, the proceedings are adversarial and party driven. Under this model, the prosecutor and the defense take the lead roles in the questioning of witnesses. Under such systems, the judge acts in a supervisory capacity. Depending on the particular legal system in question, the judge may question the witness once he or she has been questioned by the prosecutor and the defense. The judge may also have the discretion to call certain witnesses.

Under the MCCP, the trial is adversarial in nature with the prosecutor and defense being responsible for calling witnesses before the court and examining them. The judge may question a witness after he or she has been questioned by the prosecutor and the defense. Reference should be made to Article 224 and its accompanying commentaries. The form that the questioning of witnesses takes is also contained in Article 224. Paragraph 3 of Article 224 provides that a witness will be *directly examined* (the definition of *direct examination* is contained in Article 1[16]), then *cross-examined* (the definition of *cross-examination* is contained in Article 1[9]), then *reexamined*. A witness will be directly examined by the party that called him or her before the court (e.g., if the prosecutor calls a witness before the court, then the prosecutor will be responsible for directly examining this witness). The witness may then be cross-examined by the opposing party (e.g., if the prosecutor calls a witness before the court, the defense may cross-examine the witness after direct examination has been undertaken). The party conducting the cross-examination may only question the person in connection with matters raised by the party who has undertaken the direct examination (i.e., within the scope of direct examination). After cross-examination, the party who

called the witness has the opportunity to reexamine the witness in light of the cross-examination just undertaken.

Paragraph 10: The terms *day* and *working day* are used throughout the MCCP to distinguish between calendar days and working days. For example, under Article 99(2), the prosecutor has fifteen working days to notify a victim of his or her decision to initiate, suspend, or renew an investigation. In contrast, under Article 136(9), a warrant for covert or other technical measures of surveillance or investigation must not exceed sixty calendar days.

Paragraph 12: The definition of *detainee* is inspired by the definition of *detained person* contained in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment ("Use of Terms," [b]).

Paragraph 13: The term *detention* includes police detention, where a person has been arrested and is being detained by the police pending a hearing before a judge under Article 175, and detention pending trial, or *detention on remand*, as it is called in some legal systems.

Paragraph 15: The term *detention center* is used as a generic term throughout the MCCP to denote the facility where detainees and convicted persons are held. In some states, detainees and convicted persons are held in completely separate facilities: detainees may be initially held in police custody at the police station and then transferred to *jail* or a detention center for pretrial detainees; if convicted, a convicted person is placed in *prison*. This is the ideal scenario and one that is consistent with international human rights norms and standards (see, for example, Article 10[2][a] of the International Covenant on Civil and Political Rights: "Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons"). Often, given the limited resources available in most post-conflict states, detainees and convicted persons are held in the same facilities. In some instances, in order to comply with international human rights norms and standards, detainees and prisoners are kept separate from one another within the same facility.

Paragraph 16: Reference should be made to the commentary to Paragraph 9.

Paragraph 20: Reference should be made to Article 141 and its accompanying commentary on the appointment of expert witnesses.

Paragraph 21: Forensic pathology is a branch of medicine that determines the cause of death. Under Article 145(4) of the MCCP, the court may appoint a forensic pathologist to conduct an autopsy to determine how a victim died and to gather evidence that may be useful in the investigation and prosecution of an alleged perpetrator.

Many post-conflict states have a shortage not only of relevant criminal justice actors but also of other professionals such as forensic pathologists that are necessary to investigate a criminal offense. In East Timor, for example, because of the absence of forensic

pathology expertise, a forensic pathologist had to be flown in from Australia to assist in investigations. Many post-conflict states also lack pathology laboratories, where the evidence gathered by a forensic pathologist would be tested. Laboratory testing of forensic findings is crucial to the gathering of credible evidence in many criminal investigations, particularly in murder or rape cases. In some post-conflict states where there are no laboratories, evidence is sent to a laboratory outside of the state for testing; in post-conflict Kosovo, for example, evidence was sent to laboratories in Germany. In Liberia, through the efforts of international donors, a laboratory has been established in its capital, Monrovia, which precludes the need to send evidence out of the state.

Paragraph 22: Under the MCCP, upon the completion of a criminal investigation, if the prosecutor finds it appropriate to pursue the case, he or she must prepare a written indictment against the suspect. An indictment can take a number of different forms, but typically it contains the accusations against the suspect (listing the criminal offenses with which they are charged) and provides relevant facts relating to the alleged criminal offenses and the suspect's involvement. In order for the suspect to become an accused (see the discussion in the commentary to Paragraph 1), the written indictment must be presented to the court under Article 195 and confirmed under Article 201. Reference should be made to Chapter 10, Part 1, "The Indictment," and Chapter 10, Part 2, which provides the procedural rules for the presentation, hearing, and confirmation of an indictment.

Paragraph 23: An interlocutory appeal is an appeal that is heard by the appeals court prior to the final determination of criminal responsibility at trial. Only certain issues may be appealed to the appeals court prior to and during the trial. These recognized grounds of interlocutory appeal under the MCCP are set out in Article 295. Reference should be made to Article 295 and its accompanying commentary.

Paragraph 24: Reference should be made to Chapter 8, which deals with the investigation of a criminal offense.

Paragraph 26: Reference should be made to the commentary to Paragraph 5.

Paragraphs 27–30: The Model Criminal Code and the Model Code of Criminal Procedure make up volumes I and II, respectively, of the *Model Codes for Post-Conflict Criminal Justice* (hereafter, the Model Codes). The Model Codes are a set of four model codes published in three volumes. Volume III contains a Model Detention Act and a Model Police Powers Act. For a discussion of the origins, aims, and content of the Model Codes, see the User's Guide at the beginning of this volume.

Paragraph 31: Article 1 of the MCCP includes a definition of *doctor* (Paragraph 17) and *nurse* (Paragraph 33), in addition to *medical professional*. Specific mention of a doctor, nurse, and medical professional is made in Article 142, "Physical Examination of a Suspect or an Accused," and in Article 172 on the right of an arrested person to a medical examination. Ideally, a qualified doctor would conduct a physical or medical examination; however, in a post-conflict setting there may be a lack of qualified doc-

tors. For this reason, Articles 142 and 172 provide that a nurse, in place of a doctor, or a medical professional (where no qualified nurse is available) may conduct a physical or medical examination of a person.

Paragraph 32: A *motion* can be made to the court by either the prosecutor, the defense, a witness, or a victim (where applicable). A *warrant,* like a motion, is a petition to the court to take certain action; a warrant, however, can only be requested by and granted to the prosecutor or the police. If the court agrees with the motion filed, it will grant an *order*, as defined in Paragraph 34.

Paragraph 34: Reference should be made to the commentary accompanying Paragraph 32.

Paragraph 36: There are a number of different standards of proof provided for in the MCCP. The term *standard of proof* refers to the degree or level of proof required in a specific situation. The standard set out in Paragraph 36 is that of *probable cause,* which is employed in many legal systems around the world. In some systems, the term *grounded suspicion* is used instead. In the MCCP, and in many criminal procedure codes around the world, the probable cause standard is the standard of proof required in order to arrest a person (see Articles 170 and 171 of the MCCP) or to search a premises or a person (see Articles 118–125). Probable cause is a higher standard of proof than *reasonable suspicion,* which is contained in Article 1(40). Unlike reasonable suspicion (see the commentary to Paragraph 40), probable cause is wholly objective in nature and requires that such facts are present that would create a reasonable belief that a criminal offense had been committed; put differently, the probable cause standard requires that there are facts present that would convince a *reasonable person* or a *prudent person* that a criminal offense has been committed.

Under the MCCP, there are two further standards of proof: *the balance of probabilities* and *beyond reasonable doubt*. The latter is the highest standard of proof contained in the MCCP and is the one required to convict a person of a criminal offense. The balance of probabilities test is used at a confirmation hearing under Article 201. Reference should be made to Article 216 for a discussion of the *beyond reasonable doubt* standard and to Article 201 for the meaning of *the balance of probabilities.*

Paragraph 39: The definition of *public official* has been taken from Article 2(a) of the United Nations Convention against Corruption, currently the most comprehensive definition of public official in international and regional instruments.

Paragraph 40: As discussed in the commentary to Paragraph 36, the standard of proof of *reasonable suspicion* may be met where a police officer believes, on the basis of specific objective facts or inferences and in light of that police officer's experience, that a person has committed a criminal offense. The test is part objective and part subjective and is a lesser burden than that of probable cause, the balance of probabilities and beyond reasonable doubt.

Paragraph 42: The precise legal definition of the term *state* is a subject of debate among scholars of public international law and lies beyond the scope of this work. Paragraph 42 is not intended to provide a definitive statement of what a state is but instead to provide an inclusive definition of the term *state.* The purpose of doing so is to ensure that when the MCCP refers to a state, other entities are included. The reform of post-conflict laws may take place outside the context of a recognized state—as has been the case, for example, in Kosovo and in the early stages of the peace operation in East Timor (before East Timor was recognized as an independent state at an international level). In some articles of the Model Codes, it will be obvious to the reader that the term *state* could refer only to a state proper, such as with the signing of extradition treaties mentioned in Article 312 of the MCCP. The inclusive definition contained in the MCC is inspired by the commentaries to the Organization for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which discuss the scope of the term *foreign country* as defined in Article 1(4)(b) of the convention.

Paragraph 43: Reference should be made to the commentary to Paragraph 1.

Paragraph 44: The definition of *territory* is important in determining whether a state possesses territorial jurisdiction over a criminal offense under Article 4 of the MCC. It is also relevant to the determination of extraterritorial jurisdiction under Article 5 of the MCC. The question of territoriality of coastal seas and air space is one that is regulated by public international law and should be determined on a case by case basis. With regard to coastal seas, the generally recognized rule is that the waters 12 nautical miles from the coast of a state are considered part of its territory. A state may have certain rights regarding seas up to 200 nautical miles from its coast as part of an "exclusive economic zone" designated for the purpose of exploitation of resources; the state, however, does not have criminal jurisdiction over these waters.

Paragraph 45: The drafters of the Model Codes originally considered using the definition of *victim* contained in the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Principle 1). The declaration defines victims as "persons who, individually or collectively, have suffered damage, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal law operative within Member States." While this definition is both comprehensive and accurate in terms of defining victimhood in a general sense, it was decided to narrow this definition slightly for the purposes of drafting a legal definition of victim for use in the Model Codes. The intent of the drafters was to create a definition that is practical and workable. The interests of victims are protected throughout the Model Codes (see, for example, Chapter 5 of the MCCP), and the drafters were concerned that such rights should be enforceable in a practical sense. If the definition of victim from the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power was used in the MCC, a broad reading of it would require—for example, in Article 99 ("Notification of a Victim")— that the police make efforts to inform every person in the state who has been personally or collectively affected by a criminal offense

of the progress of the criminal proceedings. In theory, this requirement may impose an obligation upon the police to inform large numbers of individual "victims," an impracticable task that may have the adverse result of depriving victims who are more closely related to the criminal offense of their rights. The definition of victim contained in Paragraph 45 is based on a comparative survey of national legislation and the legal definition of the term *victim* contained in that legislation. The definition that was constructed gives both the person against whom the criminal offense was committed and close family members of that person enforceable rights under the MCCP. A partner (meaning a person in a nonmarital committed relationship with the person against whom the criminal offense was committed) has not been included in the definition of victim. A state may wish to consider adding partner to the list of victims. Reference should be made to Articles 72–79 and 99–100 of the MCCP and their accompanying commentaries, which address the rights of victims.

Paragraph 45 refers to an adopted parent and an adopted child. In some legal systems, it is not possible to "adopt" a child in the sense that the child will take the name of the adoptive parents. Different terminology is used to describe a relationship that is akin to adoption but in which the child maintains his or her family name. In a state that does not recognize adoption, the definition of victim used in domestic legislation should include any relationships that operate similarly to adoption.

Paragraph 46: Reference should be made to the commentary to Paragraph 2.

Article 2: Purpose of the MCCP

1. The MCCP determines the rules of criminal procedure that are applicable to criminal proceedings before the courts in [insert name of state] and to all actors and participants involved in the proceedings.
2. The MCCP sets out rules to guarantee that criminal offenses are investigated and prosecuted effectively and efficiently while at the same time guaranteeing that suspects, accused persons, victims, and all other persons coming into contact with the criminal justice system are treated equitably, fairly, and in a manner that complies with international human rights standards.
3. Any restrictions on the rights of persons in the investigation of a criminal offense may only be imposed in compliance with the MCCP and the applicable law.

Commentary

Article 2 provides a broad statement on the purpose, or goals, of the criminal procedure laws laid out in the MCCP. Two goals were of particular importance to the draft-

ers of the MCCP. First, it was important that the MCCP be tailored to fit the exigencies of a post-conflict environment. Second, it was essential to create legal provisions that would enable a criminal investigation and prosecution to be undertaken efficiently and effectively while ensuring that the rights of persons coming into contact with the criminal justice system (primarily suspects, accused persons, and victims) would be treated in a manner that complies with international human rights standards. The balancing of rights against the need to effectively and efficiently investigate and prosecute crime was a constant theme in drafting the MCCP, as it is in the drafting of post-conflict criminal procedure laws. Article 2, in setting out the purpose of the MCCP, articulates the importance of this balance. Article 2 also lays out the principle that all suspects, accused persons, victims, and all other persons who come into contact with the justice system are treated equitably and fairly.

In the aftermath of conflict, many states decide to reform their preexisting criminal laws. Some post-conflict states completely overhaul their entire criminal procedure framework. As a reaction to past human rights abuses, significant emphasis is often placed on ensuring that new laws comply with international human rights norms and standards. The United Nations report *The Rule of Law and Transitional Justice in Conflict and Post-Conflict States* (UN document S/2004/106) states that international human rights law should form the normative framework of all rule of law interventions (paragraph 9). While fully agreeing with this position, the drafters of the MCCP and many experts consulted during its creation also deemed it imperative to balance the need to incorporate international human rights norms and standards into criminal procedure laws against the need to ensure public safety and security through effective and efficient criminal investigations and prosecutions. Some post-conflict states, facing epidemics of crime, have introduced legislation that is more focused on crime control than on ensuring that human rights are adequately and comprehensively addressed. Conversely, other post-conflict states have made the mistake of tipping the scales too far in favor of a purely rights-based approach to justice. Paradoxically, this latter approach has inadvertently led to violations of human rights. Where the criminal procedure law does not provide sufficient powers to investigate crimes, the criminal process is stymied and thus the citizen's right to adequate redress for criminal wrongs committed against him or her or his or her property (inherent in a state's duty to respect and protect the rights of citizens, such as their right to life or property, under international human rights law) is not protected. In the case of El Salvador, for example, reform of domestic criminal procedure law was widely criticized for overemphasizing international human rights law and underemphasizing the need to fight crime and effectively investigate criminal offenses, to the detriment of the safety and the rights of its citizens (see Margarita S. Studemeister, *El Salvador: Implementation of the Peace Accords,* Peaceworks no. 38, United States Institute of Peace, p. 17). The example of El Salvador underscores the importance of the broad purposes of the MCCP set out in Article 2, which require that the MCCP simultaneously protect rights, ensure public safety and security, and ensure efficient and effective criminal investigations and prosecutions.

Chapter 2: Courts, Court Administration, and Provisions Relating to Court Proceedings

General Commentary

In most legal systems, the organization of courts is laid out not in a code of criminal procedure but in the country's constitution, in a law on courts, or in both. In a post-conflict setting, a peace agreement may also provide details of the composition and structure of the court system or at least of a temporary, transitional system. In some instances, the country's code of criminal procedure may contain a number of provisions regarding the court system but the code certainly does not contain the majority of such provisions.

The MCCP, along with the other Model Codes (the Model Criminal Code, the Model Detention Act, and the Model Police Powers Act), does not focus on institutional reforms of criminal justice institutions (such as police, courts, prosecutor, and defense counsel) in post-conflict states. Instead, the Model Codes address substantive and procedural laws. The purpose of Chapter 2, therefore, is not to provide a sample law on courts. Instead, this chapter sets out a skeletal and hypothetical court system to demonstrate how the provisions of all the Model Codes might work within a real court system. The inclusion of a hypothetical court system also serves to demonstrate the importance of incorporating certain elements in domestic legislation on courts, particularly elements concerning human rights. For example, Articles 15–20 of the MCCP enshrine the right to trial by an independent tribunal and by independent and impartial judges.

The court system laid out in Chapter 2 consists of trial courts that serve as the courts of first instance and an appeals court to which matters from the various trial courts are appealed. It designates a president and vice president of the court system, in addition to judge administrators who supervise each individual trial court, and a president of the appeals court. It also establishes an individual registry for each court, and provides for additional court staff. Reference should be made to the annex figure 1, for a diagram of the MCCP court system.

Part 1: Organization of Courts

Article 3: Courts in [insert name of state]

The courts in [insert name of state] consist of:

(a) trial courts;

(b) an appeals court; and

(c) [specialized courts].

Commentary

Reference should be made to Articles 4–9 on trial courts and Articles 10–14 on appeals courts. Article 3 sets up a court system with numerous trial courts but only one appeals court. Article 3 also refers to "specialized courts" but does not elaborate upon them. The reference to specialized courts is intended to highlight their potential existence, especially in a post-conflict context. Where such a court is established in a post-conflict state, it is regulated by a law outside the criminal code and criminal procedure code. Specialized courts deal with discrete crimes or groups of crimes. They may be regulated by distinct procedural provisions outside of the criminal procedure code, and, typically, they consolidate specialized knowledge or skills needed to adjudicate what are often complex crimes. For example, the United Nations Transitional Administration in East Timor created the Special Panels for Serious Crimes with jurisdiction over genocide, war crimes, crimes against humanity, torture, murder, and sexual offenses (see UNTAET Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses). A similar mandate was given to the Special Court for Sierra Leone set up in 2000 by agreement between the United Nations and the government of Sierra Leone. In Iraq, the Central Criminal Court was established in 2003 with jurisdiction over serious crime cases, including terrorism, money laundering, and drug trafficking. There are other so-called special mechanisms to prosecute and try serious criminals, such as the use of international judges or prosecutors. For a more complete discussion on these mechanisms and on special courts, see Colette Rausch, *Combating Serious Crimes in Postconflict Societies: A Manual for Policymakers and Practitioners*, pp. 80–97.

Part 2: Trial Courts

Article 4: Territorial Jurisdiction of Trial Courts

1. Trial courts are established at:
   (a) [insert location] with jurisdiction over [insert area over which the court has jurisdiction];
   (b) [insert location] with jurisdiction over [insert area over which the court has jurisdiction]; and
   (c) [insert location] with jurisdiction over [insert area over which the court has jurisdiction].
2. Where a criminal offense is committed on a vessel or aircraft that is registered in [insert name of state], the trial court of [insert location] has jurisdiction over the criminal offense. If the vessel or aircraft is not registered in [insert name of state], jurisdiction lies with the court with jurisdiction over the first port of arrival in the state.
3. Where a trial court lacks territorial jurisdiction over a case, it must promptly refer the case to the competent trial court.
4. The president of the courts must settle any dispute between two or more trial courts regarding jurisdiction over a case. Where the president determines that a particular trial court does not have jurisdiction over the case, the president must order the transfer of the case to the appropriate trial court.

Commentary

Article 4 of the MCC deals with territorial jurisdiction of the whole court system in a particular state and sets out general principles. In contrast, Article 4 of the MCCP addresses the territorial jurisdiction of individual trial courts within the broader territory of the state. Each trial court should have a specific geographical area over which it has jurisdiction. It may try cases only within its area of jurisdiction. A court that does not have jurisdiction must not try the case and must defer jurisdiction to the competent court. Any disputes should be settled by the president of the courts, who has the power to order which court should hear the case.

Article 5: Subject Matter Jurisdiction of Trial Courts

Trial courts have jurisdiction in all matters as courts of first instance.

Commentary

A "court of first instance" is the court where a criminal case commences. All criminal cases under the MCCP should be heard at first instance in the trial courts. In some states, different cases are heard in different courts of first instance. For example, less serious criminal offenses may be heard in a town court, district court, or county court, while more serious criminal offenses may be tried only before the high court. Appeals may go to a supreme court or a constitutional court. Because the MCCP does not deal with minor offenses and because it is creating only a skeletal court system, the drafters chose to provide the simplest court structure possible, namely, trial courts as the courts of first instance and appeals courts as the courts of second and final instance.

Article 6: Composition of Trial Courts

1. Each trial court is composed of judges who are appointed by the [insert appointing authority].
2. Except as otherwise provided in Paragraphs 3 and 4, the trial of an accused must be conducted by a single judge.
3. Where an offense is punishable by a penalty of imprisonment exceeding five years, the trial of the accused must be conducted by a panel of three judges.
4. An extradition hearing under Article 315 must be conducted by a panel of judges.
5. Where a case is being determined by a panel of judges, the panel must determine the criminal responsibility of the accused by a majority vote, with the vote of each judge having equal weight.

Commentary

Paragraph 1: The way in which judges are appointed—which varies greatly from one state to another—is not elaborated upon in this paragraph. This issue should be addressed in legislation outside of a criminal procedure code, either in the state's constitution, a law on courts, or a separate piece of legislation. The appointment of judges in many post-conflict states has involved the establishment of judicial councils or judicial commissions as part of overall institutional reforms efforts.

Paragraphs 2 and 3: A single judge should sit on a case where the penalty range for the criminal offense concerned is one to five years' imprisonment (reference should be made to Article 38 of the MCC for a discussion of penalty ranges). For all other criminal offenses, the case should be heard by a panel of three judges.

The jury system that is used in some legal systems has not been adopted in the MCCP. One reason for this is that the drafters concluded that in the aftermath of an ethnic or religious conflict that may have occurred in some post-conflict settings, it might be difficult to convene a jury free of bias against an accused who is not from their ethnic or religious group. Another reason is that operating a viable jury system is expensive and requires that jury members be compensated for their expenses for travel, sustenance, and so forth. In a resource-poor post-conflict state, the authorities may simply not have the means to sustain the jury system. In post-conflict Liberia, for example, victims of crime were reportedly forced to pay judges and juries to hear cases against the alleged perpetrators. Yet another reason why the MCCP's drafters opted not to embrace the jury system is because of the potential for corruption or intimidation of juries in states without adequate safeguards to prevent this. In some instances, accused persons have paid the jury to secure a not-guilty conviction. Having a case heard by a professional judge will not eliminate the threat of corruption, but it will reduce the number of people who are potential targets for bribes.

Paragraph 4: Given the complexity of requests for extradition, all such requests, irrespective of the potential penalty that may be imposed for the criminal offense in question, must be heard by a panel of three judges. Reference should be made to Chapter 14, Part 2, on "Extradition" and its accompanying commentaries.

Paragraph 5: At the end of the trial, the panel of judges will deliberate and then vote on each count in the indictment, as provided for in Article 263. The decision on whether an accused person is criminally responsible will be determined by the majority vote of the panel; two votes in favor will secure a conviction or acquittal on each count of the indictment. Reference should be made to Article 263 and its accompanying commentary.

Article 7: Judge Administrator of Each Trial Court

1. The [insert appointing authority] must designate a judge in each trial court to serve as the judge administrator.
2. The judge administrator is responsible to the president of the courts in [insert name of state] and is under his or her direction and control.
3. The judge administrator is responsible for all administrative matters in the trial court and must submit periodic reports to the president of the courts.
4. The judge administrator is also responsible for such other duties as provided for in the MCCP.

Commentary

For each trial court under the MCCP, a judge administrator must be appointed. A judge administrator is responsible for overseeing the administrative functioning of the particular trial court and plays a key role in overseeing the operations of the court, promoting its efficiency, and ensuring accountability to the public. He or she is required to make executive decisions on procedural or administrative matters concerning the trial court and to evaluate and analyze information leading to improved court administration. The judge administrator is also responsible for hearing complaints regarding court procedures or administrative procedures from prosecutors, defense counsel, or a member of the general public. The judge administrator will be responsible for developing an administrative plan for the proper, efficient, and prompt disposition of cases. His or her duties will also include the drawing up of a judges' roster that determines the duties of each judge on any given day, including those judges who are assigned to particular courts on a particular day and those assigned to "paper duties" (i.e., responding to applications and motions to the court); the roster also includes the weekend duty roster, which shows which judge is responsible for dealing with urgent matters on weekends and public holidays. Moreover, the judge administrator may be responsible for outlining the amount of cases each court can be expected to deal with effectively each month or year. This may involve the compilation of statistics, which would be included in the periodic report that the judge administrator is required to submit to the president under Paragraph 3, along with statistics on the number of motions and applications submitted to the court and the number of court staff. A proposed budget would also need to be compiled and included in the periodic report.

Paragraph 4: The "other duties as provided for in the MCCP" are laid out in Article 25 (on the duty of the judge administrator to oversee the work of court staff). Article 154 (on the assignment of a replacement judge to determine whether protected materials can be released in the absence of the judge who originally made the order for protective measures), Article 189 (on the extension of the maximum period of preindictment detention or house arrest), and Article 272 (on the assignment of a replacement judge to supervise imprisonment where the originally assigned judge is no longer available). Reference should be made to these articles and their accompanying commentaries.

Article 8: Presiding Judge of Each Panel in a Trial Court

1. Each panel of judges in a trial court has a presiding judge, designated by the judge administrator.
2. The presiding judge must lead the proceedings of the panel.
3. The presiding judge must not give directions to the other judges of the panel on substantive matters of law, their assessment of the evidence, or their findings in a case.
4. The presiding judge must nominate one judge of the panel as the judge rapporteur. The judge rapporteur has the primary responsibility for preparation of the final written judgment in the case.
5. The presiding judge must ensure order in the courtroom.

Commentary

Article 6(3) requires that a criminal offense punishable by a penalty of imprisonment exceeding five years must be conducted by a panel of three judges. In such cases, all matters relating to the criminal investigation (including motions and applications to permit certain investigatory actions, such as search and seizure) and the indictment hearing will be conducted by a single judge. At the trial stage, a panel must be assigned, and, in accordance with Article 8, each panel must have a presiding judge. The presiding judge will be designated by the judge administrator when he or she is assigned the case. The presiding judge will, in turn, nominate a judge rapporteur to prepare the judge in the case. The presiding judge will be responsible for leading the supervision of the trial proceedings, including ensuring order in the courtroom; however, the presiding judge may not direct or order the other two judges on the panel with regard to the law, the evidence, or the findings in the case.

Paragraph 5: Reference should be made to Article 41, which provides the court with the power to sanction persons for misconduct before the court.

Article 9: Cooperation between Trial Courts

1. Each trial court in [insert name of state] must cooperate with a request of another trial court in the state, including for the following measures:
   (a) service of orders, warrants, decisions, motions, or summonses of the requesting court on persons in the jurisdiction of the requested trial court;
   (b) reenactment of a criminal offense in the jurisdiction of the requested trial court;
   (c) access to the case files of the requested trial court; and
   (d) execution of a decision of the requesting court if the subject of the decision is located in the jurisdiction of the requested trial court.
2. A request for cooperation may only be denied where:
   (a) the requested trial court does not have jurisdiction to comply with the request; or
   (b) release of the information requested under Paragraph 1(c) is otherwise precluded by the MCCP.

Commentary

International cooperation (i.e., cooperation between domestic courts and the courts in another state) is addressed in Chapter 14, Part 1, of the MCCP. Article 9, in contrast, deals with cooperation between different courts within the same state. Paragraph 1 provides a nonexhaustive list of different measures a trial court can request another trial court in the domestic jurisdiction to undertake. For example, if a trial court in one location issues an order for protective measures in a case where a suspect or an accused (who must be served with the order under Article 153 of the MCCP) lives within the jurisdiction of another trial court, the requesting trial court can request that the other trial court serve the order on the suspect or the accused. In addition to service of documents, a trial court may request another court to execute a decision, to reenact a criminal offense (reference should be made to Article 240 that gives the court the power to order the reenactment of a criminal offense) or to access documentation

in the court's possession. The requested trial court may refuse a request for cooperation only where the requested court does not have jurisdiction to undertake the request or where it is legally precluded from doing so—for example, where a trial court requests the release of protected materials relating to an order for protective measures without the legal release order required under Article 155.

Part 3: The Appeals Court

Article 10: Territorial Jurisdiction of the Appeals Court

An appeals court is established at [insert location] with jurisdiction over [insert name of state].

Commentary

Under the MCCP, there is one appeals court, which has jurisdiction over the entire state. Typically, an appeals court is located in the capital city of the state.

Article 11: Subject Matter Jurisdiction of the Appeals Court

The appeals court has jurisdiction to hear appeals from trial courts and extraordinary legal remedies as provided for in Chapter 12 of the MCCP.

Commentary

Chapter 12 of the MCCP sets out the various types of appeals and extraordinary legal remedies that are permissible under the MCCP, including appeals against acquittal or conviction or against a particular penalty (Part 1), which come into play after the final judgment of the trial court; applications to reopen criminal proceedings (Part 2); and interlocutory appeals, which can be made prior to the final judgment (Part 3). Reference should be made to the general commentaries to Chapter 12, Parts 1–3 , for a discussion of the meaning and scope of appeals and extraordinary legal remedies within the context of the MCCP.