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SECURING THE RULE OF LAW: Assessing International Strategies for Post–Conflict Criminal Justice

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The past dozen years have seen a proliferation of international efforts to strengthen national criminal justice systems in post-conflict countries. Part of the burgeoning of discourses, policies and programs on the primacy of the rule of law in peacebuilding, these efforts are based on the principle that the restoration of law and order in the immediate aftermath of conflict is critical for building a durable peace. The UN Secretary-General encapsulated this growing importance of the rule of law in a 2004 report, in which he also stressed the need to develop strong national criminal justice systems for the administration of justice in accordance with international standards.

Although the imperative of promptly responding to dysfunctional or collapsed justice systems is widely acknowledged, the yield of programming in this area is patchy at best. International programs are often cited for their focus on particular institutions at the neglect of others, thus failing to take into account the inherent interdependence of the various institutions that collectively enable a criminal justice system to function. Unfortunately, as a number of countries have attested, the absence of a functioning justice system and a breakdown of the rule of law can prolong periods of instability and threaten the prospects for peace.

In reviewing current innovations as well as deficiencies in post-conflict criminal justice reform policy and practice, this report emphasizes the need for more coherent, comprehensive approaches on the part of international actors.

INNOVATIONS IN CRIMINAL JUSTICE

Building on nearly two decades of experience in strengthening national police forces, justice systems and other areas of criminal justice, international actors have recently introduced two notable innovations in criminal justice reform.

- The *Model Codes* is an innovation aimed at addressing the question of applicable law in post-conflict societies. Intended to provide a simple, useful package of codes from which competent national authorities can select the appropriate legislation for their own country's legal framework, the codes represent a cross-cultural hybrid of the world's major legal traditions. The set of codes is likely to become a useful tool in ensuring that the laws of post-conflict societies adhere to international standards and adequately deal with existing crimes.
- "*Justice Packages*" consist not of codes but of readily deployable personnel to restore security and the rule of law. The International Deployment Group, an Australian initiative, is dedicated solely to overseas deployment on peacekeeping, law enforcement and capacity building missions. Norway's Crisis Response Pool consists of judges, prosecutors, police lawyers and prison personnel who can be deployed on multilateral or bilateral assignments. Finally, the private sector has recently partnered in increasing numbers with bilateral donors to implement programs in the justice and security sectors.

REFORMING CRIMINAL JUSTICE INSTITUTIONS

Despite these developments, a number of critical areas of the criminal justice system have been persistently overlooked, avoided or under-explored by international actors.

- *Investigation* is one important area of criminal procedure where the different principles and approaches underlying civil law and common law systems have created divergences in practice. However, such divergences have tended to be little understood by international field staff, often leading to operational confusion at critical stages of criminal justice reform. In addition to the need for greater awareness of how criminal investigations are conducted in various legal systems, there is a need to better address the specific challenges that post-conflict situations pose, such as the rise in organized crime and sex-based crimes.
- Strong *criminal defense* propels judges and prosecutors to improve their own performance and keeps them accountable, leading to a ripple effect of improvement for the entire justice system. Nevertheless, support for criminal defense has been markedly inadequate. In order for reform to be credible and sustainable, both domestic and international actors will need to acknowledge the value of strong defense and secure the resources needed. The use of law clinics is a practical option for both providing defense and training future defense lawyers domestically.
- *Correctional institutions* have also been a victim of donor inattention, with consequences to human rights and the health of the entire justice system. As with criminal defense, reforming the corrections system is a highly cultural endeavor, involving the introduction and promotion of concepts that may be altogether foreign to local customs. Engagement with national authorities is therefore fundamental for identifying local practices and ensuring context-specificity to programming. This should include consultations not only with government representatives, but also with those responsible for the actual implementation of correctional policies.

- Effective *management* is about translating broad goals and principles into operational directives. It involves strategic planning and good hiring practices, and seeks to create a shared sense of organizational identity. Donor support should place greater emphasis on building up viable systems of management for all criminal justice institutions. Court management may require particular attention as it can serve as the critical hub linking all of the institutions of criminal justice together, thus making for a more coherent, cooperative, coordinated system.
- Donors have tended to undertake reform without sufficient understanding of *customary* or *informal laws* or systems and their contribution to justice. The challenge is to find a balance between relying on local laws and traditions to complement the formal justice system on the one hand, and upholding international standards of human rights and principles of democratic governance on the other. International actors should proactively consult with local partners who are knowledgeable about informal avenues of dispute settlement and justice, and sensitive to the benefits and dilemmas of integrating them in the administration of justice.
- *Agree at the outset on a strategic and flexible plan that clearly reflects priority areas.* A "comprehensive" or "holistic" strategy should not be seen as antithetical to the need to prioritize in the face of limited resources and urgent concerns. The aim of prioritizing is to realistically map out the successive stages within the large-scale reform plan so as to make the comprehensive reform achievable.
- *Cooperate and communicate more regularly and systematically with other donors.* When the work of police, prosecutors, defenders and prisons are so closely linked, it nearly defeats the purpose of reform when a host of donors targeting the same system fails to coordinate under a coherent overarching strategy. Coordination between donors can occur only if deliberately planned; as such, donors would need to review successful cases from the past or explore new mechanisms of coordination, ensuring that such mechanisms are incorporated into the reform strategy.
- *Consult and communicate widely, regularly and meaningfully with national actors.* Reform of the criminal justice system is a highly cultural endeavor that should be tailored to specific local contexts, and consulting with national actors is a means of tapping into the best resources available in that respect. Care and discretion should be exercised in identifying national actors, as genuine representatives may not always be evident and may come from various sectors of society.
- *Hire staff with appropriate technical and cultural skills.* Qualified staff in criminal justice reform will certainly have the requisite technical competence, training and experience in their respective areas. Beyond this, they will also have the cultural skills with which to engage constructively with national actors, demonstrate

TOWARD STRATEGIC APPROACHES

The greatest challenge for criminal justice reform policy is to ensure that international approaches to reform are strategically planned and target the span of interdependent institutions that together enable the criminal justice system to function. The proposals below are offered with the caveat that implementing comprehensive reform of any kind is a complex task; efforts to change entrenched practices and systems can be expected to confront some level of resistance even in the best of circumstances.

awareness of and sensitivity to the local context, and respect the knowledge and expertise of their national and international partners. Depending on circumstance, particular language skills may also be essential.

- *Invest the time required to gain real understanding of the legal context.* Even the existence of the Model Codes does not exempt international actors from the need to understand the legal context of the country in question, including the legal tradition on which its laws are based, the role of customary laws and authorities, the adequacy

of the law to deal with existing crimes, and the compatibility of the law with international standards.

- *Formulate an outreach strategy.* Effective communication with the public on reform of the justice sector is vital for restoring confidence in state institutions. Outreach should aim to inform the public of the reasons for criminal justice reform, of the objectives and processes involved in criminal justice, and of actual trial proceedings, thereby enabling citizens to have a stake in the justice process.

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