

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

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# REPORT

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## Executive Summary

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.

### 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.

- *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 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 institution. 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.

## I. Introduction

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 and programs aimed at strengthening the rule of law, 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.<sup>1</sup> Reform initiatives have involved a multitude of actors, including United Nations (UN) departments and agencies, multilateral organizations, international financial institutions, donor governments, non-governmental organizations (NGOs) and the private sector, and they have been implemented under an equally wide range of banners, including "rule of law programs," "security sector reform," "justice and security sector reform," "legal reform," "criminal justice reform" and "judicial reform," as well as more sector-specific headings such as "police reform" and "penal reform." The UN Secretary-General encapsulated this growing importance of the rule of law in an August 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.<sup>2</sup>

Recent UN operations in particular tell an illustrative story of the increasing priority afforded to re-establishing law and order institutions. From weak and ineffectual attempts at judicial reform in Cambodia and police reform in Haiti in the early

1990s, interventions in the justice and public security sectors mushroomed rapidly to encompass policing and the revamping of police forces, human rights monitoring, and legal and judicial reform in such post-conflict countries as Somalia and Bosnia and Herzegovina, followed by the actual administration of justice through the exercise of executive authority in Kosovo and East Timor. Since 2003, the mandates of UN missions in Liberia, Côte d'Ivoire, Burundi and Haiti have included major rule of law and human rights components.<sup>3</sup>

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.<sup>4</sup> Such approaches are akin to several uncommunicative mechanics trying to repair their favorite parts of one broken machine while keeping other damaged parts untouched, with the predictable result that the various parts are fixed but the machine remains uselessly out of order. In addition, the mixed record raises questions as to the adequacy of the very tools, mechanisms and processes used to implement reform. 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.<sup>5</sup>

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<sup>1</sup> See, for example, Agnès Hurwitz and Kaysie Studdard, "Rule of Law Programs in Peace Operations," International Peace Academy, August 2005; Antonia Potter, "The Rule of Law as the Measure of Peace? Responsive Policy for Reconstructing Justice and the Rule of Law in Post Conflict and Transitional Environments," Centre for Humanitarian Dialogue, May 2004; and Hansjörg Strohmeyer, "Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor," *American Journal of International Law* 95, January 2001, p. 60.

<sup>2</sup> Report of the Secretary-General, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies," S/2004/616, August 23, 2004, para. 34-37.

<sup>3</sup> The mandates of these and other past and current UN missions are available at <http://www.un.org/Depts/dpko/dpko/index.asp>.

<sup>4</sup> See Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War*, Cambridge: Polity Press, 2000, p. 55.

<sup>5</sup> Centre for Humanitarian Dialogue, "Assistance to Justice and the Rule of Law in Afghanistan: A Strategic Analysis," February 2004, pp. 3-4.

Even at the level of scholarly research, the need to strengthen criminal justice systems to ensure fair and timely trials of future crimes has received far less attention than, for instance, the establishment of transitional justice mechanisms to try perpetrators of past crimes.<sup>6</sup> Ending impunity certainly calls for accountability for those responsible for past atrocities, but it also necessitates legal and institutional reforms to mark a break with the past and pave the way for the establishment of a society that respects the rule of law.

To examine the need for a more coordinated and strategic approach to post-conflict criminal justice, the International Peace Academy's Security-Development Nexus Program convened a meeting of experts titled *Securing the Rule of Law: Assessing International Strategies for Post-Conflict Criminal Justice* on March 14–15, 2005, in New York. The meeting gathered together policymakers, practitioners, academics and researchers representing a wide range of institutions to review: 1) current trends and innovations in criminal justice reform; 2) key aspects of reform that may have received insufficient attention from donors; and 3) new issue areas and options for improved policy and practice.<sup>7</sup>

This paper is informed by, and builds on, the discussions from the experts' meeting. It provides an overview of current international approaches to post-conflict criminal justice reform and emphasizes the need for more comprehensive, less ad hoc approaches

on the part of international actors. The paper is divided into three parts. Part II examines recent advancements in ensuring justice in the aftermath of conflict, while Part III identifies persisting deficiencies with regard to international support for criminal justice. In Part IV, the paper concludes with a set of policy recommendations for international actors.

## II. Innovations in Criminal Justice Reform

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 Transitional Codes and "justice packages." The wide range of actors involved in these initiatives may be an innovation in itself, considering the more limited interest in these issues until recent years.

Before engaging in a discussion on the innovations, followed by deficiencies, of criminal justice reform, a word must be said about the legal standards and traditions from which the police, judges, prosecutors, defense lawyers and correctional authorities derive their power.<sup>8</sup> In supporting post-conflict criminal justice reform, how should international standards be reconciled with the pre-existing legal system? What are the most important international standards applicable to criminal justice? Are donors sufficiently aware of existing legal traditions and how they may be applied to different contexts?

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<sup>6</sup> Charles T. Call, *Constructing Justice and Security after War*, Washington, D.C.: US Institute of Peace Press, 2006 (forthcoming), introductory chapter.

<sup>7</sup> The meetings' agenda and list of participants are available on the IPA Security-Development Program webpages, at <http://www.ipacademy.org/Programs/Programs.htm>.

<sup>8</sup> A large body of international human rights law and international standards guide the administration of justice, including the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Code of Conduct for Law Enforcement Officials; UN Standard Minimum Rules for Non-custodial Measures and for the Administration of Juvenile Justice; and many others, in addition to the core international human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR) and the instruments that pertain to the treatment of prisoners (see footnote 48). For more on international standards and norms on criminal justice, see United Nations Office on Drugs and Crime, *The Application of the United Nations Standards and Norms in Crime Prevention and Criminal Justice*, papers presented at the Expert Group Meeting on February 10–12, 2003, at the Peace Center, Stadtschlaining, Austria, available at [www.unodc.org/unodc/en/crime\\_cicp\\_standards.html](http://www.unodc.org/unodc/en/crime_cicp_standards.html).

A fundamental starting point is to be cognizant of the similarities and differences between the world's two dominant legal traditions—civil law and common law.<sup>9</sup> While notable convergences between these traditions may give the illusion of increasing similarity, at their core they are underpinned by distinct concepts and histories. The differences between the fundamentally adversarial approach of common law systems and the inquisitorial approach of civil law systems translate into differences in, for example, the roles and functions of judges, prosecutors and the police, standards of proof, the value placed on precedent, and, as detailed below, in the conduct of investigations. Despite the evolution of the two traditions over centuries of practice, these differences continue to distinguish domestic justice systems and therefore must be taken into account at the outset of reform.

#### *Legal Traditions and the Model Codes*

The Model Transitional Codes is the latest innovation aimed at addressing the complex question of applicable law in post-conflict societies and in those confronting a "rule of law vacuum."<sup>10</sup> The initiative was borne of UN experiences in post-conflict Cambodia and later Bosnia and Herzegovina, Kosovo and East Timor, where each UN mission confronted lengthy and highly technical processes of interim law reform and legislative drafting while the crimes these new laws sought to curtail continued to be

committed with impunity. In a number of cases, confusion over applicable criminal procedure law led many to simply resort to the law they knew from home, thus turning a blind eye to legal traditions and realities on the ground.<sup>11</sup> The Cambodian legal system, for example, is as mixed as the collection of colonizers, donor countries and multilateral institutions that have attempted to reform it: it is a chaotic assortment of Cambodian customary law, the French legal code, the socialist legal tradition and legislation and modifications introduced by the UN Transitional Administration, which relied largely on the common law system.<sup>12</sup> Responding to such confusion and frustrations, the 2000 Brahimi Report recommended the development of an interim legal code for ready use in post-conflict situations.<sup>13</sup>

The Model Codes initiative has since evolved to developing instead a "toolbox" of transitional codes to guide the work of legislative drafters not only in post-conflict situations, but also in any other contexts in which there is need for law reform. The potential uses of the codes are many, and the non-exhaustive list includes situations in which: 1) certain aspects of the law are contrary to international standards of human rights; 2) there are critical gaps in the pre-existing law, or the law is outdated, so that it provides insufficient guidance on, for instance, criminal procedures including arrest, detention and interrogation; and 3) there is dispute over applicable law, as occurred in

<sup>9</sup> Civil law is the basis of the legal system in the majority of countries, especially in continental Europe but also in Japan and the former colonies of continental European states. The laws of Great Britain and its former territories and colonies are generally based on the common law.

<sup>10</sup> The Model Transitional Codes project is spearheaded by the U.S. Institute of Peace and the Irish Centre for Human Rights, in cooperation with the UN Office of the High Commissioner for Human Rights. The Codes have been developed through consultation with hundreds of legal experts from around the world. The first of two volumes is planned for release by the end of 2005.

<sup>11</sup> See, for example, William G. O'Neill, *Kosovo: An Unfinished Peace*, New York: Lynne Rienner, 2002, p. 109.

<sup>12</sup> While France assisted in the preparation of the draft criminal and criminal procedure codes, Japan was involved in the civil and civil procedure codes, and the World Bank was engaged in preparing commercial and trade legislation while the Asian Development Bank supported the drafting of the land tenure legislation. World Bank, "Cambodia: Legal and Judicial Reform Project," February 16, 2001. See also Project on Justice in Times of Transition, "Initiative Report: Establishing Rule of Law and Governance in Post-Conflict Societies," report of the conference held on July 11–14, 2002, Koç University, Istanbul, Turkey; and Suzannah Linton, "Cambodia, East Timor and Sierra Leone: Experiments in International Justice," *Criminal Law Forum* 12 (2001), pp. 187–202.

<sup>13</sup> A/55/305 – S/2000/809, "Comprehensive Review of the Whole Question of Peacekeeping Operations in All their Aspects," August 21, 2000, pp. 13–14.

Kosovo, or difficulty in compiling transitional law in cases where there is a need to "start from scratch," as was in Cambodia and East Timor.<sup>14</sup> The model codes consist of four components: a penal code, a code of criminal procedure, a law on detention standards and a police law. It is not meant to be a "one-size-fits-all" approach to legislative reform; neither should it be imposed on a country by external actors. Rather, it is 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. Intended to be readily applicable worldwide, the toolbox of codes represents a cross-cultural hybrid of civil, common and Islamic law.

Once available, the implementation of the codes can be expected to face a number of challenges, including how to appropriately and adequately monitor the use of the codes; determining whether at any point the codes will need to be updated or revised; ensuring that sufficient resources are available for successful law reform; and the potential need to translate the massive text into other languages.<sup>15</sup> Nevertheless, the codes initiative signifies encouraging progress in the administration of justice, attested by the fact that one frequently hears of comments from practitioners that their work in post-conflict countries would have been greatly facilitated had the Model Codes been available to them at the time.<sup>16</sup>

### *Justice Packages*

While the conceptualization in the Brahimi Report of

"a common United Nations justice package"<sup>17</sup> containing interim legal codes materialized into the Model Codes project, the Report also called for a different kind of justice package, consisting not of codes but of readily deployable personnel to restore security and the rule of law. The experts' meeting explored recent innovations in this area through three distinct examples: Australia's International Deployment Group, composed of civilian police; Norway's Crisis Response Pool, composed of judicial personnel; and the role being played by a new actor in peace operations, the private sector.

Since the UN mission in Namibia in 1988, civilian police have played an increasingly important role in peacekeeping missions. In Kosovo and East Timor, they were responsible for maintaining law and order as well as for training thousands of national police in accordance with democratic principles. Typically, in post-conflict contexts police reform is enormously complicated by the fact that former police forces—often through tight links with the military—have been implicated in violence and human rights abuses and are perceived with mistrust and fear by the public.<sup>18</sup> The effectiveness of police reform is therefore closely related to the extent to which public trust in the police can be restored.

Australian involvement in peacekeeping and capacity building missions dates back several decades and has become more entrenched in recent years. Australian civilian police played a critical role in ensuring security in East Timor after the post-referendum violence in 1999. In 2003, its regional commitment surged with the deployment of over 200 police to the

<sup>14</sup> See Vivienne O'Connor and Colette Rausch, "Laying the Foundations of the Rule of Law: The Relevance and Applicability of Criminal Law Model Codes," in Agnes Hurwitz with Reyko Huang, eds., *Rule of Law in Conflict Management: Towards Security, Development and Human Rights*, Boulder, CO: Lynne Rienner Publishers, 2006 (forthcoming).

<sup>15</sup> Ibid.

<sup>16</sup> See, for example, David Chandler, "Imposing the 'Rule of Law': The Lessons of BiH for Peacebuilding in Iraq," *International Peacekeeping* 11, no.2 (Summer 2004): 2.

<sup>17</sup> A/55/305 – S/2000/809, "Comprehensive Review of the Whole Question of Peacekeeping Operations in All their Aspects," August 21, 2000, pp. 13–14.

<sup>18</sup> See Rachel Neild, "Democratic Police Reforms in War-Torn Societies," *Conflict, Security and Development* 1, no.1 (2000), p. 22.

Solomon Islands to restore law and order, strengthen the criminal justice system and rebuild the Royal Solomon Islands Police. Reflecting the country's growing recognition of its role in contributing to peace and security in the South Pacific, in 2004 the government established the International Deployment Group (IDG) within the Australian Federal Police, a standing corps of 500 police officers dedicated solely to overseas deployment on bilateral and multilateral peacekeeping, law enforcement and police capacity building missions.<sup>19</sup> The IDG now maintains an active presence in a capacity building mission in Papua New Guinea, along with deployments in East Timor, Solomon Islands, Nauru, Cyprus and Jordan.

In UN peacekeeping missions of the 1990s, efforts to restore law and order relied overwhelmingly on reforming and strengthening the local police, with UN civilian police (CIVPOL) playing substantial roles in interim law enforcement and in training nascent police forces in post-conflict countries. One of the major and widely shared "lessons" that emerged from these missions is the imperative of paralleling police reform with reform of the judiciary, including support for judges, prosecutors, defense counsel and prisons, for the effective administration of justice. Without a functioning judiciary, even the most competent and rights-respecting police force will lose credibility if arrests do not lead to fair and timely trials. Conversely, a weak or corrupt judiciary can encourage police corruption.<sup>20</sup>

Norway's Crisis Response Pool—known as *Styrkebrønn* (Source of Strength)—is a direct response to such

lessons from Kosovo, where the UN Interim Administration in Kosovo (UNMIK), unprepared to face a judicial crisis, hastily assembled inexperienced and unqualified judges and prosecutors to create the appearance of a legal system.<sup>21</sup> Established by the Norwegian Ministry of Justice and the Police, the Crisis Response Pool is a stand-by force for civilian response to external crisis situations. It consists of judges, prosecutors, police lawyers and prison personnel—thirty members in all—who can be deployed on short notice on behalf of organizations such as the European Union, the Organization for Security and Co-operation in Europe (OSCE) and the UN or on bilateral assignments. Operational since March 2004, Response Pool teams and individuals are currently deployed in Georgia and Bosnia and Herzegovina for institution building in the judicial sector and human rights monitoring.<sup>22</sup>

While the Norwegian "justice package" is the only one of its kind and is still in an experimental stage, it represents an important and promising innovation in peace operations and deserves further review in the coming years. Other major donors, in fact, may come to replicate its design: in May 2005, the U.S. State Department's recently established Office of the Coordinator for Reconstruction and Stabilization announced that it would lead the creation of a civilian "Active Response Corps" that would deploy rapidly as first responders to crisis situations.<sup>23</sup>

A third recent development in providing assistance to the justice sector is the growth of public-private partnerships. As proponents of private sector involve-

<sup>19</sup> Gordon Peake and Kaysie Studdard Brown, "Policebuilding: The International Deployment Group in the Solomon Islands," *International Peacekeeping*, Winter 2005 (forthcoming).

<sup>20</sup> See Rachel Neild, "Democratic Police Reforms in War-Torn Societies," p. 31.

<sup>21</sup> William G. O'Neill, *Kosovo*, p. 77; David Marshall, "Reviving the Judicial and Penal System in Kosovo" in Michael Pugh and Waheguru Pal Singh Sidhu, eds., *The United Nations and Regional Security: Europe and Beyond*, Boulder, CO: Lynne Rienner Publishers, 2003, pp. 158–159.

<sup>22</sup> Based on the presentation by Karin Margrethe Bugge, Director General of the Norwegian Ministry of Justice and the Police; see also <http://www.eu-norway.org/relationship/>.

<sup>23</sup> See U.S. State Department, "Media Note: Building Civilian Conflict-Response Capabilities," May 24, 2005, at <http://www.state.gov/r/pa/prs/ps/2005/46721.htm>.

ment in peace operations see it, it is a matter of comparative advantage: private contractors offer fast, flexible responses to crisis situations, relative to civil servants; they are cost-effective and operate based on government policy; and they can serve as cover for those states that are reluctant to contribute their own armed forces. Private contractors have been used to carry out a range of functions in the security and justice sectors, including rule of law reform; disaster relief; recruitment, vetting and training of civilian police; security assistance; and security sector reform.<sup>24</sup>

While the many benefits of tapping into private sector support are readily recognized, the issue of accountability remains a major concern as the role of the private sector continues to expand.<sup>25</sup> To whom are the contractors accountable? Are they subject to local law, donor governments' law or international law? Who monitors their activities? Currently, there is no international regulatory framework to bring private contractors under the authority of international law.<sup>26</sup> As the private sector gains an accepted foothold in peace operations, these questions will demand serious consideration and appropriate responses.

### III. Deficiencies in Current Approaches

While the Model Codes and "justice packages" are important developments in strengthening national criminal justice systems in post-conflict contexts, a number of critical areas of criminal justice reform have been persistently overlooked, avoided or under-explored by international actors. As a pattern, throughout the past fifteen years reform of the police forces has been given considerable attention in peace

operations while laws, courts, prosecution, defense, judges and prisons remained more or less in states of disrepair. Without intensified research, investment and programming in these areas, restoring the rule of law may, despite recent innovations, simply face the same pitfalls as in the past.

#### *Investigation*

Criminal investigation involves conducting an official and systematic inquiry into an alleged crime. By unearthing facts and evidence, investigation provides prosecution, defense and the court with a basis on which to build a case and pass a judgment. Investigation is one important component of the criminal justice process where the different principles and approaches underlying civil law and common law systems show significant divergences in practice. As noted, however, such divergences have tended to be little understood by practitioners, often leading to operational confusion at critical stages of criminal justice reform.

The two dominant legal traditions have not created a simple dichotomy between the inquisitorial and adversarial approaches—labels which may now be deemed outdated precisely because of the significant overlaps between the two. There is instead a variation across countries in the way investigation is conducted, which puts a limit on the utility of generalizations. However, for the purposes of this paper two related points should be raised. First, the very structure of the criminal justice system is underpinned by the different logics of the two systems. The structure of civil law traditions tends to be more centralized and hierarchical, with each

<sup>24</sup> Francesco Mancini, "In Good Company? The Role of Business in Security Sector Reform," London and New York: Demos and International Peace Academy, 2005.

<sup>25</sup> The growing privatization of security has raised similar concerns over accountability issues. See Rachel Neild, "Democratic Police Reforms in War-Torn Societies," p. 33.

<sup>26</sup> Peter H. Ganz, "The Private Sector's Role in Peacekeeping and Peace Enforcement," Refugees International, November 18, 2003.

<sup>27</sup> Call and Stanley point out that this is because reforming the police is simpler and can be done more quickly than reforming judicial institutions. Charles T. Call and William Stanley, "Civilian Security" in Stephen John Stedman, Donald Rothchild and Elizabeth M. Cousens, eds., *Ending Civil Wars: The Implementation of Peace Agreements*, Boulder, CO: Lynne Rienner, 2002, p. 321.

branch of the system subordinate to the authority above it. Thus, the police are subordinate to the prosecutor's office, the prosecutor's office to the ministry of justice, and the ministry of justice to the parliament, or some variation thereof. In contrast, in common law systems there is no clear line of authority between the various branches, but the branches work in a system of mutual checks and balances. Thus, police, prosecutors, judges, courts and correctional authorities enjoy localized decision-making powers even as they cooperate procedurally.<sup>28</sup>

This observation leads to the second point, which is that the differences between the legal traditions account for the variations in *who* conducts the investigations. In common law systems, it is typically the police who drive the investigation process and carry much of the onus of producing evidence that will enable successful prosecution. Upon completion of the investigation, the police may file charges in some countries while in others the reports are sent to the prosecutor, who can then decide whether or not to charge the suspect. The court does not take part in investigation, but rather acts as an impartial arbiter in adjudication. The plaintiff and the defendant seek to present the facts in the light most favorable to themselves.

In most civil law systems, the link between the police and prosecutor is inherently tighter. Typically, prosecutors can initiate investigations and decide whether or not to bring cases to court. Reflecting the truth-finding nature of the inquisitorial approach, investigation by the office of the prosecutor is aimed at uncovering both incriminating and exonerating evidence. In France and other civil law countries, the

*juge d'instruction* (investigating magistrate), who is both an independent judge and a member of the judicial police, may be called in by either prosecution or defense to investigate complex cases. The investigating magistrate leads the investigation, hears suspects and witnesses, and hands over suspects to court for trial. Thus, the court works closely with the prosecutor to amass evidence. In line with the shifting and evolving of the two legal traditions, however, the power vested in the investigating magistrate has been in decline in several countries, while in others its function has disappeared altogether.<sup>29</sup> For instance, in the Brcko District of Bosnia and Herzegovina, extensive consultations with legal and judicial authorities led to the consensus that investigative judges were ineffective and inefficient; the entity was therefore abolished in the process of revising the law on criminal procedure.<sup>30</sup>

In addition to the need for greater awareness of how investigation is conducted in different legal systems, there is a need to better address the specific challenges that post-conflict situations pose to the conduct of investigations. For example, it was noted that tackling crimes germane to post-conflict contexts may necessitate a more prosecutorial-oriented approach to investigation. In Kosovo, UNMIK institutionalized a system whereby police investigators were required to contact prosecutors at very early stages of investigation on all legal matters and on any significant case. This approach not only bolstered the quality of investigations, but also enabled the prosecution of organized crime—a rampant problem in post-conflict Kosovo—by ensuring close police-prosecutor collaboration in finding evidence.<sup>31</sup> The involvement of competent prosecutors may also serve

<sup>28</sup> Nico Jörg, "Convergence of Criminal Justice Systems: Building Bridges—Bridging the Gaps," paper presented at the 17th Conference of the International Society for the Reform of Criminal Law, The Hague, Netherlands, August 24–28, 2003, pp. 2–3.

<sup>29</sup> See *ibid.*; and Daniel D. Ntanda Nsereko, "Prosecutorial Discretion before National Courts and International Tribunals," *Journal of International Criminal Justice* 3 (2005): 124–144.

<sup>30</sup> Michael G. Karnavas, "Creating the Legal Framework of the Brcko District of Bosnia and Herzegovina: A Model for the Region and Other Postconflict Countries," *American Journal of International Law* 97, January 2003, pp. 122–123.

<sup>31</sup> Gregory L. Naarden and Jeffrey B. Locke, "Peacekeeping and Prosecutorial Policy: Lessons from Kosovo," *American Journal of International Law* 98, pp. 735–736.

as a deterrent to police abuse in investigation, which is another common problem in countries with weakened justice systems.

Another sensitive issue investigators will need to confront is the issue of sex-based crimes. Violence against women usually rises with conflict but does not decline in the war's immediate aftermath. Prosecutors' oft-heard stance that they do not wish to "upset the victims" is counter-productive; post-conflict criminal justice should deal squarely with the issue, recognizing that rape and other forms of sexual violence committed during an armed conflict can be prosecuted as war crimes, torture, crimes against humanity and, in some cases, genocide.<sup>32</sup>

To ensure a more "holistic" and interdisciplinary approach to reform, two steps are particularly important in strengthening the investigation phase of criminal justice.<sup>33</sup> The first is the need to formulate a strategic and flexible justice plan at the outset. The plan should be based on a pre-assessment of the country's situation and of the types of crimes that have been committed during and after the conflict. It should also clearly specify the mandates of the various actors (police, prosecutors, judiciary, corrections) involved in criminal investigation.

Second, support for investigators, be they police or prosecutors, should place an emphasis on education and training. For example, in order for the police to cooperate with prosecutors, the former would need to receive training on criminal procedure while the latter, usually far less prioritized, should also receive due attention. In Kosovo, donors recognized the need to strengthen prosecutors only after large-scale deployment of international police failed to restore

the rule of law. Recognizing the weakness of locally staffed judges and prosecutors next to international civilian police, UNMIK initiated what was then an unprecedented program to bring in international prosecutors and judges.<sup>34</sup>

### *Criminal Defense*

One area which has tended to be left out of the "holistic" approach to criminal justice reform is support for criminal defense. Defenders work with defendants to ensure that the latter enjoy their right to due process. A strong 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. It also serves as a deterrent against abuse by police, prison and other authorities. It is part and parcel of ensuring fair trials in an environment where the presumption of innocence for those suspected of war crimes, crimes against humanity and other crimes under international law, at least in popular perceptions, is almost nonexistent.<sup>35</sup>

Nevertheless, support for criminal defense in international efforts to rebuild the justice sector has been markedly inadequate, particularly compared to the attention given to police, judges and prosecutors. In East Timor's Special Panel for Serious Crimes, established to try perpetrators of the atrocities of 1999, the public defenders' office was by far the weakest amongst the other pillars of the tribunal. It was initially staffed by Timorese lawyers who had no experience in litigation, until the "inequality between the inexperienced East Timorese defenders and the professional international prosecutors eventually became too obvious to ignore" for the UN mission.<sup>36</sup>

<sup>32</sup> See, for example, Human Rights Watch, "Kosovo: Rape as a Weapon of 'Ethnic Cleansing,'" March 1, 2000, <http://www.hrw.org/reports/2000/fry/index.htm#TopOfPage>.

<sup>33</sup> Based on the presentation by Roberta Baldini, Department of Justice - Criminal Division, UNMIK.

<sup>34</sup> Michael E. Hartman, "International Judges and Prosecutors in Kosovo: A New Model for Post-Conflict Peacekeeping," United States Institute of Peace, Special Report No. 112, October 2003; and Gregory L. Naarden and Jeffrey B. Locke.

<sup>35</sup> Based on a presentation by Natalie Rea, International Legal Foundation.

<sup>36</sup> Suzanne Katzenstein, "Hybrid Tribunals: Searching for Justice in East Timor," *Harvard Human Rights Journal* 16 (2003), p. 263.

The reasons for such outcomes are primarily political. Defendants are a powerless and unpopular constituency, and more often than not there is a general lack of understanding among the local populace of the very concept of legal defense, especially defense of those who have been accused of serious crimes. Furthermore, identifying and providing competent defense lawyers can be exorbitantly taxing on already meager budgets.

Strengthening criminal defense may therefore entail a far more challenging need to alter the public mindset so that national actors will themselves come to raise the demand for defense. As with prosecution, this requires an inclusive, education-oriented approach, focusing not only on training defenders but also on effective outreach to present to the public the basis for supporting criminal defense (and, indeed, for supporting criminal justice reform itself).<sup>37</sup> Keeping the public informed of judicial policy and proceedings also enables citizens to have a stake in the process, which is exceedingly important if the pursuit of justice is to have a societal impact.

It has been noted that even among donors defense generally lacks the prestige afforded to prosecution, with the result that the latter easily attracts "the best and the brightest" while defense receives scant support.<sup>38</sup> Thus, donor countries are not spared of the need to change the public mindset. One practical idea deserving further consideration is that of using law school clinics for legal defense. This would serve a dual function of training and building up a corps of

future defense lawyers while actually providing defense where needed. This system could be adopted in law schools of both donor and post-conflict countries.

NGOs such as the International Legal Foundation (ILF) have also stepped in to fill the void. In Rwanda and Afghanistan, the ILF has assisted in strengthening public defense by providing experienced public defenders, training local defenders and building defenders' offices in the face of expected donor aversion to defense.<sup>39</sup> In order for reform to be credible and sustainable, however, both the people of the post-conflict country and donors will ultimately need to recognize the value of strong defense and secure the resources needed—a process that is likely to happen only gradually, if experience is a guide, and which will require significant advocacy and awareness-raising.

### *Corrections*

Though widely recognized as one of the central pillars of the criminal justice system, correctional institutions have also been a victim of donor inattention, with consequences to human rights and the health of the justice system itself.<sup>40</sup> A leading study of corrections in UN peace operations states that corrections "is that component of the criminal justice system which has the greatest impact on the freedoms, liberties and rights of individuals."<sup>41</sup> The Handbook on UN Multidimensional Peacekeeping Operations notes: "Without the capacity to provide humane treatment

<sup>37</sup> See, for example, Peacekeeping Best Practices Unit, United Nations Department of Peacekeeping Operations (DPKO), "Lessons Learned from United Nations Peacekeeping Experiences in Sierra Leone," September 2003, pp. 65–68, available at <http://pbpu.unlb.org/pbpu/library/SL-LL%20Report.pdf>.

<sup>38</sup> This was certainly the case in East Timor's Special Panels. See Suzanne Katzenstein, "Hybrid Tribunals: Searching for Justice in East Timor," *Harvard Human Rights Journal* 16 (2003), especially p. 263.

<sup>39</sup> See the International Legal Foundation's website at <http://www.theilf.org/>.

<sup>40</sup> Curt Griffiths, "Implementing International Standards in Corrections: Challenges, Strategies and Outcomes," in UN Office of Drugs and Crime, *The Application of the United Nations Standards and Norms in Crime Prevention and Criminal Justice*, pp. 159–160.

<sup>41</sup> International Corrections and Prisons Association, "Practical Guidelines for the Establishment of Correctional Services within United Nations Peace Operations," available at [www.icpa.ca](http://www.icpa.ca), p. 2.

to prisoners, investments in police and the judiciary will have a limited effect."<sup>42</sup>

Nevertheless, donors' adherence to these principles has not been forthcoming. In East Timor, with almost all detention centers destroyed and donors reluctant to fund the building of prisons, the UN transitional administration had to release prisoners in order to detain the alleged perpetrators of the post-referendum violence of late 1999.<sup>43</sup> In Afghanistan, despite the appalling conditions of prisons throughout the country, no lead donor country to support prison reform was identified until March 2003, while lead donors had taken up reform of the judiciary and the police much earlier.<sup>44</sup>

The complex task of managing correctional institutions is usually magnified in post-conflict situations. Prisons tend to be overcrowded, dilapidated and in unsanitary conditions, posing a great risk of the spread of infectious diseases. Treatment of detainees is often inhumane and unjust, and the provision of food, water, clothing and medicine inadequate. Furthermore, because in most cases the police and courts are barely functioning, a high proportion of detainees have yet to be tried and a majority have neither been accused nor convicted of serious crime. As was the case in Afghanistan, prison staff are often poorly trained and paid, if at all,<sup>45</sup> yet, prisons are expensive to maintain, particularly for post-conflict and developing countries where scarce funds could be used for other areas of urgent need. Prisons are also costly from a socioeconomic perspective: they keep

many young men, mostly from poor families, out of the workforce, and may pose enormous risks to public health. Indeed, in developing countries the logic of detention may be entirely lost.<sup>46</sup>

As with criminal defense, reforming the corrections system is a highly culture-specific endeavor, involving the introduction and promotion of concepts that may be altogether foreign to local customs. At the same time, corrections is one area of justice reform where immediate and palpable results can be achieved in human rights. Engagement with national authorities and staff 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, such as managerial staff at correctional facilities.<sup>47</sup> Collaboration with national actors has implications for the continuity, credibility and competence of corrections systems and, perhaps more critically, for the way the general populace will come to perceive notions of public safety, security and justice.

In addition, just as the police need to be trained about the roles of prosecution and defense, so they also need to understand the function of corrections in the criminal justice process, particularly as corrections relate to their own tasks and objectives. Reform should also incorporate mechanisms to hold corrections management accountable and develop avenues through which those ill-treated can seek remedies.

<sup>42</sup> UN DPKO, Peacekeeping Best Practices Unit, *Handbook on United Nations Multidimensional Peacekeeping Operations*, December 2003, p. 98.

<sup>43</sup> Simon Chesterman, *You, the People: The United Nations, Transitional Administration, and State-Building*, Oxford University Press, 2004, p. 172.

<sup>44</sup> Amnesty International, "Crumbling Prison System Desperately in Need of Repair," July 8, 2003, available at <http://web.amnesty.org/library/index/engasa110172003>.

<sup>45</sup> *Ibid.*

<sup>46</sup> See Michael Welch, "Restoring Prison Systems in War Torn Nations: Correctional Vision, Monitoring, and Human Rights," Paper presented at the Ancillary Meeting at the Eleventh UN Congress on Crime Prevention and Criminal Justice, Bangkok, Thailand, April 18–25, 2005, p. 7.

<sup>47</sup> Curt Griffiths, p. 162.

International instruments and norms providing basic standards on prison management should inform the work of all relevant authorities and staff.<sup>48</sup>

A well-functioning corrections system focuses not only on detention and prison management, but also on providing support to prisoners themselves. The successes achieved through the use of "paralegal clinics," where paralegals—trained aids who are the "first providers" of legal aid to ordinary citizens—would inform and educate prisoners on criminal law and their rights as prisoners, is worth highlighting. The Paralegal Advisory Service in Malawi, launched by Penal Reform International with the support of other NGOs, had the effect of re-activating the criminal justice system, drawing the attention of police and prosecutors to the plight of those in lengthy pre-trial detention, improving communication within the court system and improving case flow, all at the cost of less than \$450 a month.<sup>49</sup> The program, which has developed links with the police, courts, traditional authorities and a forum on juvenile justice, now serves seventy-five percent of the country's prison population and is increasingly seen as a model throughout Africa.<sup>50</sup> Effort must also be put into making sure that prisoners can be re-absorbed into society once they have served their time. In reality the current approach is far more incarceration- than reintegration-oriented. In this light, discussions on restorative justice may be relevant for exploring

alternatives to detention for more minor crimes, especially in post-conflict countries facing critical resource constraints.<sup>51</sup>

### *Managing Criminal Justice Systems*

Having examined some of the important yet under-explored components of the criminal justice system, an important question still remains: how should these institutions be managed, and what does management entail? What are some issues in the management of criminal justice institutions that pertain specifically to post-conflict countries?

In post-conflict situations, laying the groundwork for a court management system must go hand in hand with programs to strengthen judges, police, prosecutors, defenders and corrections. The building of any court infrastructure would be incomplete without the installment of a system with which to oversee the running of the court.

Effective management is about translating broad goals and principles into operational directives and routines of work, backed by incentive schemes to motivate compliant behavior.<sup>52</sup> For example, principles such as transparency, accountability, service orientation and human rights—which may have been previously non-existent in highly corrupt institutions—must be newly incorporated into the work

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<sup>48</sup> There are a number of international norms and instruments on the humane treatment of detainees and maintenance of decent conditions in prisons, including UN Standard Minimum Rules for the Treatment of Prisoners, the UN Standard Minimum Rules for Non-Custodial Measures, the UN Rules for the Protection of Juveniles Deprived of Their Liberty, the International Covenant on Civil and Political Rights, the International Labour Organization (ILO) conventions on forced labor, the Vienna Convention on Consular Relations and the Council of Europe Convention on the Transfer of Sentenced Persons. See UN DPKO, *Handbook on United Nations Multidimensional Peacekeeping Operations*, p. 98.

<sup>49</sup> Based on a presentation by Adam Stapleton of Penal Reform International in Malawi. See also Penal Reform International Lilongwe Office, "Energising the Criminal Justice System in Malawi."

<sup>50</sup> See [http://www.penalreform.org/english/region\\_africa.htm#malawi](http://www.penalreform.org/english/region_africa.htm#malawi).

<sup>51</sup> See Eleventh United Nations Congress on Crime Prevention and Criminal Justice, Bangkok, April 18–25, 2005, "Enhancing Criminal Justice Reform, including Restorative Justice: Background Paper," UN Doc. A/CONF.203/10, February 24, 2005.

<sup>52</sup> Based on the presentation by Otwin Marenin, professor of political science and director of the Criminal Justice Program at Washington State University. On the application of similar concepts to the building up and management of the police, see Marenin, "Restoring Policing Systems in Conflict Torn Nations: Process, Problems and Prospects," Geneva Centre for the Control of Armed Forces (DCAF) Occasional Paper No. 7, June 2005.

routine in such a way that staff are assured that adhering to these principles is a boon, rather than a detriment, to their careers. Good management also involves strategic planning that takes into account any past lessons learned, views reform as a long-term process, establishes fundamental processes linked to desired outputs and outcomes, and values popular legitimacy.

Once the vision for reform is set in place, management must staff the organization with appropriate personnel; at this stage, careful recruitment and training greatly influence the kind of organization that will emerge. In addition, management as an institution seeks to create a shared sense of organizational identity and culture, which are particularly important for institutions such as the police. Management will also put in place effective channels of communication, structuring the organization so that information flows from the top to the bottom and vice versa.<sup>53</sup>

Court management is one area that has significant impact on the functioning of the judicial system. It involves overseeing issues regarding personnel, budgets, infrastructure, facilities and technology, planning and case management. Good court management aims to increase the efficiency, transparency and professionalism of the court by ensuring that personnel are well trained, facilities are adequate, and that there is order to—and sufficient budgeting for—case management, case flow, record management, archiving and compiling case statistics.<sup>54</sup> It is important that court managers have effective working relationships with all of the various components of the justice system, including judges,

prosecutors and defenders, and ensure effective consultation with and between them. In this sense, court management serves as the critical hub linking all of the institutions of criminal justice together, making for a more coherent, cooperative, coordinated system where cases flow more smoothly and where timeliness, transparency and consultation become the rule.<sup>55</sup>

### *Customary Criminal Justice*

As donors increasingly prioritize the restoration of the justice system in the aftermath of conflict, what is often marginalized in the endeavor is the consideration given to the vitality and viability of informal justice or dispute settlement mechanisms. Many states throughout the world have within them procedures and authorities based on what are variously called "customary," "informal," "traditional" or "local" laws and systems. In many countries, such systems are the only accessible means of pursuing "justice" for large proportions of the population. For international actors, the point should be not so much to see whether the formal or the informal system works best, as to consider them as two aspects of a system that work to complement each other.<sup>56</sup>

Resorting to local or traditional structures of justice can have many advantages in a post-conflict context. Local forums may help fill the legal vacuum while court houses are being rebuilt, judges, prosecutors and lawyers trained, and legislation adopted. Where the formal system is more or less in place, local mechanisms can further supplant it by easing the overload of cases going to state courts. Informal systems are also less expensive and more accessible

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<sup>53</sup> For instance, organizations such as the police often confront classic cases of the principal-agent problem, whereby the "principal" at the top does not have all the information on the performance and behavior of the rank-and-file "agent." As a participant noted, mid-level managers may be needed to bridge any existing gaps in management.

<sup>54</sup> See World Bank, *Legal and Judicial Reform: Strategic Directions*, 2003, pp. 29–31.

<sup>55</sup> Based on the presentation by Robin Vincent of the Special Court for Sierra Leone.

<sup>56</sup> This was a point raised by Sinclair Dinnen of the Australian National University.

for rural residents, and may enjoy more legitimacy.<sup>57</sup>

At the same time, the informal system may pose an impediment to "justice" itself, and therefore should not be taken as a panacea. Traditional authorities may discriminate against certain social and ethnic groups or may rule arbitrarily, and informal systems may lack accountability and espouse legal principles and forms of punishment that belie international standards. In addition, it is often extremely difficult in post-conflict situations to identify local partners who can and will share knowledge in customary law and tradition with international actors. Identifying "traditional" authorities may in itself be a challenge.<sup>58</sup> International actors, for their part, often overlook the fact that customary law is not static but highly dynamic and flexible, and as a result may not be uniformly acceptable to all citizens.<sup>59</sup> For a practitioner from the Democratic Republic of Congo (DRC), the very term "customary" is inappropriate and confusing as there is no one "customary law" that is accepted by all in a multi-ethnic, multi-linguistic society such as the DRC.<sup>60</sup> Similarly, in Bougainville, Papua New Guinea, what is called "customary" was ironically not the system familiar to most people for much of recent history. It was only in the aftermath of the recent conflict that citizens, eager to mark a break with the colonial period, sought to return to traditional forms of justice. This meant that it would take time and a great deal of awareness for the people to internalize the changes brought on by the re-introduction of the so-called "customary" law.<sup>61</sup>

The challenge, then, 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. The imperative in this undertaking is to proactively seek meaningful consultations with local partners who are knowledgeable about informal avenues of dispute settlement and justice and sensitive to the benefits, complexities and dilemmas of integrating the informal system into the span of possible judicial mechanisms. Many of today's proponents of customary law are well educated and aware of international standards and norms, and seek to resurrect customary law in conformity with such standards. Further innovations in this regard seem entirely possible, as demonstrated by a publicly accepted form of policing in Bougainville, now enshrined in its constitution, which links the formal justice sector with traditional systems of law and justice.

#### IV. Conclusion and Key Recommendations

International efforts to secure the rule of law in the aftermath of conflict are undergoing a period of significant activity, experimentation and innovation. From the Model Transitional Codes to fill gaps in legal systems to "justice packages" for rapid response to post-conflict situations, from NGO programs to provide paralegals and defenders to private sector involvement in restoring order, these initiatives seek to base criminal justice reform fully on past experiences and emerging lessons.

However, donor approaches have hitherto been marked by a lack of coordination and coherence, with

<sup>57</sup> On this last point, see Jennifer Widner, "Courts and Democracy in Post-Conflict Transitions: A Social Scientist's Perspective on the African Case," *American Journal of International Law* 95 (2001), p. 65. See also The International Legal Foundation, "The Customary Laws of Afghanistan," September 2004, available at [www.TheILF.org](http://www.TheILF.org).

<sup>58</sup> Hansjoerg Strohmeyer, "Policing the Peace: Post-Conflict Judicial System Reconstruction in East Timor," *University of New South Wales Law Journal* 24, no.1 (2001), p. 179.

<sup>59</sup> See Rama Mani, *Beyond Retribution*, pp. 81–82.

<sup>60</sup> Based on the presentation by Batabiha Bushoki, International Peace Academy.

<sup>61</sup> Based on the presentation by Emmart Tsimes, Community Auxiliary Police, Bougainville, Papua New Guinea.

a panoply of actors working on certain sectors of their choice, at the neglect of other components and yielding at best sub-optimal results in terms of achieving a functioning justice system. The greatest challenge may therefore be the most critical for ensuring effective reform: approaching the reform of the criminal justice system in a more comprehensive manner.

Below is a set of broad and more sector-specific policy proposals, aimed at donors and other international actors, each of which can be seen as a direct subset of an umbrella recommendation for criminal justice reform: *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 work towards strengthening the rule of law.*

It is not without the necessary dose of reality and practicality that these policy proposals are offered. Without a doubt, implementing "comprehensive reform" of any kind is a complex undertaking: its vast scope encompasses multiple institutions and actors at once, and changing entrenched practices and systems of an institution is likely to confront some level of resistance even in the best of circumstances. However, the need to strengthen the criminal justice system as a whole has been demonstrated repeatedly by past challenges and failures and is now widely acknowledged. The national and international actors involved will need to strike an agreement on who can best lead the process, what role each actor should play, and how the process can be managed.

#### *Criminal Justice Reform Policy Recommendations*

- *Support the currently under-resourced yet critically important components of the criminal*

*justice system, including defense and corrections.* Reform focused solely on police, judges or prosecutors, no matter how rigorous, may have a limited effect on justice administration, and may in fact create space for human rights violations associated with unfair trials and lengthy incarceration.

- *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 security and socioeconomic 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.* This is now an age-old recommendation with which every donor agrees, but finds few incentives to heed. Yet, 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.*<sup>62</sup> Reform of the criminal justice system is a highly cultural endeavor that will succeed only if tailored to specific local contexts. Whether a program targets customary or informal justice systems,

<sup>62</sup> On enhancing partnerships between national and international actors in peacekeeping, see International Peace Academy and WSP International, "Building Effective Partnerships: Improving the Relationship Between Internal and External Actors in Post-Conflict Countries," Peacebuilding Forum Conference Report, October 2004.

management, criminal defense or the police, consultation with national actors is a means of tapping into the best resources available in that respect. Past experiences, furthermore, have demonstrated that wide in-country consultations lend legitimacy to internationally assisted programs and help ensure that reforms are sustainable. Care and discretion should be exercised in identifying national actors, as genuine representatives may not always be readily apparent and may come from various sectors of society.

- *Hire staff with appropriate technical and cultural skills.* The best planned strategy for reform will fall short of its goals if programs are not staffed with the right people. The "right people" in criminal justice reform will certainly have the requisite technical competence, training and experience in their respective areas, and previous overseas experience is an enormous asset, if not a prerequisite. Beyond this, they will also have the cultural sensitivity with which to engage constructively with national actors, demonstrate awareness of and sensitivity to the local context, and respect the knowledge and expertise of their national and international partners. Depending on circumstances, particular language skills may also be an essential part of the skills set.
- *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.* Past criminal

proceedings in post-conflict situations, including the experiences of the international criminal tribunals of Rwanda and the former Yugoslavia, have demonstrated the importance of an effective outreach strategy. 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. Effective communication with the public on reform of the justice sector is vital for restoring confidence in state institutions.

#### *Sector-Specific Recommendations*

- *Conduct implementation evaluations of the Model Codes and "justice packages."* Evaluation of the Model Codes should highlight any substantive areas in need of revision and propose any steps needed to ensure appropriate implementation. Evaluations of new initiatives such as the Norwegian Crisis Response Pool and public-private partnerships should aim to bring to light their contributions and shortfalls, keeping in mind the possibility of replication of successful models.
- *Formulate a clear strategy for investigation from the outset.* The strategy should be based on sound understanding of the legal context and the specific challenges of post-conflict environments, as well as on pre-assessments of the crimes that have been committed during and after the conflict. The role of each actor involved (police, prosecutor, court, etc.) should be clearly designated and sufficient training provided.
- *Increase support for criminal defense.* This requires not only boosting the funding allocated to defense, but also initiating efforts to train local defenders and raise awareness of the

- critical function of criminal defense in the justice process. The use of law clinics is a practical option both for providing defense and for training future defense lawyers domestically.
- *Increase support for correctional institutions.* Priorities may range from building infrastructure and ensuring that prisons are well managed, to informing relevant authorities and staff of the basic standards on prison management and providing support to prisoners. Engagement with national authorities and staff is fundamental for identifying local practices and ensuring that reform is tailored to the specific context. This should include consultations not only with government representatives, but also with those responsible for the actual implementation of correctional policies, such as managerial staff at correctional facilities.
  - *Support the creation of an effective system of management for the criminal justice system.* Competent management helps ensure that criminal justice reforms are sustainable. Given the links between the court and all other components of the criminal justice system, special attention should be paid to strengthening court management in order to increase its efficiency, transparency and professionalism.
  - *Examine the role of customary justice systems or authorities.* Decisions on how to incorporate such systems and authorities into the reform process should be made in consultation with national actors. In doing so, the advantages and disadvantages of using traditional structures of justice should be clearly identified, ensuring that the justice system upholds international standards of human rights.

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