User's Guide

Introduction

This User's Guide introduces *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 co-operation with the United Nations Office of the High Commissioner for Human Rights and the United Nations Office on Drugs and Crime.

This volume, volume I, contains the first of the Model Codes—the Model Criminal Code. Volume II contains the Model Code of Criminal Procedure, 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 Criminal Code. 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, and 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 law-making 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 (fall 2007) 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 (spring 2008) 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 are 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 Criminal Code

Substantive criminal law regulates what conduct is deemed to be criminal in a particular state, 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. In some legal systems, substantive criminal law is a mixture of judge-made law and individual pieces of legislation. However, in a large number of states, it is fully codified and contained in a penal code or criminal code (which may be supplemented by other pieces of legislation).

Substantive criminal law is usually subdivided into a General Part and a Special Part. The General Part of a criminal code contains the general principles and rules of criminal law that apply to the determination of criminal responsibility for a criminal offense and to the determination of any consequential penalties. In some states, and in the MCC, the General Part also deals with the court's jurisdiction over a particular person or course of conduct. Supplementary to the General Part, the Special Part of a criminal code contains a catalog of criminal offenses, divided into different categories or families. The MCC also follows this structure.

The Model Criminal Code: General Part

Sections 1 and 2: Definitions and Fundamental Principles

Section 1 of the General Part of the MCC contains a preliminary list of definitions that are applicable throughout the MCC. Section 2 contains two fundamental principles that are applicable not only to the individual but also to the legislature: the scope and purposes of criminal legislation, and the principle of legality.

Section 3: Jurisdiction

Section 3 addresses jurisdiction of domestic courts, dealing with the issues of territorial, extraterritorial, and universal jurisdiction and of personal jurisdiction. Section 3 defines the scope of jurisdiction over persons by setting a minimum age of criminal responsibility below which a person cannot be brought before a court for the

commission of a criminal offense. It further provides that domestic courts have jurisdiction not only over human persons but also over legal persons.

Section 4: *Ne Bis in Idem*

Section 4 addresses the principle of *ne bis in idem*, or double jeopardy. The principle of double jeopardy, like the principle of legality discussed above, is an international human right. It requires that no person be tried for a criminal offense of which he or she has previously been acquitted or convicted.

Section 5: Statutory Limitations

Section 5 contains the provisions governing statute of limitations. A statute of limitations acts as a procedural bar to the prosecution of the alleged perpetrator of a crime by setting out specific time limits within which charges must be brought before a court. Section 5 also provides an exemption to the application of the statute of limitations, consistent with international standards, when a person is accused of the criminal offenses of genocide, crimes against humanity, or war crimes.

Section 6: Time and Place of Commission of a Criminal Offense

To ascertain when a statute of limitations begins to run, it is essential to determine the time at which a criminal offense was committed. In some cases, this is a straightforward question. In other cases (such as a "continuing crime"), it becomes more complex. Section 6 sets out the general principles for determining the time of commission of a criminal offense.

Section 7: Criminal Offense, Criminal Responsibility, and Commission of a Criminal Offense

Section 7 deals with the core issues of what a criminal offense is and the circumstances under which a person can be found to be criminally responsible for a criminal offense. The MCC provides that a person may be held criminally responsible for a particular criminal offense only where (a) he or she voluntarily committed a course of conduct, by act or omission, that is defined as a criminal offense in the Special Part; (b) did so with the requisite mental state (either intention, recklessness, or negligence as defined in the MCC); and (c) there is no excuse, justification, or other lawful ground excluding criminal responsibility.

Section 8: Criminal Responsibility of Legal Persons

Section 8 addresses the circumstances under which a legal person may be held criminally responsible. The scope of liability for the commission of criminal offenses is broadened to include legal persons where a criminal offense is committed by any natural person with a management or supervisory role in the company. Such corporate criminal responsibility was once excluded from the ambit of criminal law, but it is

increasingly being recognized and introduced into legislation around the world. Where corporate criminal responsibility comes into play under the MCC, both the corporate actor who commits the criminal offense and the legal person as a separate body may simultaneously be held liable for the offense.

Section 9: Justification and Exclusion of Criminal Responsibility

Where a person is found to have voluntarily committed a certain course of conduct, either through an act or omission, with the requisite mental state, the person will be held criminally responsible only where there was no excuse, justification, or other lawful ground excluding criminal responsibility.

Section 9 contains three generally recognized and agreed-upon grounds of justification: self-defense, necessity, and superior orders (superior orders applying only to the criminal offenses of genocide, crimes against humanity, and war crimes). Section 9 also contains a number of well-recognized excuse defenses, namely, mental incompetence, intoxication, duress, and mistake of fact. Where a person falls under any category of excuse or under any justification defense, he or she may not be held liable for the commission of a criminal offense.

Sections 10 and 11: Criminal Attempt and Participation in a Criminal Offense

Sections 10 and 11 of the MCC set out the relevant grounds by which a person is taken as having committed a criminal offense through his or her conduct, even though he or she was not necessarily the primary perpetrator of that offense. Section 10 contains provisions on criminal attempt, while Section 11 sets out a number of grounds of participation (additional to a person having committed the offense directly), including participation in a common purpose, ordering, soliciting, inducing, incitement, facilitation, and command responsibility.

Sections 12 and 13: Penalties and Confiscation of the Proceeds of Crime

Once a person has been declared criminally responsible for his or her conduct, it is for the court to determine the applicable penalty that should be imposed. Section 12 sets forth the range of applicable penalties under the MCC (prison, community service, semiliberty, and so forth) and the process by which a court determines the penalty.

In addition to any penalties that may be imposed upon a person, a person convicted of a criminal offense may be subject to confiscation of the proceeds of criminality, which may include property acquired from the proceeds of crime or income derived from the proceeds of crime. Asset confiscation is an important legal tool that aims to deprive criminals of the fruits of their criminality. The principles underlying the confiscation of the proceeds of crime and property are set out in Section 13, while the accompanying confiscation procedure is dealt with in the Model Code of Criminal Procedure.

Section 14: Dispositions Applicable to Juveniles and Adults on Trial for Criminal Offenses Committed as Juveniles

Given the vulnerable status of children, international human rights law provides that children who come into contact with the criminal justice system are entitled to special protection and consideration. This provision applies along the entire criminal procedure continuum, and it also applies to the determination of penalties against juveniles. Section 14 gives effect to the international standards on the treatment of juveniles, setting forth the adjudication of disposition applicable to juveniles or to persons who were juveniles at the time they committed criminal offenses.

The Model Criminal Code: Special Part

The Special Part of the Model Criminal Code is a catalog of 114 separate criminal offenses grouped into 17 specific categories. While comprehensive, the MCC Special Part does not contain every offense usually found in a domestic criminal code. For example, notably absent are the petty offenses, minor crimes, and misdemeanors usually found in domestic legislation or, in some states, in a misdemeanor code. Instead of covering minor offenses, the MCC focuses on serious crimes, especially those that are prevalent in post-conflict states; pose a significant threat, if unchecked, to the process of stabilization and peaceful transition; and are often missing from or inadequately covered in existing penal legislation.

The drafters of the MCC conducted a comparative survey of serious crime problems in post-conflict states and the inadequacies of domestic criminal laws to see which offenses should be included in the code as a matter of priority. Consequently, the MCC addresses such serious crimes as organized crime, money laundering, terrorism, bombing, corruption, drug trafficking, cybercrime, and trafficking in persons. It also covers sexual offenses and gender-based violence, which often plague post-conflict states.

The MCC also covers criminal offenses that international law requires be included in domestic criminal legislation, either as part of the international human rights framework or as part of the international criminal law framework. These offenses include torture, enforced disappearances, child prostitution, child pornography, sale of children, genocide, crimes against humanity, war crimes, terrorist bombing, and financing of terrorism.

The categorization of the criminal offenses in the MCC is determined by "protected interest." For example, criminalizing the offense of unlawful killing is an attempt to protect a person's life and is included under offenses against life and limb. Criminalizing robbery and theft is an attempt to protect a person's property interest, and these crimes are included under offenses against property. There are seventeen categories of offenses in the Special Part of the MCC:

- Genocide, crimes against humanity, and war crimes
- Offenses against life and limb
- Sexual offenses

- Offenses against the rights of persons
- Offenses against children
- Property offenses
- Economic offenses
- Organized crime offenses
- Corruption offenses
- Corruption-related offenses and other offenses involving public officials
- Offenses against the state, public safety, and security
- Offenses against UN and associated personnel
- Offenses involving firearms, ammunition, explosives, and weapons
- Drug offenses
- Election offenses
- Cybercrime offenses
- Offenses against the administration of justice

Each of the offenses contained in the Special Part of the MCC is accompanied by a minimum and a maximum applicable penalty. As in the General Part, each provision is also accompanied by commentary. The commentary explains the origin, meaning, and scope of each criminal offense. It also discusses the offense's prevalence in post-conflict states and its potential destabilizing influence. Where the wording of a criminal offense is derived from an international or regional treaty, this information is highlighted. If the introduction of a specific criminal offense requires additional procedural provisions, institutional reforms (e.g., setting up a special police or investigation unit), or reforms outside the realm of criminal law (e.g., introduction of the criminal offense of money laundering may require significant changes to domestic banking law), the commentary highlights this as well. The commentary also highlights, where appropriate, the resource implications of introducing a particular new criminal offense into domestic criminal law.

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 unknown 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, pages 421–25, 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," page 442.)

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 subse-

quently). 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, prisons 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.