

# Model Codes for Post-Conflict Criminal Justice

## Volume II Model Code of Criminal Procedure



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## Volume II Model Code of Criminal Procedure

Edited by Vivienne O'Connor and Colette Rausch  
with Hans-Joerg Albrecht and Goran Klemencic

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# Contents

<b>Foreword</b> , <i>by Louise Arbour and Antonio Maria Costa</i>	xxv
<b>Preface</b> , <i>Neil J. Kritz and William A. Schabas</i>	xxvii
<b>Acknowledgments</b>	xxxi
<b>Editors</b>	xxxiii
<b>Contributors</b>	xxxv

## USER'S GUIDE

Introduction	3
1. The Model Codes Project: A Response to Post-Conflict Criminal Law Needs	5
2. Potential Uses of the Model Codes in a Criminal Law Reform Process	11
3. A Synopsis of the Model Code of Criminal Procedure	19
4. Guiding Principles for the Criminal Law Reform Process	27

## CHAPTER 1 GENERAL PROVISIONS

Article 1 Definitions	35
Article 2 Purpose of the MCCP	45

## CHAPTER 2 COURTS, COURT ADMINISTRATION, AND PROVISIONS RELATING TO COURT PROCEEDINGS

<b>Part 1 Organization of Courts</b>	48
Article 3 Courts in [insert name of state]	48
<b>Part 2 Trial Courts</b>	49
Article 4 Territorial Jurisdiction of Trial Courts	49
Article 5 Subject Matter Jurisdiction of Trial Courts	50
Article 6 Composition of Trial Courts	50
Article 7 Judge Administrator of Each Trial Court	52
Article 8 Presiding Judge of Each Panel in a Trial Court	53
Article 9 Cooperation between Trial Courts	54

<b>Part 3 The Appeals Court</b>	56
Article 10 Territorial Jurisdiction of the Appeals Court	56
Article 11 Subject Matter Jurisdiction of the Appeals Court	56
Article 12 Composition of the Appeals Court	57
Article 13 President of the Appeals Court	57
Article 14 Presiding Judge of Each Panel in the Appeals Court	58
<b>Part 4 Judicial Independence and Impartiality</b>	59
Article 15 Judicial Independence	61
Article 16 Insulation from Pressure	62
Article 17 Impartiality of Judges	63
Article 18 Excusal of a Judge on Account of Lack of Impartiality	64
Article 19 Disqualification of a Judge on Account of Lack of Impartiality	66
Article 20 Public Confidence	68
<b>Part 5 Organs of the Courts and Their Competencies</b>	69
<b>Section 1 President and Vice President of the Courts</b>	69
Article 21 President and Vice President	69
Article 22 Responsibilities of the President of the Courts	69
<b>Section 2 The Registry</b>	70
Article 23 Registry	70
Article 24 Responsibilities of the Registry	71
<b>Section 3 Court Staff</b>	72
Article 25 Court Staff	72
<b>Part 6 Administration of Courts</b>	73
<b>Section 1 Filing Submissions to the Courts</b>	73
Article 26 Submissions to the Courts	73
<b>Section 2 Service of Documents by the Courts</b>	73
Article 27 Service of Documents	73
<b>Section 3 Court Summonses</b>	75
<b>Subsection 1 Summons of a Suspect or an Accused</b>	75
Article 28 Summons of a Suspect or an Accused	75
Article 29 Service of a Written Summons on a Suspect or an Accused	75

Article 30	Oral Summons of a Suspect or an Accused	76
Article 31	Apprehension Order against a Suspect or an Accused for Failure to Comply with a Summons	77
<b>Subsection 2</b>	<b>Summons of a Witness or an Expert Witness</b>	78
Article 32	Summons of a Witness or an Expert Witness	78
Article 33	Service of a Written Summons on a Witness or Expert Witness	78
Article 34	Oral Summons on a Witness or an Expert Witness	79
Article 35	Apprehension Order against a Witness or an Expert Witness for Failure to Comply with a Summons	80
<b>Subsection 3</b>	<b>Summons of a Police Officer, a Detention Authority Official, or a Member of the Military</b>	81
Article 36	Summons of a Police Officer, a Detention Authority Official, or a Member of the Military	81
<b>Part 7</b>	<b>Provisions Relating to Court Proceedings</b>	82
<b>Section 1</b>	<b>Court Records</b>	82
Article 37	Records of Court Proceedings	82
Article 38	Records of Other Actions Taken by Judges and the Registry	85
<b>Section 2</b>	<b>Change of Location of Court Proceedings</b>	85
Article 39	Change of Location	85
<b>Section 3</b>	<b>Control of Court Proceedings</b>	86
Article 40	Sanctions for Misconduct before a Court	86
Article 41	Sanctions for Noncompliance with a Court Order	87
<b>CHAPTER 3</b>	<b>OTHER ACTORS IN CRIMINAL PROCEEDINGS</b>	
<b>Part 1</b>	<b>Prosecution Service</b>	89
<b>Section 1</b>	<b>Organization and Composition of the Prosecution Service</b>	90
Article 42	Organization of the Prosecution Service	90
Article 43	Composition of the Office of the Chief Prosecutor	91
Article 44	Composition of the Offices of the Prosecutor	91

<b>Section 2 Duties of the Prosecution Service and Duties of Prosecutors</b>	92
Article 45 Duties of the Prosecution Service	92
Article 46 Duties of Individual Prosecutors	93
<b>Section 3 Independence and Impartiality of the Prosecution Service and of Prosecutors</b>	94
Article 47 Independence of the Prosecution Service	94
Article 48 Insulation from Pressure	95
Article 49 Impartiality of Prosecutors	96
Article 50 Excusal of a Prosecutor on Account of Lack of Impartiality	97
Article 51 Disqualification of a Prosecutor on Account of Lack of Impartiality	98
<b>Part 2 Defense Service</b>	99
Article 52 Defense Service	99
<b>Part 3 The Police</b>	103
Article 53 Duties and Powers of the Police Relating to Criminal Investigation	103

## CHAPTER 4 RIGHTS OF THE SUSPECT AND THE ACCUSED

<b>Part 1 General Fair Trial Rights</b>	105
Article 54 Right to Equality before the Law and the Courts	105
Article 55 Right to Freedom from Discrimination	106
Article 56 Presumption of Innocence	107
Article 57 Privilege against Self-Incrimination and the Right to Silence	108
Article 58 Right to Freedom from Coercion, Duress, Threat, Torture, or Cruel, Inhuman, or Degrading Treatment	110
Article 59 Right to an Interpreter	112
Article 60 Right to Be Informed of the Charges	113
Article 61 Right to Preparation of a Defense	114
Article 62 Right to a Fair and Public Hearing and the Right to Be Present during a Trial	115
Article 63 Right to Trial without Undue Delay and the Right of Detained Persons to Trial within a Reasonable Time or Release	118
Article 64 Right to Examination of Witnesses	120



## **Part 2 Rights Relating to Legal Assistance of the Suspect and the Accused** 122

Article 65	Right to Defend Oneself Personally or through Counsel	122
Article 66	Right to Counsel	124
Article 67	Right to Free Legal Assistance	125
Article 68	Mandatory Free Legal Assistance	126
Article 69	Waiver of Right to Counsel	127
Article 70	Right to Communication with Counsel	128
Article 71	Right to Presence of Counsel during Interviews	129

## **CHAPTER 5 VICTIMS IN CRIMINAL PROCEEDINGS**

Article 72	General Provisions on Victims	132
Article 73	Requests by a Victim to the Prosecutor to Undertake an Investigation	133
Article 74	Updating a Victim on the Progress of a Case	133
Article 75	Notification of a Victim of Criminal Proceedings	134
Article 76	Participation of a Victim in Criminal Proceedings	135
Article 77	Access to Evidence	135
Article 78	Counsel for a Victim in Criminal Proceedings	136
Article 79	Medical and Psychological Assistance for Victims	136

## **CHAPTER 6 CRIMINAL PROCEEDINGS AGAINST A LEGAL PERSON**

Article 80	Proceedings against a Legal Person	138
Article 81	Representative for a Legal Person in Criminal Proceedings	139
Article 82	Defense Counsel for a Legal Person in Criminal Proceedings	140
Article 83	Service of Documents and Other Court Materials on a Legal Person	141
Article 84	Contents of the Indictment against a Legal Person	141
Article 85	Opening Statements at Trial	141
Article 86	Written Judgment against a Legal Person	142

## **CHAPTER 7 PROVISIONS RELEVANT TO ALL STAGES OF THE CRIMINAL PROCEEDINGS**

### **Part 1 Proceedings on Admission of Criminal Responsibility** 143

Article 87	Proceedings on Admission of Criminal Responsibility	143
------------	---	-----

<b>Part 2 Variation of Time Limits</b>	146
Article 88 Variation of Time Limits	146
<b>Part 3 Mental Incapacity of a Suspect or an Accused</b>	148
Article 89 Mental Incapacity of a Suspect or an Accused	148
 <b>CHAPTER 8 INVESTIGATION OF A CRIMINAL OFFENSE</b>	
 <b>Part 1 Initiation, Suspension, and Discontinuation of a Criminal Investigation</b>	153
Article 90 Purpose of a Criminal Investigation	154
Article 91 Conduct of a Criminal Investigation	154
Article 92 Reporting of a Criminal Offense	156
Article 93 Investigative Measures prior to the Formal Initiation of an Investigation	157
Article 94 Initiation of an Investigation	158
Article 95 Grounds Barring the Initiation of an Investigation	159
Article 96 Discretion of the Prosecutor to Decide Not to Initiate an Investigation	160
Article 97 Suspension of an Investigation	161
Article 98 Discontinuation of an Investigation	163
Article 99 Notification of a Victim on the Decision to Initiate, Suspend, or Discontinue an Investigation	164
Article 100 Appeal by a Victim on the Decision Not to Initiate an Investigation or on the Discontinuation of an Investigation	165
Article 101 Retention, Security, and Storage of Information and Evidence Relating to the Criminal Investigation	166
 <b>Part 2 Records of a Criminal Investigation</b>	167
 <b>Section 1 Records of Investigative Actions Undertaken by the Police or the Prosecutor</b>	167
Article 102 Written Record of Actions Undertaken in a Criminal Investigation by the Police and the Prosecutor	167
 <b>Section 2 Records of the Questioning of a Suspect</b>	169
Article 103 Audio or Video Recording of the Questioning of a Suspect	169
Article 104 Written Record of the Questioning of a Suspect	171

<b>Section 3 Records of the Questioning of Other Persons</b>	173
Article 105 Written Record of the Questioning of Other Persons	173
<b>Part 3 Collection of Evidence</b>	174
<b>Section 1 Questioning of Suspects, Victims, and Other Persons</b>	175
Article 106 Guiding Principles on the Questioning of All Persons	175
Article 107 Questioning of a Suspect	178
Article 108 Questioning of Deaf or Mute Persons	179
Article 109 Questioning of Mentally Disordered or Mentally Vulnerable Persons	180
Article 110 Questioning of Victims and Other Persons	181
<b>Section 2 General Provisions on Investigative Measures</b>	182
Article 111 General Provisions on the Issuance of Warrants and Orders	182
Article 112 General Provisions on the Application for Warrants and Orders	183
Article 113 General Provisions on the Execution of Warrants and Orders	184
Article 114 General Provisions on the Seizure of Objects and Documents	184
Article 115 Inadmissibility of Evidence Obtained without a Warrant or an Order	186
<b>Section 3 Gathering Information from Suspects, Victims, and Other Persons</b>	187
Article 116 Provisional Detention of Persons on the Scene of a Criminal Offense	187
Article 117 Taking of Photographs and Fingerprints of Arrested Persons and Other Persons	188
<b>Section 4 Search and Seizure</b>	189
<b>Subsection 1 Search of Premises and Dwellings</b>	189
Article 118 General Provisions on the Search of Premises and Dwellings	189
Article 119 Search of Premises and Dwellings under a Warrant	190
Article 120 Search of Premises and Dwellings without a Warrant	192
Article 121 Execution of a Search of Premises or Dwellings	193
<b>Subsection 2 Search of a Person and Objects in His or Her Possession</b>	195
Article 122 General Provisions on the Search of a Person	195
Article 123 Search of a Person under a Warrant	196

Article 124	Search of a Person without a Warrant	198
Article 125	Execution of a Search of a Person	199
<b>Subsection 3</b>	<b>Search of Vehicles</b>	200
Article 126	Inspection of a Vehicle	200
Article 127	Search of a Vehicle	201
<b>Subsection 4</b>	<b>Preservation of and Access to Computer Data and Telecommunications Traffic Data</b>	204
Article 128	Expedited Preservation of Computer Data and Telecommunications Traffic Data	204
Article 129	Identification of a Subscriber, Owner, or User of a Telecommunications System or Point of Access to a Computer System	207
Article 130	Seizure of a Computer and Access to Computer Data	209
<b>Subsection 5</b>	<b>Production Order</b>	212
Article 131	Production Order	212
<b>Subsection 6</b>	<b>Preservation and Seizure of Proceeds of Crime and Property Used in or Destined for Use in a Criminal Offense</b>	213
Article 132	Expedient Preservation of Property and Freezing of Suspicious Transactions	213
Article 133	Temporary Seizure of Proceeds of Crime or Property Used in or Destined for Use in a Criminal Offense	215
<b>Section 5</b>	<b>Covert or Other Technical Measures of Surveillance or Investigation</b>	222
Article 134	General Provisions on Covert or Other Technical Measures of Surveillance or Investigation	224
Article 135	Covert or Other Technical Measures of Surveillance or Investigation without a Warrant in Exigent Circumstances	226
Article 136	Covert or Other Technical Measures of Surveillance or Investigation under a Warrant	227
Article 137	Execution of Covert or Other Technical Measures of Surveillance or Investigation	231
Article 138	Prohibition of Provocation (Entrapment)	233
Article 139	Extension of a Warrant for Covert or Other Technical Measures of Surveillance or Investigation	233
Article 140	Destruction of Unused Materials from Covert or Other Technical Measures of Surveillance or Investigation	234
<b>Section 6</b>	<b>Expert Witnesses</b>	235
Article 141	Expert Witnesses	235

<b>Section 7 Forensic Investigative Measures</b>	239
Article 142 Physical Examination of a Suspect or an Accused	239
Article 143 DNA Analysis of Samples Taken during a Physical Examination or of Other Materials	244
Article 144 Examination of the Mental State of a Suspect or an Accused	245
Article 145 Autopsy and Exhumation	246
<b>Section 8 Unique Investigative Opportunity</b>	250
Article 146 Unique Investigative Opportunity	250
<b>Part 4 Witness Protection, Witness Anonymity, and Cooperative Witnesses</b>	252
<b>Section 1 Protective Measures for Witnesses under Threat and Vulnerable Witnesses</b>	252
Article 147 Protective Measures	254
Article 148 Grounds for Seeking an Order for Protective Measures	256
Article 149 Procedure for Seeking an Order for Protective Measures	257
Article 150 Granting of an Order for Protective Measures without a Hearing	258
Article 151 Granting of an Order for Protective Measures after a Hearing	259
Article 152 Records Relating to a Protective Measures Hearing	261
Article 153 Service of an Order for Protective Measures	262
Article 154 Amendment of an Order for Protective Measures	262
Article 155 Appeal	263
<b>Section 2 Witness Anonymity for Witnesses under Threat</b>	263
Article 156 Witness Anonymity	265
Article 157 Grounds for Seeking an Order for Witness Anonymity	266
Article 158 Procedure for Seeking an Order for Witness Anonymity	267
Article 159 Witness Anonymity Hearing	268
Article 160 Records Relating to an Order for Witness Anonymity	270
Article 161 Service of an Order for Witness Anonymity	271
Article 162 Appeal	271
<b>Section 3 Immunity from Prosecution for Cooperative Witnesses</b>	271
Article 163 Definition of a Cooperative Witness	273
Article 164 Procedure for Seeking a Cooperative Witness Order	275
Article 165 Cooperative Witness Hearing	276

Article 166	Records Relating to a Cooperative Witness Hearing	278
Article 167	Service of a Cooperative Witness Order	279
Article 168	Revocation of a Cooperative Witness Order and Liability for the Criminal Offense of False Testimony of a Cooperative Witness	279

## CHAPTER 9 ARREST AND DETENTION

### Part 1 Arrest 281

Article 169	The Right to Presumption of Liberty and Freedom from Arbitrary Arrest or Detention	281
Article 170	Arrest without a Warrant	282
Article 171	Arrest under Warrant	284
Article 172	Procedure upon Arrest	286
Article 173	Questioning of an Arrested Person	290
Article 174	Conditions of Detention of an Arrested Person	291

### Part 2 Review of Legality of Arrest and Initial Detention Hearing 292

Article 175	Initial Hearing before a Judge after Arrest	292
-------------	---	-----

### Part 3 Detention, Bail, and Restrictive Measures Other Than Detention 294

#### Section 1 General Provision 295

Article 176	Detention, Bail, and Restrictive Measures Other Than Detention	294
-------------	--	-----

#### Section 2 Detention 295

Article 177	Grounds for Detention	295
Article 178	Conditions of Detention	296

#### Section 3 Bail 296

Article 179	Grounds for Bail	296
Article 180	Provision of Bail	297
Article 181	Consequences of a Breach of a Warrant for Bail	298
Article 182	Cancellation of a Warrant for Bail during Criminal Proceedings	299
Article 183	Cancellation of a Warrant for Bail after the Completion of Criminal Proceedings	299

<b>Section 4 Restrictive Measures Other Than Detention</b>	300
Article 184 Restrictive Measures Other Than Detention	300
<b>Section 5 Initial Procedure for Seeking Detention, Bail, or Restrictive Measures Other Than Detention</b>	301
Article 185 Prosecutorial Applications for Detention, Bail, or Restrictive Measures Other Than Detention	301
Article 186 Determination of an Application for Detention, Bail, or Restrictive Measures Other Than Detention at the Initial Hearing under Article 175	302
Article 187 Application for Detention, Bail, or Restrictive Measures Other Than Detention Other Than at the Initial Detention Hearing	305
<b>Section 6 Procedure for Seeking Continued Detention or Continued House Arrest of a Suspect or an Accused</b>	306
Article 188 Hearing on Continued Detention or Continued House Arrest	306
<b>Section 7 Time Limits for Detention or House Arrest and Procedure for Seeking an Extension of Time Limits</b>	307
Article 189 Time Limits for Detention or House Arrest	307
Article 190 Procedure for Extending the Time Limits for Detention or House Arrest	308
<b>Section 8 Detention and House Arrest after the Presentation of the Indictment and during the Trial</b>	310
Article 191 Competent Judges to Hear Detention Issues after the Confirmation of the Indictment and during the Trial	310
<b>Section 9 Appeals Relating to Detention, Continued Detention, or Restrictive Measures Other Than Detention</b>	311
Article 192 Appeal of Orders for Detention, Continued Detention, or Restrictive Measures Other Than Detention	311

## **CHAPTER 10 INDICTMENT, DISCLOSURE OF EVIDENCE, AND PRETRIAL MOTIONS**

<b>Part 1 The Indictment</b>	312
Article 193 Joinder of Accused Persons	312
Article 194 Joinder of Criminal Offenses	313

<b>Part 2</b>	<b>Presentation and Confirmation of an Indictment and Disclosure of Evidence prior to the Confirmation Hearing</b>	314
Article 195	Presentation of an Indictment	315
Article 196	Receipt of an Indictment by the Court and Notification of the Suspect	315
Article 197	Disclosure of Evidence to the Defense prior to the Confirmation Hearing	316
Article 198	Response to the Indictment by the Suspect	317
Article 199	Waiver of the Right to a Confirmation Hearing	317
Article 200	Amendment of an Indictment prior to the Confirmation Hearing	318
Article 201	Confirmation Hearing	319
Article 202	Duration between the Confirmation Hearing and the Trial	322
Article 203	Amendment of an Indictment after the Confirmation Hearing	322
<b>Part 3</b>	<b>Disclosure of Evidence after the Confirmation Hearing and prior to the Trial</b>	324
Article 204	Disclosure and Inspection of Materials in the Possession or Control of the Prosecutor	325
Article 205	Matters Not Subject to Disclosure	326
Article 206	Restrictions on Disclosure	327
Article 207	Disclosure of the Names of Prosecution Witnesses to Be Called at Trial	328
Article 208	Disclosure Obligations on the Defense	329
Article 209	Disclosure of the Names of Defense Witnesses to Be Called at Trial	330
Article 210	Breach of Disclosure Obligations by the Prosecutor or the Defense prior to the Trial	331
Article 211	Breach of Disclosure Obligations by the Prosecutor or the Defense during the Trial	331
<b>Part 4</b>	<b>Preliminary Motions</b>	332
Article 212	Preliminary Motions	332



## CHAPTER 11 TRIAL OF AN ACCUSED

<b>Part 1 General Provisions</b>	334
Article 213 Requirement of a Public Trial	334
Article 214 Trial in the Presence of the Accused	334
Article 215 Requirement of the Presence of Judges throughout the Trial	336
Article 216 Burden of Proof and Standard of Proof	336
Article 217 Record of Trial Proceedings	336
Article 218 Transmission of Records of Prior Proceedings to the Trial Court	337
<b>Part 2 Trial Procedure</b>	338
Article 219 Joint and Separate Trials	339
Article 220 Commencement of the Trial	339
Article 221 Motions Relating to Trial Proceedings	340
Article 222 Opening Statements	341
Article 223 Statement of the Accused	341
Article 224 Presentation of Evidence during the Trial	342
Article 225 Adjournment of the Trial	343
Article 226 Recess of the Trial	344
Article 227 Closing Arguments and Closure of the Trial	344
<b>Part 3 Rules of Evidence</b>	345
Article 228 General Provisions on Evidence	345
Article 229 Refusal to Allow Irrelevant or Repetitive Evidence	346
Article 230 Exclusion of Evidence Obtained in Violation of the MCCC or in Violation of the Rights of the Accused	347
Article 231 Handling of Excluded Evidence	352
Article 232 Exclusion of Evidence Obtained through Torture or Cruel, Inhuman, or Degrading Treatment	352
Article 233 Exclusion of Evidence of Privileged Communications	353
Article 234 Exclusion of Privileged Information, Documents, or Other Evidence of the International Committee of the Red Cross (ICRC)	354
Article 235 Exclusion of Evidence of Sexual Conduct	356
Article 236 Principles of Evidence in Cases Involving Sexual Violence	358
Article 237 Hearing to Determine the Admissibility of Evidence	359
Article 238 Introduction of Books, Records, Documents, and Other Tangible Items into Evidence before the Court	360

<b>Part 4</b>	<b>Power of the Trial Court to Order Additional Evidence</b>	362
Article 239	Power of the Court to Order the Production of Additional Evidence	362
Article 240	Power of the Court to Order the Reenactment of a Criminal Offense	363
Article 241	Power of the Court to Order a Medical Examination or Examination of the Mental State or Mental Incapacity of the Accused	363
<b>Part 5</b>	<b>Witnesses and Witness Testimony before the Court</b>	364
<b>Section 1</b>	<b>Obligation on Witnesses to Testify before the Trial Court</b>	364
Article 242	Obligation on Witnesses to Testify before the Court	364
<b>Section 2</b>	<b>Persons Not Required to Testify before the Trial Court</b>	364
Article 243	Family Members of the Accused Not Required to Testify	365
Article 244	Other Persons Not Required to Testify	365
<b>Section 3</b>	<b>Failure of a Witness or Expert Witness to Appear before the Trial Court</b>	366
Article 245	Consequences of Failure of a Witness or Expert Witness to Appear before the Trial Court	366
<b>Section 4</b>	<b>The Accused as a Witness</b>	367
Article 246	The Accused as a Witness	367
<b>Section 5</b>	<b>Solemn Declaration of a Witness and Declaration of Preliminary Information</b>	368
Article 247	Solemn Declaration	368
Article 248	Solemn Declaration of a Child Witness	368
Article 249	Solemn Declaration of a Mute or Deaf Witness	369
Article 250	Preliminary Information	369
<b>Section 6</b>	<b>Freedom from Self-Incrimination of a Witness and Warnings Issued by the Court</b>	370
Article 251	Freedom from Self-Incrimination	370
Article 252	Warnings Issued by the Court	371

<b>Section 7 Requirement of Absence of a Witness during Testimony of Another Witness</b>	371
Article 253 Absence of a Witness during Testimony of Another Witness	371
<b>Section 8 Measures for the Protection of Witnesses Testifying before the Court</b>	372
Article 254 Protection of Witnesses during a Trial	372
Article 255 Control of Questioning of Witnesses by the Trial Court	373
<b>Section 9 Measures to Protect Child Witnesses Testifying before the Court</b>	374
Article 256 Questioning of a Child Witness	374
<b>Section 10 Testimony before the Trial Court and Its Exceptions</b>	375
Article 257 General Principle of Live and Direct Testimony of Witnesses	375
Article 258 Exceptions to the General Principle of Live and Direct Testimony of Witnesses	376
<b>Section 11 Presentation of Prior Statements and Other Evidence to a Witness during the Trial</b>	378
Article 259 Presentation of Prior Statements to the Witness during the Trial	378
Article 260 Presentation of Physical or Documentary Evidence to the Witness during the Trial	379
<b>Section 12 Impeachment of a Witness</b>	379
Article 261 Impeachment of a Witness	379
<b>Section 13 Compensation of Witnesses Summoned before the Trial Court</b>	380
Article 262 Compensation of Witnesses	380
<b>Part 6 Deliberations and Judgment</b>	381
Article 263 Deliberations of the Trial Court	381
Article 264 Pronouncement of the Judgment	383
Article 265 Status of an Acquitted Person	384
Article 266 Final Judgment	385
<b>Part 7 Imposition of Penalties and Orders</b>	386
Article 267 Hearing and Determination of an Appropriate Penalty or Order	386
Article 268 Pronouncement of the Penalty or Order	387

Article 269	Preparation and Release of a Written Judgment	388
Article 270	Appeal of Errors and Miscalculations in a Written Judgment	389
<b>Part 8</b>	<b>Execution of Penalties and Orders</b>	390
Article 271	Execution of Penalties and Orders	390
<b>Part 9</b>	<b>Supervision of Imprisonment and Conditional Release</b>	392
Article 272	Supervision of Imprisonment	392
Article 273	Conditional Release after Trial	392

## CHAPTER 12 APPEALS AND EXTRAORDINARY LEGAL REMEDY

<b>Part 1</b>	<b>Appeals against Acquittal or Conviction or against a Penalty</b>	395
Article 274	Grounds of Appeal	397
Article 275	Error of Law	398
Article 276	Substantial Violation of the MCCP	398
Article 277	Procedure upon Filing an Appeal Statement	400
Article 278	Notification of the Respondent of an Appeal, Response to the Appeal Statement, and Cross-Appeal	401
Article 279	Transmission of the Trial Records to the Appeals Court and the Parties	402
Article 280	Discontinuation of an Appeal	403
Article 281	Competence Regarding Detention of the Convicted Person	403
Article 282	Appeal Hearing	403
Article 283	Deliberations of the Competent Panel of the Appeals Court	405
Article 284	Pronouncement of the Judgment on Appeal	407
Article 285	Preparation and Release of a Written Appeal Judgment	408
<b>Part 2</b>	<b>Extraordinary Legal Remedy to Reopen Criminal Proceedings Terminated by a Final Judgment</b>	410
Article 286	General Provision on Reopening of Criminal Proceedings	410
Article 287	Grounds for Reopening of Criminal Proceedings	411
Article 288	Procedure on Filing an Application to Reopen Criminal Proceedings	412
Article 289	Initial Determination of an Application to Reopen Criminal Proceedings	412
Article 290	Determination of an Application to Reopen Criminal Proceedings by a Trial Court	413

Article 291	Determination of an Application to Reopen Criminal Proceedings by the Appeals Court	414
Article 292	Deliberations of the Competent Panel of the Appeals Court or the Trial Court	415
Article 293	Pronouncement of the Judgment	415
Article 294	Preparation and Release of a Written Judgment	416

### **Part 3 Interlocutory Appeals** 418

Article 295	Interlocutory Appeals	418
Article 296	Procedure for Seeking an Interlocutory Appeal	420
Article 297	Determination of an Interlocutory Appeal	420

## **CHAPTER 13 CONFISCATION**

Article 298	Confiscation of Property, Equipment, or Other Instrumentalities Used in or Destined for Use in a Criminal Offense	423
Article 299	Confiscation of Proceeds of Crime or of Property of Corresponding Value	424
Article 300	Rights of Third Persons	425
Article 301	Subsequent Challenge of Confiscation by a Third Party	426

## **CHAPTER 14 MUTUAL LEGAL ASSISTANCE AND EXTRADITION**

### **Part 1 Mutual Legal Assistance** 427

Article 302	General Principles Governing the Provision of Mutual Legal Assistance	428
Article 303	Application of Treaties, Agreements, and the MCCP to Mutual Legal Assistance	428
Article 304	Measures of Mutual Legal Assistance	429
Article 305	Central Authority for Receiving and Transmitting Requests for Mutual Legal Assistance	431
Article 306	Form of a Request for Mutual Legal Assistance	432
Article 307	Hearing of a Request for Mutual Legal Assistance	434
Article 308	Execution of a Request for Mutual Legal Assistance	437
Article 309	Execution of a Request to Facilitate the Appearance of a Person in a Requesting State	438
Article 310	Use of Information Obtained from a Request for Mutual Legal Assistance	439
Article 311	Costs of Executing a Request for Mutual Legal Assistance	440

<b>Part 2 Extradition</b>	441
Article 312 Application of Treaties and the MCCC to Extradition	442
Article 313 Instituting a Request for Extradition	443
Article 314 Instituting a Request for Provisional Arrest prior to a Request for Extradition	445
Article 315 Extradition Hearing	447
Article 316 Surrender to a Requesting State	455
Article 317 Rule of Specialty	456
Article 318 Concurrent Requests	457
Article 319 Costs of Extradition	457
Article 320 Requests for Extradition from a Foreign State	458
 <b>CHAPTER 15 JUVENILE JUSTICE</b>	
<b>Part 1 Applicability of the MCCC to Juveniles</b>	461
Article 321 Provisions Applicable to Juveniles	461
<b>Part 2 Special Panels for Juveniles</b>	462
Article 322 Composition and Duties of Special Panels for Juveniles	462
<b>Part 3 Jurisdiction over Children and Juveniles</b>	464
Article 323 Jurisdiction over Children and Juveniles	464
Article 324 Determination of the Age of a Child or Juvenile	464
<b>Part 4 Aim of Juvenile Justice and Applicable Principles</b>	466
Article 325 Aim of Juvenile Justice	466
Article 326 Principles Applicable to Juvenile Justice	466
<b>Part 5 Juvenile Diversion Programs</b>	469
Article 327 Juvenile Diversion Programs	469
<b>Part 6 Investigation, Arrest, and Detention of a Juvenile</b>	471
Article 328 Contact with the Police and the Prosecutor	471
Article 329 Questioning of a Juvenile	471
Article 330 Warrants and Orders against a Juvenile	472
Article 331 Physical Examination of a Juvenile	473
Article 332 Arrest of a Juvenile	474
Article 333 Review of Arrest of a Juvenile	475
Article 334 Detention of a Juvenile	475

## **Part 7 Indictment, Trial, and Appeal Proceedings 477**

Article 335	Proceedings in Court	477
Article 336	Records of Proceedings	478
Article 337	Juvenile Dispositions	478
Article 338	Conditional Release from Juvenile Imprisonment	479

## **CHAPTER 16 RIGHT TO REVIEW THE LEGALITY OF ANY DEPRIVATION OF LIBERTY**

Article 339	Right to Review Legality of Deprivation of Liberty (Habeas Corpus)	481
Article 340	Procedure for Filing a Motion for Habeas Corpus	482
Article 341	Assignment of a Motion for Habeas Corpus to a Judge	483
Article 342	Assignment of a Motion for Habeas Corpus and the Initial Review of the Habeas Corpus Motion	484
Article 343	Date for a Hearing of a Motion for Habeas Corpus	485
Article 344	Habeas Corpus Hearing	485
Article 345	Investigation into an Unlawful Deprivation of Liberty	487

## **CHAPTER 17 RIGHT TO COMPENSATION FOR UNLAWFUL DEPRIVATION OF LIBERTY OR MISCARRIAGE OF JUSTICE**

Article 346	Establishment of a Compensation Mechanism for Unlawful Deprivation of Liberty or Miscarriage of Justice	488
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## **Annex 491**

Figure 1	Organization of the Court System	491
Figure 2	Organization of the Prosecution Service	492
Figure 3	Flow of Criminal Proceedings	493
Figure 4	Flow of Criminal Proceedings: Opening of Investigation	494
Figure 5	Investigative Measures	495
Figure 6	Flow of Criminal Proceedings—Confirmation of Indictment	496
Figure 7	Flow of Criminal Proceedings—Trial	497

<b>Further Reading and Resources</b>	499
Legal Instruments	499
Further Reading Relevant to the Model Code of Criminal Procedure	504
Criminal Law Reform Resources	524
Useful Web Sites	530
<b>Index</b>	537



# Foreword

**Louise Arbour, United Nations High Commissioner for Human Rights**

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

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

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

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

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

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



# Preface

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

**William Schabas, Director, Irish Centre for Human Rights**

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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