

Model Codes for Post-Conflict Criminal Justice

Volume II Model Code of Criminal Procedure

Model Codes for Post-Conflict Criminal Justice

Volume II Model Code of Criminal Procedure

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

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

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

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

© 2008 by the Endowment of the United States Institute of Peace. All rights reserved.

First published 2008

Printed in the United States of America

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

Library of Congress Cataloging-in-Publication Data

Model codes for post-conflict criminal justice / edited by Vivienne O'Connor and Colette Rausch, with Hans-Joerg Albrecht and Goran Klemencic.

p. cm.

Includes bibliographical references and index.

ISBN-13: 978-1-60127-015-3 (pbk. : alk. paper)

ISBN-10: 1-60127-015-1 (pbk. : alk. paper)

ISBN-13: 978-1-60127-016-0 (hardcover : alk. paper)

ISBN-10: 1-60127-016-X (hardcover : alk. paper)

1. Criminal justice, Administration of—International cooperation. 2. Criminal law—International cooperation. 3. Reparation (Criminal justice). 4. Restorative justice. I. O'Connor, Vivienne M. 1977– II. Rausch, Colette. III. Albrecht, Hans-Joerg, 1950– IV. Klemencic, Goran. V. Title.

K5001.M63 2008

345—dc22

2008008930

Contents

Foreword , by Louise Arbour and Antonio Maria Costa	xxv
Preface , Neil J. Kritz and William A. Schabas	xxvii
Acknowledgments	xxxix
Editors	xxxiii
Contributors	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	
Part 1 Organization of Courts	48
Article 3 Courts in [insert name of state]	48
Part 2 Trial Courts	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

Part 3 The Appeals Court	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
Part 4 Judicial Independence and Impartiality	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
Part 5 Organs of the Courts and Their Competencies	69
Section 1 President and Vice President of the Courts	69
Article 21 President and Vice President	69
Article 22 Responsibilities of the President of the Courts	69
Section 2 The Registry	70
Article 23 Registry	70
Article 24 Responsibilities of the Registry	71
Section 3 Court Staff	72
Article 25 Court Staff	72
Part 6 Administration of Courts	73
Section 1 Filing Submissions to the Courts	73
Article 26 Submissions to the Courts	73
Section 2 Service of Documents by the Courts	73
Article 27 Service of Documents	73
Section 3 Court Summonses	75
Subsection 1 Summons of a Suspect or an Accused	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
Subsection 2	Summons of a Witness or an Expert Witness	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
Subsection 3	Summons of a Police Officer, a Detention Authority Official, or a Member of the Military	81
Article 36	Summons of a Police Officer, a Detention Authority Official, or a Member of the Military	81
	Part 7 Provisions Relating to Court Proceedings	82
	Section 1 Court Records	82
Article 37	Records of Court Proceedings	82
Article 38	Records of Other Actions Taken by Judges and the Registry	85
	Section 2 Change of Location of Court Proceedings	85
Article 39	Change of Location	85
	Section 3 Control of Court Proceedings	86
Article 40	Sanctions for Misconduct before a Court	86
Article 41	Sanctions for Noncompliance with a Court Order	87
 CHAPTER 3 OTHER ACTORS IN CRIMINAL PROCEEDINGS		
	Part 1 Prosecution Service	89
	Section 1 Organization and Composition of the Prosecution Service	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

Section 2 Duties of the Prosecution Service and Duties of Prosecutors	92
Article 45 Duties of the Prosecution Service	92
Article 46 Duties of Individual Prosecutors	93
Section 3 Independence and Impartiality of the Prosecution Service and of Prosecutors	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
Part 2 Defense Service	99
Article 52 Defense Service	99
Part 3 The Police	103
Article 53 Duties and Powers of the Police Relating to Criminal Investigation	103
CHAPTER 4 RIGHTS OF THE SUSPECT AND THE ACCUSED	
Part 1 General Fair Trial Rights	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
------------	---	-----

Part 2 Variation of Time Limits	146
Article 88 Variation of Time Limits	146
Part 3 Mental Incapacity of a Suspect or an Accused	148
Article 89 Mental Incapacity of a Suspect or an Accused	148
CHAPTER 8 INVESTIGATION OF A CRIMINAL OFFENSE	
Part 1 Initiation, Suspension, and Discontinuation of a Criminal Investigation	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
Part 2 Records of a Criminal Investigation	167
Section 1 Records of Investigative Actions Undertaken by the Police or the Prosecutor	167
Article 102 Written Record of Actions Undertaken in a Criminal Investigation by the Police and the Prosecutor	167
Section 2 Records of the Questioning of a Suspect	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

Section 3 Records of the Questioning of Other Persons	173
Article 105 Written Record of the Questioning of Other Persons	173
Part 3 Collection of Evidence	174
Section 1 Questioning of Suspects, Victims, and Other Persons	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
Section 2 General Provisions on Investigative Measures	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
Section 3 Gathering Information from Suspects, Victims, and Other Persons	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
Section 4 Search and Seizure	189
Subsection 1 Search of Premises and Dwellings	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
Subsection 2 Search of a Person and Objects in His or Her Possession	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
Subsection 3	Search of Vehicles	200
Article 126	Inspection of a Vehicle	200
Article 127	Search of a Vehicle	201
Subsection 4	Preservation of and Access to Computer Data and Telecommunications Traffic Data	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
Subsection 5	Production Order	212
Article 131	Production Order	212
Subsection 6	Preservation and Seizure of Proceeds of Crime and Property Used in or Destined for Use in a Criminal Offense	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
Section 5	Covert or Other Technical Measures of Surveillance or Investigation	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
Section 6	Expert Witnesses	235
Article 141	Expert Witnesses	235

Section 7 Forensic Investigative Measures	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
Section 8 Unique Investigative Opportunity	250
Article 146 Unique Investigative Opportunity	250
Part 4 Witness Protection, Witness Anonymity, and Cooperative Witnesses	252
Section 1 Protective Measures for Witnesses under Threat and Vulnerable Witnesses	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
Section 2 Witness Anonymity for Witnesses under Threat	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
Section 3 Immunity from Prosecution for Cooperative Witnesses	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

Section 4 Restrictive Measures Other Than Detention	300
Article 184 Restrictive Measures Other Than Detention	300
Section 5 Initial Procedure for Seeking Detention, Bail, or Restrictive Measures Other Than Detention	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
Section 6 Procedure for Seeking Continued Detention or Continued House Arrest of a Suspect or an Accused	306
Article 188 Hearing on Continued Detention or Continued House Arrest	306
Section 7 Time Limits for Detention or House Arrest and Procedure for Seeking an Extension of Time Limits	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
Section 8 Detention and House Arrest after the Presentation of the Indictment and during the Trial	310
Article 191 Competent Judges to Hear Detention Issues after the Confirmation of the Indictment and during the Trial	310
Section 9 Appeals Relating to Detention, Continued Detention, or Restrictive Measures Other Than Detention	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

Part 1 The Indictment	312
Article 193 Joinder of Accused Persons	312
Article 194 Joinder of Criminal Offenses	313

Part 2 Presentation and Confirmation of an Indictment and Disclosure of Evidence prior to the Confirmation Hearing	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
Part 3 Disclosure of Evidence after the Confirmation Hearing and prior to the Trial	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
Part 4 Preliminary Motions	332
Article 212 Preliminary Motions	332

CHAPTER 11 TRIAL OF AN ACCUSED

Part 1 General Provisions	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
Part 2 Trial Procedure	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
Part 3 Rules of Evidence	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 MCCP 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

Part 4 Power of the Trial Court to Order Additional Evidence	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
Part 5 Witnesses and Witness Testimony before the Court	364
Section 1 Obligation on Witnesses to Testify before the Trial Court	364
Article 242 Obligation on Witnesses to Testify before the Court	364
Section 2 Persons Not Required to Testify before the Trial Court	364
Article 243 Family Members of the Accused Not Required to Testify	365
Article 244 Other Persons Not Required to Testify	365
Section 3 Failure of a Witness or Expert Witness to Appear before the Trial Court	366
Article 245 Consequences of Failure of a Witness or Expert Witness to Appear before the Trial Court	366
Section 4 The Accused as a Witness	367
Article 246 The Accused as a Witness	367
Section 5 Solemn Declaration of a Witness and Declaration of Preliminary Information	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
Section 6 Freedom from Self-Incrimination of a Witness and Warnings Issued by the Court	370
Article 251 Freedom from Self-Incrimination	370
Article 252 Warnings Issued by the Court	371

Section 7 Requirement of Absence of a Witness during Testimony of Another Witness	371
Article 253 Absence of a Witness during Testimony of Another Witness	371
Section 8 Measures for the Protection of Witnesses Testifying before the Court	372
Article 254 Protection of Witnesses during a Trial	372
Article 255 Control of Questioning of Witnesses by the Trial Court	373
Section 9 Measures to Protect Child Witnesses Testifying before the Court	374
Article 256 Questioning of a Child Witness	374
Section 10 Testimony before the Trial Court and Its Exceptions	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
Section 11 Presentation of Prior Statements and Other Evidence to a Witness during the Trial	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
Section 12 Impeachment of a Witness	379
Article 261 Impeachment of a Witness	379
Section 13 Compensation of Witnesses Summoned before the Trial Court	380
Article 262 Compensation of Witnesses	380
Part 6 Deliberations and Judgment	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
Part 7 Imposition of Penalties and Orders	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
	Part 8 Execution of Penalties and Orders	390
Article 271	Execution of Penalties and Orders	390
	Part 9 Supervision of Imprisonment and Conditional Release	392
Article 272	Supervision of Imprisonment	392
Article 273	Conditional Release after Trial	392

CHAPTER 12 APPEALS AND EXTRAORDINARY LEGAL REMEDY

	Part 1 Appeals against Acquittal or Conviction or against a Penalty	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
	Part 2 Extraordinary Legal Remedy to Reopen Criminal Proceedings Terminated by a Final Judgment	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

Part 2 Extradition	441
Article 312 Application of Treaties and the MCCP 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
CHAPTER 15 JUVENILE JUSTICE	
Part 1 Applicability of the MCCP to Juveniles	461
Article 321 Provisions Applicable to Juveniles	461
Part 2 Special Panels for Juveniles	462
Article 322 Composition and Duties of Special Panels for Juveniles	462
Part 3 Jurisdiction over Children and Juveniles	464
Article 323 Jurisdiction over Children and Juveniles	464
Article 324 Determination of the Age of a Child or Juvenile	464
Part 4 Aim of Juvenile Justice and Applicable Principles	466
Article 325 Aim of Juvenile Justice	466
Article 326 Principles Applicable to Juvenile Justice	466
Part 5 Juvenile Diversion Programs	469
Article 327 Juvenile Diversion Programs	469
Part 6 Investigation, Arrest, and Detention of a Juvenile	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
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

Further Reading and Resources	499
Legal Instruments	499
Further Reading Relevant to the Model Code of Criminal Procedure	504
Criminal Law Reform Resources	524
Useful Web Sites	530
Index	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. ■

Acknowledgments

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

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

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

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

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

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

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

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

Vivienne O'Connor, Irish Centre for Human Rights
Colette Rausch, United States Institute of Peace

Editors

VIVIENNE O'CONNOR is the rule of law project officer at the Irish Centre for Human Rights, National University of Ireland, Galway, and codirector of the Model Codes for Post-Conflict Criminal Justice Project. She is also a senior fellow of the University of Melbourne, where she lectures on criminal law and development. Her areas of expertise include international human rights law, international and comparative criminal law and procedure, police law, security-sector reform, and post-conflict rule of law. She has taught international human rights law as a guest lecturer at the National University of Ireland, Galway, and has lectured on the rule of law and criminal law reform at a variety of professional training courses. She has also been involved in criminal law reform efforts in a number of post-conflict states and has published several works on the subject.

COLETTE RAUSCH is deputy director of the United States Institute of Peace's Rule of Law program. Her work focuses on criminal justice and police reform initiatives, especially in Africa and Southeast Asia. Before joining the Institute, she worked at the Organization for Security and Co-operation in Europe's Mission in Kosovo, serving first as head of the Rule of Law Division and then as director of the Department of Human Rights and Rule of Law. Rausch also served as the U.S. Department of Justice's resident legal adviser, first in Hungary, where she worked on the development of a crime task force, and later in Bosnia in 1998–99. In 1999–2000, she was the Department of Justice's program manager for Central and East Europe, establishing criminal justice development and training projects in Albania, Bosnia, Croatia, Kosovo, and Macedonia. She has worked as a federal prosecutor with the U.S. Attorney's Office in Las Vegas, Nevada. She has published a number of articles and book chapters that examine reform of the criminal justice sector in post-conflict societies; she is also editor of *Combating Serious Crimes in Postconflict Societies: A Handbook for Policymakers and Practitioners*.

HANS-JOERG ALBRECHT is director of the Max Planck Institute for Foreign and International Criminal Law in Freiburg, Germany. He is professor of criminal law, criminal justice, and criminology at the University of Freiburg. Currently a guest professor at the Law Faculty of Beijing Normal University, he has also served as a guest professor at the Center for Criminal Law and Criminal Justice of the China University of Political Science and Law and the Law Faculty of Wuhan University in China. He has been awarded life membership at Clare Hall College, Cambridge University, and holds a permanent faculty membership at the Faculty of Law at Qom High Education Center, Tehran. His numerous publications address comparative criminal law, sentencing theory, juvenile crime, drug policies, environmental crime, organized crime, terrorism, and trafficking in persons.

GORAN KLEMENCIC is a senior lecturer at the Faculty of Criminal Justice and Security Studies of the University of Maribor, Slovenia. His teaching, writing, and research focus on international comparative criminal law and procedure, law enforcement powers and human rights, and specialized criminal justice mechanisms to tackle corruption and organized crime. He is involved in various criminal justice reform efforts, particularly those involving legislative reform of criminal law and procedure, as well as reform of police and security services in transitional and post-conflict environments in Eastern and Southeastern Europe, Central Asia, China, and Latin America. He has previously worked for the Slovenian Ministry of Interior/Police, the Slovenian Independent Commission for the Prevention of Corruption, the Organisation for Economic Co-operation and Development, and the Council of Europe.