

Chapter Four

Institutional Reforms

The aims of this chapter are to

- Discuss institutional reforms that could aid in the fair and effective investigation and prosecution of serious crimes and in the imprisonment of serious crimes perpetrators
- Discuss, in particular, reforms of the police, including the creation of specialized units, that may assist in the investigation of serious crimes perpetrators
- Elaborate on different institutional structures that may be created to prosecute and try serious crimes, namely, specialized courts and chambers and other mechanisms such as the use of a second state as an alternative location from which to prosecute serious crimes perpetrators
- Consider mechanisms to provide legal assistance to serious crimes perpetrators, and examine other defense counsel–related issues, including restrictions on access to counsel and to security-sensitive evidence in serious crimes cases
- Consider what specific reforms of prisons may be required for the incarceration of serious crimes perpetrators
- Lay out the close protection needs of institutions and of police, prosecutors, defense counsel, and judges involved in serious crimes cases
- Outline how to establish and run a close protection program
- Discuss the need for witness protection and relocation programs in order to effectively investigate and prosecute certain serious crimes cases

Postconflict criminal justice institutions often suffer from lack of capacity and resources due to the ravages of conflict, inefficiency, and corruption, and from lack of compliance with international and regional human rights standards. In nations where criminal justice institutions were once used as tools of oppression, they further suffer from a lack of credibility and public trust. Such conditions not only hamper the criminal justice system's ability to combat serious crimes but also cause the public to lose

confidence in the system. Accordingly, institutional reforms to the criminal justice system are crucial to addressing such conditions and developing a fair and effective system of justice that is transparent, accountable, and efficient.

Depending upon the situation in a postconflict state, numerous measures may be needed to reform the criminal justice system, such as establishing vetting mechanisms for public officials; developing free legal assistance mechanisms; restructuring the organizational framework of the courts, police, prisons, and prosecutorial institutions; creating selection and disciplinary procedures for judges, police, prosecutors, and lawyers; establishing accountability and oversight mechanisms for criminal justice institutions; and establishing human rights institutions.

As subsets of these broad-ranging reforms, a variety of measures would specifically contribute to efforts to effectively and fairly investigate and prosecute serious crimes and to incarcerate serious criminals. This chapter discusses such measures. Whereas chapter 3 discusses the substantive and procedural reforms to the legal framework needed to tackle serious crimes, this chapter examines complementary institutional reforms of the police, the judiciary, prosecutor services, criminal defense, and prisons.

The first section of this chapter looks at police reforms and the creation of specialized units to tackle particular serious crimes problems. The next section discusses the creation of special mechanisms and other options for prosecuting and adjudicating serious crimes, including courts, chambers, and prosecution by an interested second state. It offers a variety of concrete examples of such mechanisms drawn from a dozen recent international interventions. Following this discussion is a section addressing access to legal assistance and other issues relating to access to defense counsel that are relevant to the fair investigation of serious crimes. The next section focuses on reform measures that may be necessary for the incarceration of serious crimes perpetrators. The final sections address the provision of security to protect criminal justice system personnel and witnesses involved in serious crimes cases.

Police Reforms: The Creation of Specialized Functions

An effective civilian police force is one of several critical components of any state's capacity to combat serious crimes. Most likely, police reform will be a core component in the overall rule of law strategy in a postconflict state. Some elements of police reforms relate specifically to addressing serious crimes, although they could apply equally to both postconflict states and more stable states.

Overarching Principles

Any police force, whether operating in a postconflict state or in a more stable environment, should operate according to the basic principles of human rights, as articulated in customary international law and in applicable international instruments, as well as according to nonconflicting domestic laws. The Office of the United Nations High Commissioner for Human Rights, in its publication *Human Rights Standards and Practice for Police*, has set forth a number of “principles of democratic policing” (a phrase describing principles applicable to a police force in a democratic state). These principles include:

- *Representative policing*, which ensures that police personnel sufficiently represent the community they serve; that minority groups and women are adequately represented through fair and nondiscriminatory recruitment policies; and that the human rights of all peoples are protected, promoted, and respected
- *Responsive policing*, which ensures that police are responsive to public needs and expectations, especially in preventing and detecting crime and maintaining public order; that policing objectives are attained both lawfully and humanely; that police understand the needs and expectations of the public they serve; and that police actions are responsive to public opinion and wishes
- *Accountable policing*, wherein, legally, the police are accountable to the law, as well as to individuals and institutions in the state; politically, the police are accountable to police and citizen liaison groups and to the public through the democratic and political institutions of government; and, economically, the police are accountable for the way they use resources allocated to them.

In a postconflict state where there may be a great deal of mistrust of police based on past violations of the rights of the population, developing a police force that complies with internationally recognized human rights standards and principles for democratic policing is not only an international obligation but, from a practical standpoint, good policy as well. Therefore, integrating and implementing internationally recognized human rights standards and principles of democratic policing, including accountability mechanisms such as an independent and transparent mechanism for processing citizen complaints against the police, will go a long way toward rebuilding people’s trust in the police force, which is vital to effectively confronting serious crimes.

Outsourcing Forensic Work

In Sierra Leone, recognizing budget and resource limitations, civilian police working for the United Nations Mission in Sierra Leone (UNAMSIL) arranged for forensic work on serious crimes to be outsourced to laboratories in South Africa.

Technical and Resource Elements

In addition to operating according to commonly accepted human rights standards and democratic principles, any police force

addressing serious criminal activity should develop the following technical and resource elements:

- Access to forensic tools for investigating serious crimes, including evidence envelopes and crime-scene diagramming forms, fingerprint kits, video and still cameras, evidence-gathering materials, and equipment for analyzing gunshot residue, blood, drugs, and DNA
- A forensic capacity for evidence analysis. If police in a postconflict state do not have the resources to obtain this capacity, they should have access to some type of forensic analysis in another state.
- Access to facilities and equipment, including basic office supplies, appropriate weapons, standard and unmarked vehicles for conducting undercover operations and surveillance, communications equipment, and laboratory equipment
- Data-management systems, such as centralized computer databases for incident reporting, centralized databases for special units (e.g., a criminal intelligence unit or a financial crimes investigation unit), and methods to secure and protect data acquired during undercover and other sensitive operations

Building an Iraqi Police Force

Building a police force capable of combating serious crimes in a postconflict society is inherently complex, and great care must be given to determining appropriate priorities. In Iraq, it was only with the creation in March 2004 of the Civilian Police Advisory Training Team (CPATT) that work on resolving the issue of police pay could begin. This was an essential development given the corruption that existed within the force. For example, by mid-2004, the Iraqi police numbered approximately 85,000, but more than 120,000 employees were receiving salaries. This employee “ghost roll” was an obvious

drain on vital fiscal resources, and its elimination, as well as the removal of those not suitable for service, became a key effort of CPATT’s mission. A Qualifying Committee (composed of a mix of Iraqi police and CPATT officers) was established, which developed a plan for every police officer to provide biometric data for the creation of a central database of all serving officers. This work is ongoing, but it highlights the need to determine, as early as possible, who exactly is on the police force and where they are deployed. A reluctance to tackle this issue only encourages corruption.

- Policies and procedures for interagency cooperation and cooperation between the police and the prosecutor or investigating judge in a case
- Access to regular police training programs, including regular training on human rights instruments and their practical application to policing activities

In addition to the foregoing, it is essential that the competent authority in a postconflict state ensures that the police have access to sufficient budgetary resources and the administrative assistance needed to tackle serious crimes.

Specialized Functions of Police

Beyond the basic elements described above, which again apply equally to a newly constituted police force in a postconflict state or an established police force in a more stable environment, it may be useful for a police operation to develop a number of specialized groups in order to better handle serious crimes. These groups are usually called task forces, operational units, or bureaus, but more important than the name is the idea that groups of personnel with specialized training and equipment may be needed to perform certain specialized functions. These operational units do not always act independently; for example, a narcotics investigation might involve the services of a narcotics unit, a border control and security unit, a financial investigations unit, and a tactical response team.

The following are just some of the specialized groups that might need to be developed (assuming, of course, that sufficient resources are available).

- *Tactical Response Team.* Sometimes referred to as a “special weapons and tactics (SWAT) team,” a tactical response team may be needed to carry out high-risk tactical operations, such as executing search warrants and arrest warrants against unusually dangerous elements.
- *Border Control and Security Unit.* The control of borders often poses a problem in postconflict states. Hostile military forces or insurgents may use border crossing points to destabilize a peace process. Unsecured border crossings are also commonly used as entry points for illegal trafficking of persons, weapons, drugs, and commercial contraband and for the entry of illegal aliens. Border police would likely be required to work with other government agencies concerned with customs, immigration, and military operations.
- *Criminal Intelligence Unit.* As discussed in chapter 5, the police require the capacity to gather, analyze, and share intelligence information pertaining to serious criminal activity.
- *Special Operations: Undercover and Surveillance Units.* The use of special investigative means and covert measures, such as interception of telecommunications, covert surveillance, and deployment of undercover agents, is

a legitimate and essential tool for the prevention, detection, investigation, and prosecution of serious crimes. However, these mechanisms inherently involve an element of deception, intrusion into privacy, and capacity for abuse. Thus they require a comprehensive legal framework and a proper institutional structure with effective control mechanisms, as well as specialized trained personnel for the practical implementation of these measures. Accordingly, the establishment of a special operations department with at least two units—one for the implementation of technical covert surveillance measures and the interception of telecommunications, and the other for human intelligence and deployment and the handling of undercover agents—is crucial. These units should have operational independence and should work within carefully prescribed internal guidelines.

- *Financial Investigations Unit.* Attacking the financial base of a criminal operation can seriously disrupt its effectiveness, so directing resources toward financial investigations parallel to “traditional” criminal investigations is a worthwhile expenditure. A financial investigation aims at the identification, tracing, seizure, and confiscation of the proceeds of crime and requires the specialized expertise of designated financial investigators or, ideally, a separate financial investigations unit.
- *Narcotics Unit.* If narcotics production or trafficking is a problem in the post-conflict state, a counternarcotics unit would be required for its expertise in undercover operations, international cooperation, and the coordination of related investigations and prosecutions.
- *Organized Crime Unit.* The term “organized crime” covers a wide array of crimes, from smuggling of weapons, people, and drugs to the running of brothels to kidnappings for ransom and extortion. Where organized criminals seek to disguise the proceeds of their criminal activity through money laundering, the role of this unit may overlap with the mandate of the financial crimes unit. Given the prevalence of organized crime, its frequent involvement in the political sphere in postconflict states, and the specialized knowledge and skill necessary to investigate organized crime and gather the evidence needed to mount a successful prosecution, it may be necessary to establish a dedicated organized crime unit.
- *Financial and Economic Crimes Unit.* Specialized skills and resources are required to gather data on, analyze, investigate, and prosecute financial and economic crimes. Such crimes are often paper-intensive. Combating them requires expertise in gathering financial data and analyzing it, as well as working with other experts, such as financial or forensic accountants.
- *Anticorruption Unit.* In addition to creating a financial and economic crimes unit, many police forces set up specialized anticorruption units, as required by a number of regional and international conventions. Such units are designed to provide trained staff and the budgetary means to effectively combat cor-

ruption. The unit should have appropriate independence, autonomy, and protection in the exercise of its functions and be free from improper influence.

- *Close Protection Unit.* As discussed later in this chapter, the protection of judges, prosecutors, and defense lawyers is a critical component of a state's ability to investigate and prosecute serious crimes. Such a unit should be able to assess the threat to vulnerable persons and to develop an appropriate protection plan that may include providing bodyguards and guarding offices and residences. The successful protection of vulnerable individuals in key court cases is necessary both to enable prosecutions and to create public confidence in the police and justice system.
- *Witness Protection Unit.* Just as critical as protecting vulnerable persons is protecting witnesses and cooperating defendants whose safety, and possibly the safety of their families, may be at risk. A witness protection unit is responsible for devising a plan to ensure their safety before, during, and after trial.
- *High-Risk Prisoner Transport Units.* Prisoner transport units are important for ensuring the safe and efficient movement of prisoners between detention facilities, prisons, courts, and medical facilities. Such units are particularly important in cases involving organized crime or other high-profile prisoners. In postconflict states, prisoner transport has often been a weak link, and the risk of escape through armed intervention must be countered. While prisoner transport should be part of the prison system, in a postconflict state it may be necessary for the police to assume this duty, particularly in regard to high-profile serious crimes cases.
- *Internal Affairs/Professional Standards Unit.* In all police structures, it is crucial to give adequate attention to upholding professional standards and integrity and to the prevention, detection, and investigation of misconduct, transgressions, and corruption of police officials. Given the importance of maintaining or reestablishing the integrity and credibility of the police force in the eyes of the public, and given the specific nature and difficulty of investigations within the police structure, a separate internal affairs unit with adequate resources and autonomy to efficiently investigate police misconduct is vital.
- *Victim Assistance Unit.* Victims of serious crimes, especially vulnerable persons such as children and victims of human trafficking, may need assistance. This assistance may include help locating shelter, medical assistance, mental health counseling, and legal advice. It may also include providing information, such as how the criminal justice system operates, so that victims will have a better understanding of what to expect from the system. Establishing a victim assistance unit is a specific requirement of the Protocol to the United Nations Convention against Transnational Organized Crime (UNTOC). In some locations, prosecutor's offices also have victim assistance units.

Targeting Organized Crime, Drugs, and Trafficking in Bosnia

Security Council Resolution 1144, passed in 1997, ordered that the UN Mission in Bosnia and Herzegovina (UNMIBH) play a role in creating specialized police units to address key public security concerns, including organized crime, drugs, corruption, and public security crisis management. As part of these efforts, all police officers, including new recruits and returning former officers, were mandated to attend UNMIBH-led training courses in such specialized areas as riot control, traffic policing, and firearms management. Additionally, in June 2001, UNMIBH and local police established the Special Trafficking Operations Programme (STOP), the most ambitious antitrafficking project to date in Western Europe and the Balkans. As of November 2002, STOP had carried out more than eight hundred raids; identified more than two hundred establishments suspected of trafficking; and, with the support of the International Organization for Migration (IOM), helped to repatriate hundreds of trafficked victims.

Interagency Coordination and Cooperation

Other agencies, such as those involving taxation or customs, are needed for the effective investigation of serious crimes and may be called in to assist in a particular case. Additionally, a multidisciplinary task force might be useful in handling a particular serious crimes case or other problem. Depending upon the situation, a task force might include police, tax officers, customs officers, and a prosecutor as a leader, with the assistance of specialists such as accountants.

In these instances, it is critical that rules and agreements (such as memoranda of understanding) be devised to address and facilitate interagency cooperation and sharing of information. Additionally, regular meetings, combined with a cooperative attitude on the part of task force participants, can greatly increase its success.

Judicial Structures and Options for Trying Serious Crimes Cases

An independent and impartial judiciary and a fair and effective prosecution are critical components of any effort to handle serious crimes cases. Absent a strong judicial system able to promptly and fairly investigate, prosecute, and adjudicate serious crimes, even the most careful and sophisticated investigations will result in criminal actors being released back onto the street. Such impunity not only encourages further criminality but also damages police and public morale. In light of the far-reaching powers that many of the measures discussed in chapter 3 give to police and prosecutors, it is all the more imperative that the judiciary is able to guarantee international standards of fair trial and is (and is seen to be) fair and impartial in its application of the law.

This requirement poses an obvious conundrum. The serious crimes addressed in this handbook are committed in postconflict societies generally characterized by weak and fragile rule of law institutions. For a variety of reasons, the judicial system may be ill equipped to handle serious crimes cases. The conflict may well have taken a physical toll on the judicial system, leaving courthouses and prosecutors' offices destroyed and decimating the number of qualified judges and prosecutors. The judicial system may also have been used as a tool of government oppression against dissent or specific ethnic, religious, or political groups, undermining the legitimacy of the institutions and the credibility of the judges and prosecutors who were part of them. Judges and prosecutors left over from the conflict may thus be tainted, and systemic flaws in the institutions or the political structures of the state may compromise their independence.

In postconflict states, some judges and prosecutors may continue to demonstrate bias and prejudice against certain ethnic, religious, or political groups; may be vulnerable to intimidation and physical threats by criminal actors; or may be subjected to actual or perceived pressure from their peers or from societal groups. They may also not enjoy the level of personal security necessary to handle serious crimes cases safely. Further, the political environment in postconflict states may be such that certain government officials decide it is not in their interests to create a strong judicial system that may end up holding them accountable. These officials may cripple reform by not allocating funds or human resources or by obstructing legislative reform efforts. All these factors can interfere with the judicial system's ability to fairly and impartially investigate and try serious crimes cases.

The task of addressing these shortcomings and establishing a fully functional, fair, and effective judicial system, including an independent judiciary, requires a long-term and multifaceted effort. It may involve reconstructing courthouses, establishing a new system of appointment and discipline for judges and prosecutors, establishing systems of court administration, reforming legal education institutions, establishing training programs, and increasing public awareness. These are all critical steps that should be taken as early as possible. However, in light of the destabilizing impact of serious crimes, which may in fact undermine these very efforts, it may not be wise to wait until these efforts have borne fruit before tackling serious crimes. Some immediate solutions for disposing of serious crimes cases in a fair, impartial, and independent manner will need to be found. This section discusses two options for handling serious crimes cases in the absence of a fully functional and fair judicial system: the creation of specialized jurisdictions in the postconflict state, and prosecution by another interested state.

Specialized Mechanisms to Prosecute and Adjudicate Cases

A number of postconflict societies have sought to overcome the systemic shortcomings of the judicial system by designating or creating specialized courts, chambers, or departments, and/or specialized prosecutorial offices, with specific jurisdiction over serious crimes. In this way, limited resources can be leveraged and focused to provide an appropriate venue for serious crimes, even if the regular court system and the postconflict context in which it operates remain deeply flawed.

The concept of creating specialized jurisdictions is certainly not a novel one. Many countries have prosecutors or investigating judges who specialize in particular types of crimes. Many countries have specialized courts, or divisions within courts, to handle disputes such as family matters, juvenile crime, commercial law, or tax matters. Prosecutors' offices may also have dedicated personnel and departments that similarly focus on particular types of crime. The obvious reason for doing so is to create efficiencies by consolidating expertise, specialized equipment, and

Special Courts for War Crimes and Related Cases in East Timor and Sierra Leone

East Timor

The United Nations Transitional Administration in East Timor (UNTAET) established "serious crimes" panels with exclusive jurisdiction over the criminal offenses of genocide, war crimes, crimes against humanity, torture, murder, and sexual offenses. (As illustrated by these crimes, UNTAET's definition of "serious crimes" differs from that used in this book.) The panels, which have now come to an end, sat at the Dili District Court and were composed of international and Timorese judges. International and national prosecutors worked together under the deputy prosecutor general for serious crimes, who had exclusive jurisdiction to investigate and prosecute serious crimes. International and national defense attorneys also acted together in serious crimes cases. The serious crimes panels were governed by UNTAET Regula-

tion 2000/15, the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences. This regulation was inspired by different sources of law, including the Statute of the International Criminal Court (the basis for definitions of crimes, general principles of law, defenses, individual criminal responsibility, etc.), the UN Convention against Torture (the basis for the definition of torture), and the Indonesian Penal Code (which had been declared the applicable penal law in East Timor and whose provisions formed the basis for the definition of the crimes of murder and sexual offenses). In conjunction with UNTAET Regulation 2000/15, which was mainly composed of substantive criminal law, the panels also applied the procedural provisions of UNTAET Regulation 2000/30, Transitional Rules of Criminal Procedure.

Sierra Leone

Following Security Council Resolution 1315 (2000), the Special Court for Sierra Leone was established as an independent special court by an agreement between the government of Sierra Leone and the United Nations. The court's jurisdiction is over "persons who bear the greatest responsibility" for the commission of genocide, crimes against humanity, war crimes, and the following offenses derived from Sierra Leonean law: offenses relating to the abuse of girls, the wanton destruction of property, and arson. Unlike the special panels in East Timor, the special court has "concurrent jurisdiction" over these offenses with national courts in Sierra Leone. When requested to do so by the special court, however, a domestic court must cede its jurisdiction to the special court and cease hearing a case. While domestic courts are governed by domestic law, the special court applies a special statute, drafted as

part of the agreement, that includes some elements of Sierra Leonean law (e.g., the definitions of domestic criminal offenses) and incorporates the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda as the applicable criminal procedure rules. The statute also includes provisions governing the jurisdiction of the court, its composition and organization, the sentencing and appeals process, and general principles of criminal law. The special court is composed of both international and national personnel, the former appointed by the United Nations and the latter by the government of Sierra Leone. Trials and appeals are heard by panels consisting of a majority of international judges. The prosecutor of the special court is appointed by the secretary-general of the United Nations and is assisted by a Sierra Leonean deputy prosecutor and other national and international prosecutors.

resources and to provide a mechanism to limit a prosecutor's load of complex or technical cases to allow for proper investigation and preparation for trial. For example, a prosecutor's office might have a specialized unit to deal with financial and economic crimes, another unit for organized crime cases, and another to handle narcotics cases. While it is unusual and generally unnecessary to create specialized trial and appeal chambers to handle serious crimes, doing so may have several benefits in a postconflict society.

Concentrating serious crimes cases in designated forums limits the number of judges and prosecutors who handle such cases, allowing for a more rigorous process of selecting these personnel. It also allows for easier monitoring of cases to ensure fair procedures. Since most serious crimes cases tend to be complex and technical, especially when financial crime is involved or high-level and more insulated organized crime leaders are prosecuted, diverting such cases to a special jurisdiction may prevent backlogs in the regular court system and avert undue pressure on prosecutors or judges to hurry up an investigation or trial.

In addition, limited resources can be concentrated to create the necessary conditions for the handling of serious crimes. Courts or departments can be outfitted with the equipment needed to effectively

and efficiently try serious crimes—for example, two-way mirrors, voice- and image-distortion equipment, and closed-circuit television networks to protect the identity of victims and witnesses. Specialized judges and prosecutors can be targeted for intensive training on substantive and procedural aspects of serious crimes cases. Special jurisdictions can be provided with special security measures, including building security, personal security for judicial personnel, and witness protection. To the extent that international personnel are deployed to mentor and train judges, prosecutors, and court administrators, their work can be concentrated on the special jurisdiction. Similarly, to the extent that international judges and prosecutors are deployed to try serious crimes in cooperation with their national counterparts, special jurisdictions are an efficient way to use them. (Chapter 6 discusses issues related to the use of international personnel, including selection, training, accountability, and oversight.)

It is also worth noting that the experiences of tribunals established to prosecute war crimes and related cases, including the challenges these tribunals face and some reasons underlying the decision to create them, are relevant to the process of setting up specialized jurisdictions or mechanisms to handle serious crimes cases. As several postconflict countries have learned in the past decade, the need to harness special resources and specialized personnel, establish witness protection and other specialized capabilities, and address crimes that are destabilizing all relate to war crimes and related cases as well as serious crimes cases.

The ad hoc international criminal tribunals for the former Yugoslavia and for Rwanda have proved problematic in several ways: they are very costly; they operate at a great distance from the events in question (the tribunal for the former Yugoslavia convenes in The Hague and that for Rwanda is based in Arusha, Tanzania); they can deal with only a limited number of cases; and they do little to build domestic capacity to handle these crimes. The Special Court for Sierra Leone was developed in part to mitigate these problems, but it also has been criticized as a stand-alone court with a very limited caseload. Panels with exclusive jurisdiction over serious criminal offenses in East Timor, while technically part of the existing Timorese judiciary, in fact have been poorly integrated into the national court system, fueling serious concerns about their long-term impact. In Kosovo, a specialized war and ethnic crimes court was not created; instead, international prosecutors were inserted into individual cases in district courts, and ad hoc panels with a majority of international judges were created for selected cases. In Bosnia, international judges and prosecutors have been integrated into a department for war crimes within the state court. One of the lessons learned from the experience with these tribunals to date, emphasized in the *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, is that such tribunals should be integrated as

fully as possible into the domestic system, with a clear goal of building domestic capacity to handle challenging cases.

To varying degrees, the experiences of the war crimes-related tribunals and courts were considered in crafting approaches to dealing with both war crimes and serious crimes cases in Bosnia and in Kosovo and with significant narcotics cases in Afghanistan. Naturally, politics, available resources, the role of the international community, and the particularities of each situation also influenced the approaches ultimately adopted. In 2000, the SRSG for Kosovo promulgated a regulation creating a procedural mechanism to transfer serious crimes cases to international prosecutors and ad hoc panels composed of international and Kosovo judges. (Five years later, however, planning began for a central court and prosecutor's office to replace the ad hoc panels in various Kosovo district courts.) Bosnia established a special department for organized crime, economic crime, and corruption within the existing state court, in which international judges and prosecutors work alongside national counterparts. In Afghanistan, a Central Narcotics Tribunal (CNT) for large cases has been created as part of the country's judiciary; the court is nationally staffed but receives significant assistance from the international community in training, funding, and case preparation.

The following sidebars (pages 85–95) describe these and other approaches in detail.

A Special Prosecutor's Office to Handle Human Rights Violations Cases in Cambodia

In February 1992, the Security Council authorized the establishment of the UN Transitional Authority in Cambodia (UNTAC), responsible for implementing the Paris Peace Accords of October 1991 and overseeing the organization and conduct of the 1993 elections. Under the Paris Accords, UNTAC's special representative of the secretary-general, Yasushi Akashi, was authorized to issue binding directives to administrative agencies that would ensure a neutral environment for the elections. When national authorities failed to quell political violence and intimidation leading up to the election, Akashi promulgated Directive 93/1 and established a special prosecutor's office within UNTAC that had the power to arrest, prosecute, and detain persons suspected of serious human rights violations. At the time, this was a radical

step, unique to any UN peacekeeping force, and one that was opposed by many within the mission. Ultimately, this continued opposition meant the potential for such an office was never realized; only three alleged violators were ever arrested by the special prosecutor, and he was unable to bring any of them to trial due to a weak judiciary that was unable to handle the cases. The special prosecutor complained that UNTAC leadership was afraid to upset high-ranking Cambodian officials, and, in fact, he resigned before his contract expired. While the effort was ultimately unsuccessful in the Cambodian context, it created a precedent for the introduction of international personnel in missions where serious crimes threaten the peace, particularly in the absence of a functioning police and judicial system.

A Mechanism to Prosecute and Adjudicate Serious Crimes in Kosovo

In Kosovo, despite clear signs that the national judicial system would not be able to handle serious crimes on an impartial basis, the effort to find a fair and effective means of prosecuting and adjudicating serious crimes cases took several incremental twists and turns rather than following a straight developmental line. The approach ultimately adopted was the result of ad hoc, stop-gap measures developed in response to crises, leading to a mechanism of dealing with serious crimes that contained procedural flaws. In 1999, UNMIK proposed the establishment of a separate tribunal, the Kosovo War and Ethnic Crimes Court, to be staffed by international and Kosovo judges and prosecutors. The United Nations and international donors ultimately rejected the proposal amid concerns about the extremely high cost and the fear that it would divert resources and attention from the task of establishing the Kosovo judicial system as a whole.

Meanwhile, as the Kosovo judiciary (composed almost entirely of Kosovo Albanians) continued to release some dangerous Kosovo Albanians while treating some Kosovo Serbs differently, the commander of KFOR (the NATO-led international military force deployed to the region), arguing authority to maintain a safe and secure environment under Security Council Resolution 1244 and citing the lack of a functioning judicial system, instituted a procedure to allow him to approve continued detention, despite release orders from the judiciary. The Organization for Security and Coopera-

tion in Europe (OSCE) and international human rights organizations argued that such detentions violated international human rights standards and called for the appointment of international judges and prosecutors to handle sensitive and serious cases in situations where the national judiciary was either biased or under threat or pressure. In February 2000, a series of violent attacks and ethnic riots in Mitrovica forced the issue. UNMIK issued Regulation 2000/6, allowing the appointment of an international judge and prosecutor to the Mitrovica district court and public prosecutor's office. This regulation further gave international judges and prosecutors the authority to "select and take responsibility for new and pending" criminal investigations. A few months later, reacting to a hunger strike by Serb prisoners indicted for war crimes, who were protesting what they considered to be an unfair, ethnic Albanian-controlled judiciary, UNMIK enacted Regulation 2000/34, which allowed the appointment of international judges and prosecutors to all five district courts and to the supreme court.

This regulation proved insufficient to counter continued charges of bias, because Kosovo judges were in a majority on the five-judge trial and three-judge detention hearing and appeals panels and consistently outvoted international judges. Additionally, it became apparent that it was not only cases of ethnic violence that were challenging for the Kosovo judicial system to fairly investigate, prosecute, adjudicate,

and determine detention issues. Organized crime cases, as well as murders committed by feuding Kosovo Albanian political factions, also proved difficult for the Kosovo judges and prosecutors. In December 2000, UNMIK issued Regulation 2000/64, authorizing the special representative of the secretary-general (SRSG) to approve requests by UNMIK, the prosecution, or the defense that a case be heard by a special ad hoc three-judge panel (including at least two international judges) and for the case to be prosecuted by an international prosecutor.

The need to find a special mechanism for handling serious crimes in Kosovo is undisputed. And the "64 Panels" have in many cases succeeded in bringing criminals to justice where the previous system had failed to do so. However, this approach has been criticized for a number of procedural flaws. OSCE and the UNMIK human rights ombudsperson have argued that UNMIK SRSG's having the authority to appoint and renew the usual six-month employment contracts of the international judges and prosecutors, and to determine which cases they will hear, constitutes a violation of the separation of powers between the executive and the judiciary and a violation of the independence of the judiciary. It has also been argued that some safeguards, such as an independent appointing body or mechanism, should be in place to ensure independence. The lack of criteria governing which cases are to be heard by 64 Panels and the lack of transparency in this decision-making process have caused cases of a similar nature and seriousness to

be treated differently. The lack of criteria has also permitted political and other irrelevant considerations to be taken into account in deciding which cases are to be heard by a three-judge panel with a majority of international judges rather than by a five-judge panel with a majority of Kosovo judges.

Moreover, rather than working together with their domestic counterparts, international judges and prosecutors have effectively acted on a parallel basis to the national judicial system, resulting in a minimal transfer of capacity and skills to national judges and prosecutors. A detailed strategy with specific goals, benchmarks, and target dates for phasing out international personnel and empowering the national judges and prosecutors to handle these cases did not exist for the first six years of UNMIK's presence. Further, coprosecutions by an international prosecutor and a Kosovo prosecutor, where both would participate in the questioning of witnesses at trial, were not encouraged, and only a few were conducted at the initiative of an individual international prosecutor. However, positive developments occurred in early 2006, when UNMIK announced the establishment of the Kosovo Special Prosecutor's Office (KSPO). The KSPO is to be composed of ten local and ten international prosecutors, who will work together on individual cases. In addition, the government of Kosovo will supply ten or so legal officers. Once it is up and running, KSPO, together with the still extant UNMIK Department of Justice, will handle the most complex organized crime, public corruption, and inter-ethnic crime cases.

A Special Department to Handle Serious Crimes Cases in Bosnia

In Bosnia and Herzegovina, the decision to create a special mechanism for handling serious crimes came late—eight years after the peace agreement—but with the benefit of lessons learned from the Kosovo experience. The multitude of jurisdictions emanating from the complex structure agreed upon at Dayton, involving a weak state, two largely ethnic-based entities (the Federation of Bosnia and Herzegovina, and the Republika Srpska), and ten largely ethnic-based cantons of the Federation, contributed to a climate of impunity for criminals, who were generally tried in their home venues, where they could exert pressure on the judiciary. Dayton did not provide for any state-level prosecutor's office or criminal court for Bosnia-wide organized crime or corruption activities.

Efforts to increase capacity specifically for handling serious crimes began in 1998–9 with proposals for reforming the criminal law framework to assist in the investigation, prosecution, and adjudication of serious crimes. A further idea was to have international investigators and prosecutors assist select national counterparts in developing serious crimes cases, although only nationals would prosecute and adjudicate cases. Donor countries sent a few investigators and prosecutors and together with the Anti-Fraud Department of the Office of the High Representative (OHR) took on this task. OHR had supervisory power over the national institutions, including the power to enact laws. While this situation led to cases being brought before the courts, by 2002 none had come to a verdict. The outmoded legal framework lacked proper definitions of criminal acts such as corruption, money laundering, and other economic crimes, as well as effective sanctions such as asset forfeiture. The cumbersome criminal proce-

cedure codes afforded too many opportunities for delay in judicial proceedings—opportunities that were consistently exploited by judges unwilling to tackle sensitive cases. A lack of legal cooperation between the two Bosnian entities made it difficult to carry out arrests and execute warrants and enforcement measures, giving criminals an easy way out. Bribery, intimidation, and pressure by corrupt and implicated politicians were commonplace. In what has become an emblematic case, in 1999 the deputy minister of the interior of the Federation was killed by a car bomb. The suspected murderers were part of an organized crime gang the minister was investigating. It was suspected that his assassination was prompted in part by his close cooperation with UN mission officials, who had found him to be a competent and professional police officer. The cantonal court dismissed the case for lack of evidence, despite what the international community viewed as considerable proof. The murder remains unresolved.

A more robust approach to tackling serious crimes was taken as part of a broader strategy of judicial and criminal reform. In 2002 the international community adopted a new approach to judicial appointments, involving establishment of a High Judicial and Prosecutorial Council, to coincide with a countrywide vetting and restructuring of the court system and prosecutorial offices. Following years of attempted law reform, criminal codes and procedure codes were revamped and passed into legislation. This work included a controversial restructuring and expansion of the role played by prosecutors and the corresponding elimination of the investigative judge role. A state court, which had been established by law but was delayed by a constitutional challenge by the Republika Srpska, was finally about to come

into existence. While this court was initially meant to serve only electoral and administrative disputes, OHR created a Special Department for Organized Crime, Economic Crime and Corruption, with a corresponding department in the state prosecutor's office. These departments have jurisdiction over offenses with an interentity aspect and shares jurisdiction over these offenses with the entity courts. The chief prosecutor of the state can seek transfer of cases from the entity to the special department.

Upon request of the Bosnian authorities, OHR included international judges and prosecutors in the special department. Whereas generally all-Bosnian panels would hear cases, the presiding judge, a Bosnian, could assign trials and appeals to panels consisting of two international judges and one national judge. A team of a lead international and supporting national prosecutor also handles cases. In its first two years of existence, the special department convicted a major ring of human traffickers and a former president of Bosnia and Herzegovina, who was sentenced to ten years for abuse of office. Between February and October 2005, the department conducted eleven trials, resulting in eight verdicts, seven of which included convictions and were in the appeal phase as of October 2005. The convictions involved charges of corruption, organized crime, human trafficking, customs fraud, tax evasion, and banking violations. In addition, a case is pending against another former president of Bosnia and Herzegovina for fraud and corruption.

Establishment of the special department has not been without challenges. As a new state institution, it needed to be constructed from scratch, and thus needed buildings, furniture, equipment, and staff. Finding premises for the court and prosecutor's office took more than a year. A lack of cooperation by politicians added to the delay.

Despite strong international consensus on the need for the court, funds and personnel were not immediately forthcoming; it took more than a year for the international positions to begin to be filled, and as of October 2005, a number of positions remained unfilled. Unevenness in the levels of experience and expertise displayed by seconded international judges and prosecutors has at times damaged public perceptions of the initiative. International personnel were not provided with specific training in the applicable Bosnian laws and on occasion simply relied on the laws of their home countries. Linguistic and cultural barriers also separated international personnel from their national counterparts, creating in effect a parallel system of different legal and cultural understandings in the selection and investigation of cases. The Bosnian presiding judge initially refused to assign sensitive cases to international panels, causing consideration of an alternative mechanism of case assignment. This was averted following diplomatic efforts.

In 2004 the establishment of the Special Section for War Crimes in the State Court and Prosecutor's Office of Bosnia commenced. An independent registry was established to ensure that national justice institutions have the material and professional capacity to process complex cases of war crimes and organized crime. The registry administers the recruitment and selection of international judges and prosecutors; manages and administers international donor funds; provides support services (in the form of court management, language services, information technology, and legal officers) to the special section; and conducts coordination activities related to detention, defense, and witness protection and support.

The philosophy of the registry is that the proper role of the international community is to provide the people and institutions of

Bosnia and Herzegovina with the managerial and technical tools and the financial and material resources to try war crimes and organized crime cases meeting international standards. A transition strategy is incorporated into the core project plan, and by August 2006 the registry's international staff expects to complete the transfer of responsibility for management of core functions of the registry to national professionals.

Using donor funds, a high-security detention unit was constructed and is now fully staffed by Bosnians. All costs of the detention unit are paid by the Bosnian government. By October 2005, the registry, in coordination with the Bosnian Ministry of Justice, was managing a project to construct a 340-bed maximum-security prison.

In May 2005, the chief prosecutor of Bosnia and Herzegovina presented his war crimes prosecution strategy. Two hundred

very sensitive cases have been selected for investigation, and the International Criminal Tribunal for the former Yugoslavia (ICTY) is considering referring seven of its cases to the court. The head of the prosecution teams is a Bosnian prosecutor, and he is supported by international prosecutors with experience in prosecuting war crimes. Panels are composed of three judges, and the presiding judge is Bosnian. War crimes trials have commenced, and in September 2005 ICTY transferred the first indictee from The Hague to the Court of Bosnia and Herzegovina. As of October 2005, the court had approximately forty war crimes files in various phases of proceedings. These files include the "Kravice Warehouse" case, involving ten men suspected of the murder of one thousand men and boys in the Srebrenica area and arrested by Republika Srpska police in July 2005.

A Multipronged Counternarcotics Strategy in Afghanistan

A November 2005 UN report stated that Afghanistan produces 87 percent of the world's opium and that income from opium production and drug trafficking in 2005 was estimated at \$2.7 billion, equivalent to about 52 percent of Afghanistan's legal gross domestic product. Illegal opium cultivation and drug trafficking are widely considered to be a major threat to Afghanistan's stability and continued progress toward peace. Regional warlords, corrupt government officials, and criminal organizations exploit the narcotics trade as a key source of revenue and patronage, undermining Afghanistan's fragile internal security and nascent democracy. Drug trafficking is also considered to be a significant source of funding for terrorist and extremist groups such as Taliban remnants. The Bonn Agreement establishing the Afghan

Interim Authority in 2001 committed the international community to working in cooperation with the new government in the fight against drugs and organized crime. If Afghanistan cannot control drugs, it cannot maintain security. If it cannot maintain security, reconstruction and progress toward peace will falter.

Afghanistan's National Counter Narcotics Strategy identified a multipronged approach, including criminal prosecution, interdiction, eradication, alternative livelihoods, lowering demand, and public awareness. Efforts on the criminal justice side alone have involved reforms at multiple levels: to close gaps in the legal framework, to develop specialized police capacity and investigative task forces, and to create a judicial mechanism capable of handling sensitive and complex narcotics cases.

In 2003 the Counter Narcotics Police of Afghanistan (CNPA), with a specialized National Interdiction Unit (NIU) and mobile detection teams, was created as a special department of the Ministry of Interior. Challenges to its interdiction capacity included a lack of expertise, poor administration, weak management, and confusion among different law enforcement agencies regarding respective responsibilities. Over the following years, much work has been done to improve its capacity and address these weaknesses. An international donor is providing training (in subjects such as firearms, navigation, raid execution, arresting and interviewing techniques, and evidence collection), logistical support, specialized vehicles and equipment, and international experts to work with the NIU on interdiction operations. According to a U.S. report, the CNPA in 2005 seized 42.9 metric tons of opium and 5.5 metric tons of heroin and detained or arrested more than thirty individuals on charges related to these seizures.

With international assistance, selected Afghan prosecutors and investigators have formed a Vertical Prosecution Task Force (VPTF), an investigative task force that works to develop cases all over Afghanistan. By late 2005, this task force was linked with the NIU, which hands over cases arising from its interdiction activities. As of March 2006, the VPTF is made up of approximately thirty Afghan prosecutors and thirty-five to forty Afghan investigators. Given the historical separation of and geographical distances between the central government and the provinces, a key challenge is to promote awareness and to develop logistics plans to ensure that the task force is able to operate nationally. National notification procedures govern when police in the provinces make arrests and are required to notify the task force. International prosecutors and drug-enforcement professionals work with the

task force on the development of cases.

The need for Afghanistan to develop the capacity of the judiciary and prosecution to effectively handle these cases has been apparent from the start, given a lack of training and weak judicial institutions. With officials at all levels of government suspected of involvement in narcotics trafficking, and given the power held by criminals, especially in provincial areas outside of Kabul, it is not surprising that arrested traffickers are routinely released, sometimes before being brought to trial, despite clear evidence of their guilt. In contrast, low-level “mules,” who carry narcotics from one point to another for the traffickers, are sometimes detained beyond legally specified timelines.

A proposal to establish a stand-alone drug court with national jurisdiction was ultimately rejected amid some national and international concerns that it was unconstitutional, was reminiscent of the security courts of the Taliban regime, could lead to unchecked power for the state, and could be used as a political tool. Instead, following a series of negotiations with relevant government institutions and international assistance providers, the chief justice of the supreme court proposed to establish the Central Narcotics Tribunal (CNT) as an integrated part of the judiciary. On July 26, 2005, President Hamid Karzai signed a decree putting this system into effect. The CNT was created to handle cases involving mid- to high-level offenders and has exclusive nationwide jurisdiction to adjudicate cases involving 2 kilograms or more of heroin, morphine, or cocaine or 10 kilograms or more of opium. This arrangement—one tribunal with one set of judges and one courthouse—enables targeted training and makes it easier to build adequate and secure facilities. As of March 2006, the CNT consisted of fourteen judges and the VPTF was preparing and trying several dozen cases

before the CNT. A court was also established in the court of appeals to handle appeals coming out of the CNT.

Among the myriad of challenges in establishing the court was finding suitable facilities, including courtrooms, administrative offices, and secure detention and prison facilities. A proposal to construct court and prison facilities faltered because of a lack of funds and poor planning and coordination. By November 2005, a temporary location for the court and the CNPA had been identified. Additionally, despite initial setbacks, as of March 2006, planning was under way for the construction of the Counter Narcotics Justice Center, which would be a secure Afghan-run facility housing offices for the

CNT and the VPTF, courtroom spaces, and secure detention facilities.

In December 2005, the Afghan government adopted a comprehensive Counter Narcotics Law, which introduced a number of changes and additions to the legal framework, including procedural provisions on search and seizure, wiretapping, surveillance and covert operations, guidelines for use of informants, and asset seizure and confiscation. The government is also considering developing a witness protection program and enlisting international assistance to train defense attorneys to handle serious crimes cases. Each of these programs will require significant financial and technical assistance to implement and sustain.

International Judges and Prosecutors Handling Serious Crimes Cases in the Solomon Islands

Between 1998 and 2000, violent conflict spread throughout the Solomon Islands, fueled by land disputes, political unrest, and the widespread availability of illegal weapons. Although a peace agreement was signed in October 2000, peace remained fragile, and in 2003 an Australian-led military and police force, known as the Regional Assistance Mission to the Solomon Islands (RAMSI), was deployed. Since RAMSI's arrival, inter-

national judges and prosecutors have been appointed to positions in the public prosecutor's office, the magistrate court, and the high court. The appointees' primary function is to mentor and train Solomon Islands personnel as a means to build capacity. They also handle sensitive cases, including cases brought against the leaders of the warring factions, as well as corruption charges leveled against police and parliamentarians.

Foreign Judges Handling Sensitive Cases in Fiji

Pacific states have frequently appointed judges from other countries to their courts. Following the Fijian coup d'état of 2000 (the third coup in a decade), state officials sought to collocate available international judges with Fijian judges on the High Court to assist with the court's heavy workload. International judges, who are appointed under local conditions of service, have been able to deal effectively with a range of cases that would have been too sensitive for national judges to hear. International judges have been assigned to adjudicate cases that are particularly controversial within Fijian society,

such as those dealing with treason, corruption, and the constitution. For instance, a judge from New Zealand, acting as a judge on the High Court of Fiji, in 2004 rejected the argument of a military officer, charged with participating in the 2000 coup, that he should not be tried under military law in Fiji's military court because his right to a fair and impartial trial under the constitution would likely be breached. In 2005, the same judge awarded compensation to landowners whose traditional land had been taken by Fiji's electricity authority to build a hydroelectric project.

Central Criminal Court for Serious Crimes Cases in Iraq

In July 2003, the Coalition Provision Authority (CPA) established the Central Criminal Court of Iraq (CCCI), with specific jurisdiction over serious crimes offenses, including cases involving terrorism, money laundering, drug trafficking, war crimes, and sabotage. As a national court, the CCCI is composed of Iraqi judges, prosecutors, and defense counsel. The U.S. military assists by providing evidence in certain cases. It also escorts prisoners to the CCCI from detention facilities and works with Iraqi guards to provide security for the CCCI. Because the court's mandate involves hearing cases that threaten the security and stability of Iraq, suspected insurgents impli-

cated in criminal offenses and organized crime members are referred to it, as are those accused of committing serious offenses during declared states of emergency. Defense lawyers complain that although in principle they are allowed access to clients, in practice, they do not have the necessary access to adequately prepare for trial because their clients are housed either in a remote detention facility, Camp Bucca, in the south or at Abu Ghraib jail. Further, defense lawyers complain that they often do not learn what the charges are until their clients arrive for their trials. As of March 2006, the CCCI had convicted almost nine hundred people in almost one thousand trials.

Special Court Chamber for Organized Crime Cases in Serbia

As the International Criminal Tribunal for the Former Yugoslavia completed its list of indictments in 2004, two chambers of Belgrade's district court—the Special Chamber for War Crimes and the Special Chamber for Organized Crime—were established in an effort to begin building Serbia's domestic capacity for adjudicating serious crimes cases. Chief among these cases was the 2003 assassination of Serbia's prime minister Zoran Djindjic (a trial for twelve of the forty-four defendants has been under way since 2004), as well as a case against eighteen defendants charged with participating in the execution of two

hundred Croat prisoners of war and civilians in 1991. Each chamber is composed of nine judges—including regular district court judges from Belgrade and seconded judges from other courts—and the legislation that created them also mandates specialized prosecutors, a special detention unit, and a special war crimes investigation service within the Ministry of Internal Affairs. Since the court began functioning, various international assistance programs have focused on training for managing complex trials, security needs, logistical issues, witness protection programs, and public relations.

Mixed National and International Commission Proposed for Haiti

During fall 2005, talks were held on the establishment of a mixed Haitian-international commission to help "break the impasse" in Haiti over imprisoned former prime minister Yvon Neptune, who had been incarcerated since June 2005 on charges implicating him in deaths and arson attacks earlier that year. In May 2005, Ambassador Luigi R. Einaudi, acting secretary-general of the Organization of American States, suggested that a tripartite commission—made up of a Haitian

jurist, an international jurist, and an international forensic expert—examine the Neptune case and recommend a course of action. Several delegations expressed concern about the humanitarian implications of the case and welcomed Einaudi's initiative. Argentina offered to provide a forensic expert to serve on the proposed tripartite commission. As of April 2006, Neptune remained in detention while Einaudi's proposal to establish a tripartite commission remains unheeded.

Call for Foreign Judges to Support and Advise Liberian Judges

With government corruption continuing to hinder Liberian politics, in fall 2005 international donors, in conjunction with the African Union, the Economic Community of West African States, and the United Nations Mission in Liberia, proposed a series of reforms to combat widespread theft and fraud. Known collectively as the Governance and Economic Management Assistance Program (GEMAP), these reforms include the establishment of an independent Anti-Corruption Commission as well as the introduction of foreign judges to “support and advise” Liberian judges, especially in politically sensitive

corruption cases, where international judges can be better insulated from political pressures. The Liberian constitution requires that judges be citizens of Liberia. While some argue this rule should be amended to allow foreign judges to handle sensitive cases, others believe such a change would be demeaning and is unnecessary because many Liberians, including expatriates, possess the appropriate qualifications. While the proposal to introduce foreign judges has stirred some controversy, similar programs have worked well in other countries in the region, including Ghana and Sierra Leone.

General Principles in Considering Specialized Mechanisms

Each postconflict society has its own set of political, practical, and legal issues and challenges that need to be taken into consideration in developing a specialized mechanism for handling serious crimes cases. It is not possible to prescribe a single model that will work in all situations. Depending on the nature and structure of the existing judicial system, available resources, and the role being played by international actors, it may be appropriate to create a single special court, a department or chamber within an existing court or several courts, or a procedural mechanism that ensures that serious crime cases are heard by a panel composed of specially appointed judges. All these mechanisms require a corresponding prosecutorial office to handle these cases and adequate appellate mechanisms, as well as adequate support for defense attorneys, including the provision of defense attorneys for those unable to afford counsel. (Issues related to defense counsel access are discussed more fully later in this chapter.)

Regardless of the particular mechanism adopted, there are certain general principles to heed and potential pitfalls to avoid:

- *Clearly define the types of cases that fall within the jurisdiction of the specialized mechanism and set out a transparent decision-making process for assigning cases to the specialized mechanism. Failure to do so can lead to confusion and to similar cases being treated differently. Moreover, it can make the process susceptible to improper political interference.*

- *Safeguard the actual and perceived independence of the judiciary of the specialized mechanism.* It is necessary to establish an independent and credible appointment, discipline, and removal system; to set out criteria for reappointment and contract renewal; and to avoid improper executive interference. It may also be necessary to increase salaries to attract and retain qualified personnel and to introduce provisions for financial disclosure so as to deter corruption. Judicial personnel may also require secure housing and close protection.
- *Avoid any real or perceived association with special or secret courts used by a former regime as tools of political repression.* Mechanisms that are integrated into the existing criminal justice system may be preferable to stand-alone courts with separate rules and procedures. Transparent procedures and public monitoring can provide extra checks on executive authority.
- *Ensure that a comprehensive legal framework, governing both the substance and the procedures of the specialized mechanism, is in place.* Depending upon the applicable law, amendments or additions to the legal framework may be required to address, for example, procedures for appointing, disciplining, and removing judges and prosecutors; the institutional structures, organization, competency, and duties of courts and prosecutors' offices; and standard operating procedures for courts and prosecutors' offices, rules and methods for fair and transparent case assignment and transfer of cases, required qualifications for personnel, and ethical standards.
- *Adequately fund infrastructure and equipment needs, administrative support, case-management systems, building and personal security, detention and incarceration facilities, and witness protection measures and other special techniques.* These commitments are costly—often more costly than is anticipated—but experience has shown that without all these pieces in place, investigations will be neither fair nor comprehensive, trials will be delayed, and safety and international standards will be at risk.
- *Find a balance between supporting specialized mechanisms and undertaking reform of the judicial system.* Precisely because they can be a magnet for resources from donor countries, specialized mechanisms have been criticized for diverting attention and funds away from long-term efforts to reform the judicial system as a whole. An additional complication occurs when the specialized mechanism targeting serious crimes competes for personnel, funding, and support with a specialized mechanism dealing with crimes related to the conflict, such as war crimes and other atrocities. Furthermore, in some postconflict societies, a specialized mechanism may be able to handle only the most sensitive and high-profile cases, while the vast majority of cases are left to the remainder of the judicial system. Thus, it is imperative to establish a balance between supporting specialized mechanisms and undertaking reform of the entire judicial system.

- *Do not let the roles played by international judges and prosecutors in specialized mechanisms undermine efforts to build domestic capacity to handle serious crimes.* This risk can be mitigated by creating an appropriate balance between the numbers of international and domestic personnel, by ensuring that international personnel work closely with their national counterparts, and by incorporating a strategy for building domestic capacity and transitioning international assistance to a lower profile as the national system demonstrates its capacity to confront serious crimes effectively and administer justice fairly. Most specialized mechanisms should have a permanent cadre of national judges and prosecutors to provide continuous and long-term interaction with international personnel. Moreover, whenever possible, national and international prosecutors should coprosecute a case, even though the process may be complicated by linguistic differences and the need for interpreters. National capacity is best strengthened through practical application. (Additional caveats regarding the use of international personnel are discussed in chapter 6.)

Prosecution of a Serious Crime by an Interested State

Where a postconflict state is unable to prosecute a particular serious crime, an option may be for another interested state to prosecute the alleged perpetrator. For example, a postconflict state may not have the financial resources, personnel, expertise, or political will to handle a complex serious crimes prosecution and may prefer that another interested state handle the case.

The first requirement for the prosecution of a serious crime by an interested state is for that state to have the will to prosecute. In many cases, the direct impact of the crime on the interested state explains why it wishes to prosecute. Serious criminal activities such as trafficking in human beings, drugs, and weapons; smuggling goods; money laundering; exploitation of raw material resources; and terrorism all have the potential to destabilize neighboring states and thus to prompt one or more of them to act. The interested state may also be motivated to act because the postconflict state refrains from prosecuting an offense committed by or against a national of the interested state. Rather than see the perpetrator enjoy impunity for the offense, the interested state may wish to assert jurisdiction.

A second requirement is that the interested state must adjudge the investigation and prosecution of the crime to be practicable. In reaching this determination, the interested state will likely consider whether it has the resources to take on the case, the amount of evidence available, the location of witnesses and victims, the difficulty of conducting an investigation,

U.S. Assertion of Jurisdiction over Afghan Drug Lord

To encourage the government of Afghanistan to support the extradition and prosecution of suspected drug traffickers, the United States asserted extraterritorial jurisdiction over Baz Mohammad, an Afghan drug lord with reported ties to the Taliban. Mohammad became the first Afghan citizen to be extradited to the United States and made his first U.S. court appearance in October 2005. As of March 2006, he was awaiting trial in a U.S. federal court in New York. He is accused of heading an international cartel responsible for taking more than \$25 million worth of heroin into the United States and other countries. As an “interested state” clearly affected by the heavy drug trade originating in Afghanistan, the United States sought extradition under the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

and whether any other competent state may be better placed to prosecute.

A third requirement is that the interested state has some form of legal ground to prosecute the offense. That is, the legal framework in the interested state must provide it with the power to prosecute an offense outside of its territory; in other words, it must have jurisdiction over the case. The most common form of jurisdiction asserted by states is “territorial jurisdiction,” meaning that a state can prosecute a criminal offense that occurs on

its territory. This sort of jurisdiction would not suffice where a crime has been committed wholly outside of the second state. (If the offense was committed partly in the second state, then asserting jurisdiction would not be an issue, and the second state could thus assert territorial jurisdiction. The classic example of a crime being committed in more than one state is firing a gun across a border and killing someone, where the criminal act occurred in one state but the consequence occurred in another.)

For a state to prosecute a crime that occurred in another state, it must possess “extraterritorial jurisdiction.” Extraterritorial jurisdiction, in concept and practice, has not been universally embraced, with many states reticent to assert jurisdiction over crimes occurring outside their immediate territory. That said, quite a number of states allow for extraterritorial jurisdiction over certain offenses. Furthermore, recent international conventions on matters such as terrorist offenses and organized crime encourage states that have signed and ratified these treaties to assert extraterritorial jurisdiction over these crimes. There are two principal forms of territorial jurisdiction, namely, active-personality jurisdiction and passive-personality jurisdiction. Active-personality jurisdiction means that a state can assert jurisdiction over a national when the national commits a criminal offense outside of its territory. Passive-personality jurisdiction holds that a state may prosecute any person who commits a criminal offense against one of its nationals.

Other grounds for extraterritorial jurisdiction are based on the “effects doctrine” and the “protective principle.” The effects doctrine

means that a state can prosecute an offense that occurred in another state if the offense had substantial effects on the first state, while the protective principle asserts that a state can have jurisdiction over a criminal offense that affected its security interests even though it occurred in another state. While not common, both principles can be found in international conventions. For example, Article 6(2) of the International Convention for the Suppression of Terrorist Bombings provides that states that have signed and ratified the treaty may assert jurisdiction on the basis of both the effects doctrine and the protective principle.

The final legal hurdle to overcome before an interested state can prosecute a criminal offense committed in another state is whether extradition treaties and mutual legal assistance treaties are in place between both states. The former will be required to ensure the presence of the perpetrator in the second state, and the latter is necessary in the effective investigation of the case.

In essence, a second state that is willing and able to prosecute a serious crime committed in a postconflict state will not be able to bring a successful prosecution without the requisite laws on jurisdiction, extradition, and mutual legal assistance mechanisms. Most important, it will need the cooperation and consent of the state in which the offense was committed.

As an alternative to an interested state's prosecuting and adjudicating a crime that occurred in a postconflict state, the interested state may provide international legal assistance, police and legal advisers, and even financial support to the postconflict state to enable the case to be properly investigated, prosecuted, and adjudicated there.

Similar issues arise when a national of a postconflict state commits a crime in another state. If extradition is not permitted by law, a postconflict state may unintentionally become a haven for those who commit crimes in other states and then return to the postconflict state. This was the case in Kosovo, where Norway, Germany, and other states supported investigations and trials of Kosovo defendants who committed crimes in these states and then fled back to Kosovo.

Reforms Addressing Right to Defense Counsel, Access to Defense Counsel, and Defense Counsel's Access to Evidence

In many postconflict states, the criminal justice system has been left in tatters by the conflict. There may be a dearth not only of police and prosecutors to enforce criminal justice but also of trained lawyers to act in the defense of serious criminals. Three aspects of the right to legal assistance merit particular attention in connection with serious crimes: the right to defense counsel and free legal assistance for serious criminals;

Assistance to Defense Lawyers in Kosovo

In Kosovo in 2001, the OSCE established the Criminal Defence Resource Centre (CDRC) to assist Kosovo defense attorneys. The center later became an independent non-governmental organization. Staffed with both international and Kosovo lawyers, the CDRC acted as a resource for defense attorneys but did not actually represent clients in proceedings. (Although an earlier proposal suggested that international defense lawyers should represent clients charged in serious crimes cases, the Kosovo bar association strongly opposed the proposal.) The kinds of assistance furnished by CDRC included providing lawyers access to relevant international instruments, assisting in research, case and motion preparation, and providing continuing legal education programs.

restrictions on the right of access to defense counsel; and the right of the defense to access evidence in a case. These rights have all proven to be contentious issues in postconflict situations where the legal framework is being amended to address serious crimes.

The Right to Defense Counsel

The right to counsel of one's own choosing is a fundamental fair trial right of an arrested or accused

person as set out in international and regional human rights instruments. The right envisages a situation where the person is capable of paying for counsel. However, where a person does not have the means to pay for his or her own lawyer, the state is required to provide a lawyer free of charge in certain circumstances. This is not an automatic right; the standard used to adjudge whether free legal assistance will be provided is the "interests of justice" test. The United Nations Draft Declaration on the Right to a Fair Trial and Remedy states that "[t]he interests of justice in a particular case should be determined by consideration of the seriousness of the offense of which the defendant is accused and the severity of the sentence which he or she risks." Generally, this right "attaches," or becomes effective, once a person is arrested. In such an instance, a lawyer is provided free of charge and is entitled to be present during the interrogation of the accused and all pretrial and trial proceedings.

There has been a general tendency to place the provision of free legal assistance for serious criminals low on the list of priorities in addressing

serious crimes issues in postconflict states. Instead, priority has been given to the development, implementation, and financing of strategies and tools to assist police and prosecutors in investigating serious crimes. This fundamental imbalance between police and prosecutors, who

Working Side by Side in the Solomon Islands

As part of the Australian-led Regional Assistance Mission to the Solomon Islands, a public solicitor and seven experienced lawyers from countries outside the Solomon Islands work in the Public Solicitor's Office alongside Solomon Islands colleagues, providing free legal advice and representing people charged with criminal and other offenses.

possess extensive and far-reaching powers that greatly affect the rights of the accused, and an accused person who lacks access to or representation by a defense attorney, should be redressed. All accused persons in a serious crimes case who do not have sufficient means to pay for legal assistance should be provided with free legal assistance. After all, in such a case the potential sentence is likely to be severe. Any strategy to address serious crimes should thus involve reforming the mechanism to deliver free legal assistance and allocating sufficient resources to this system. The mechanism for providing legal aid may vary from the creation of an independent office of the defense to the establishment of a system of appointment of counsel through the court registry.

Restrictions on the Right of Access to Defense Counsel

International and regional fair trial standards provide that from the moment questioning begins after an arrest, the arrested or accused person has the right of access to defense counsel. In practice, this means that the arrested or accused person has the right to communicate confidentially with counsel (i.e., within sight but not within hearing of police or prison officers). An arrested or an accused person also has the right to have his or her defense lawyer present during interrogation. In postconflict states, there may be a tendency by some to support the idea of restricting access to defense counsel and granting police or prosecutors access to an arrested person without the presence of a lawyer for some period immediately after an arrest. Those who support such restrictions argue that it is justified on the basis that some defense lawyers, especially those paid for by a person arrested for a serious crime, would be in league with the criminal and would pass information from the criminal to his or her criminal associates. Thus the lawyer could take steps to thwart the arrest of suspects not yet located or could otherwise improperly influence the criminal investigation, for example, by dictating messages to hide evidence or threaten witnesses.

Where proposals have been made for restricting access to defense, opponents have expressed concerns, particularly where the restrictions violate the rights of the arrested person to have counsel present, especially during any postarrest questioning. The function of a defense lawyer in an interrogation is to ensure that the rights of the arrested person are adequately protected, including ensuring that the arrested person is not tortured or mistreated during an interrogation. Removing this safeguard, and introducing the practice of “incommunicado detention,” significantly increases the risk of, or at least creates conditions conducive to, violation of the rights of the arrested person. Access to counsel (and notification of family members) without restriction is the general principle and should be followed in all but very exceptional cases. Rather than

restricting access to counsel, police and prosecution should use supplemental safeguards to deter defense malfeasance. If it is proven that defense counsel is acting contrary to his or her professional standards of ethical conduct, or indeed contrary to the law (if he or she is involved in the obstruction of justice, for example, through leaking information to criminal associates who then take steps to thwart an investigation), he or

Debating Access to Counsel in Kosovo

In Kosovo, the first two years of UNMIK witnessed numerous debates surrounding access to counsel. Eventually, a working group composed of representatives of different international organizations and personnel active in the Kosovo justice system was formed to discuss the issue and draft a regulation on the rights of an arrested person. During their debates, some group members advocated legislation that would limit access to counsel in certain serious cases for up to seventy-two hours after arrest. They argued that if police did not have this “lead time,” they could not obtain information needed for their investigation, as a defense counsel would likely advise a client to not speak to the police (a position consistent with an arrested person’s right to silence). Other proposed limitations included not allowing certain defense attorneys to represent clients or requiring that police be present while defense counsel spoke to clients. The rationale was that some defense lawyers were corrupt and would aid their clients in obstructing justice. Yet another proposal was that a defense lawyer could be present during police questioning but would have to remain silent. Eventually, UNMIK Regulation 2001/28 on the Rights of Persons Arrested by Law Enforcement Authorities was promulgated. This regulation did not contain these restrictions, which violated international standards, although some argued that it contained troublesome provisions that unduly impinged upon access-to-counsel standards, including a delay of access to

counsel for up to forty-eight hours from the time of arrest if the arrested person was suspected of terrorism or organized crime and the prosecutor or competent investigating judge determined the delay to be necessary to the investigation. The regulation also allowed questioning to start before the arrival of defense counsel “if there are reasonable grounds for concluding that information obtained from the arrested person could enable another person’s life to be saved.”

In April 2004, the newly applicable Provisional Criminal Procedure Code of Kosovo replaced the above provisions; however, it, too, is problematic and controversial. It provides the prosecutor with authority to prevent an arrested person from contacting family members or others for up to twenty-four hours if “exceptional needs” require. It further provides that a person arrested for terrorism or organized crime desiring counsel be represented by an alternative appointed defense counsel for a maximum of seventy-two hours from the time of arrest if there are grounds to believe that the defense counsel chosen by the arrested person was involved in the commission of the criminal offense or will obstruct the conduct of the investigation. And, for any crime, if an arrested person’s desired counsel does not show up within two hours, and an alternative appointed counsel does not show up within one hour, the arrested person can be questioned if the prosecutor or police determines that further delay will seriously impair the conduct of the investigation.

she should be subject to disciplinary or legal action, such as prosecution for obstruction of justice.

The Right of the Defense to Access Evidence in a Case

International and regional human rights instruments provide that an accused person has the right to “adequate time and facilities” to prepare his or her defense. This right is part of the right to equality of arms between the prosecution and the defense. Part of making this right fully effective is providing the defense with access to documents and other evidence that will be used against the accused person or may support the accused person’s innocence (exculpatory evidence). Such disclosure is required so that the accused can build his or her case. Additionally, in the case of serious crimes investigations—which often involve intrusive measures such as wiretapping and covert surveillance that may infringe greatly upon the rights of the accused—this provision is an essential safeguard and acts as an additional accountability mechanism on police and prosecutorial powers, especially if combined with a policy of excluding evidence if proper procedures are not followed.

An accused cannot properly defend himself or herself against charges if evidence that will be used against him or her is not disclosed, which is why international standards require the prosecution to turn over evidence or not use it against the accused. However, disclosure becomes a difficult issue for states when dealing with sensitive evidence (e.g., cases involving national security or cases in which evidence comes from intelligence sources that cannot be made public). Some experts argue that disclosure should be restricted in such cases, and some states have introduced special procedures for disclosure of sensitive information, such as requiring defense counsel to go through a security clearance process (i.e., a background check) before being given access to some documents on the behalf of a client in the same manner as judges and prosecutors who access this information. Legislation to introduce these kinds of provisions must lay out how defense counsel can handle this evidence and what restrictions are to be placed on disclosure of sensitive evidence to third parties, including the accused. An alternative approach is taken in some states, whose national security laws enable a judge to review the intelligence or sensitive national security information to determine the existence of any exculpatory evidence.

Prison Reforms to Address Serious Crimes

Every criminal justice system needs dedicated facilities in which to house persons held in pretrial detention (suspects and accused persons) and

Problems Caused by Shortages of Prison Space: The Examples of Kosovo and Somalia

Kosovo

KFOR, the NATO military force in Kosovo, pursuant to its mandate to protect the safety and security of the region, caught many people smuggling weapons from Macedonia, Albania, and elsewhere into Kosovo. Although these people were arrested and temporarily detained in military facilities, many suspects were not prosecuted and were soon released due to a lack of permanent prison facilities and guards.

Somalia

When the peace operation in Somalia was launched in 1992, the absence of a functioning judiciary to hear cases or release persons contributed to a chronic shortage of detention facilities and prison space. With the prisons full, arrested persons had to be immediately released because there was nowhere to house them. This practice of allowing known criminals back into the community to reoffend caused widespread anger among the Somali people and stoked disenchantment with the international presence in the country.

persons convicted of criminal offenses. A prison system must be capable of providing for the housing, care, and security of prisoners; of respecting international standards for prisoners' rights; and of catering to the special needs of juveniles and women in detention.

In the fight against serious crimes in postconflict states, it is especially important that the system be able to detect and prevent criminal enterprises being run from prison. It is also vital that prison authorities can adequately and safely house high-risk prisoners, not only those who are especially dangerous and may have outside help in trying to escape but also those who are cooperating with the police in the investigation of criminal offenses. The latter group—suspects or accused persons who have been granted immunity or convicted persons who have received mitigated sentences on account of cooperation—may be under witness protection or may require special protection, including separation from prisoners against whom they are providing evidence or testimony.

Where the police have not established a prisoner transfer unit, the prisons authority must make contingencies for the transport of high-risk

prisoners to and from prisons, courts, and medical facilities. With accomplices at large likely to have access to substantial weaponry, including rocket-propelled grenades and mines, high-risk prisoners may have to be transported in armored vehicles by highly trained

Human Rights Violations in Iraq

In Iraq, failure to ensure compliance with international human rights standards, including standards for proper procedures, training of personnel, and oversight and accountability, was made glaringly apparent by release of photographs of Iraqi prisoners being tortured at Abu Ghraib prison outside Baghdad.

personnel armed with automatic weapons.

In recent postconflict missions, the lack of an adequate prison infrastructure has been a substantial problem and has led to perpetrators of serious criminal activities evading justice. In both Kosovo and East Timor the lack of prisons limited the number of known serious criminals who were prosecuted, because it was recognized that even if they were convicted there was nowhere to hold them.

As discussed in chapter 2, early assessment of prison staff, of prison facilities, and of the need for construction or repair is critical; it typically takes several years to construct adequate facilities and to train and equip professionally competent staff.

In reforming laws on prisons and detention facilities in a postconflict state, reference should be made to relevant “soft law” instruments on international standards for detention and imprisonment (see the discussion in chapter 3, page 50), as well as to *Practical Guidelines for the Establishment of Correctional Services within United Nations Peace Operations* and *A Human Rights Approach to Prison Management* (issued by the International Centre for Prison Studies). The “Model Detention Act,” part of the *Model Codes for Postconflict Criminal Justice*, may also be helpful; it provides a substantive and procedural legal framework for the treatment of suspects, accused persons, and convicted persons.

Prison Building in Afghanistan

Afghanistan suffers from a lack of prison space that meets human rights standards and of properly trained prison guard staff. To improve the situation, the Afghan Ministry of Justice, in partnership with international donors such as the UN Office of Drugs and Crime and the U.S. State Department’s Bureau of International Narcotics and Law Enforcement, has begun a massive building and training program. The Afghan ministry has taken the lead and is requiring donor countries to meet its priority needs rather than funding programs that donors find more politically palatable. Donors are typically reluctant to fund prison construction, often because they fear that the public will see such assistance as demonstrating concern for the welfare of criminals rather than for their victims or for the police who catch them. Indeed, some donor agencies have blanket restrictions on their aid going to prisons or police. However, the pressing need to protect the human rights of detainees and convicted prisoners had made prisons a high priority in Afghanistan.

Lack of Security for Transporting Prisoners in Liberia

When the United Nations Mission in Liberia (UNMIL) was deployed in 2003, it encountered a country struggling to reestablish a viable judiciary and upgrade its existing legal framework, and in dire need of security reform. Several serious crimes perpetrators escaped while en route from Monrovia Central Prison to the capital’s courthouse, either because of a failure to secure the road on which they were traveling or because of a lack of vehicles with which to transport the accused. The need to properly equip the Liberian National Police had to be examined at every step of the serious crimes chain, from investigation through to arrest and adjudication.

Prisoner Escape in Kosovo

Since UNMIK had insufficient facilities to hold its own detainees, a temporary detention facility was built inside Camp Bondsteel, a U.S. army base in Kosovo. Camp Bondsteel also held KFOR detainees. The poor design of the camp and the inadequate training of its staff led to the escape of a prime suspect in the bombing of a civilian bus. In a report released in June 2001, U.S. Army military police concluded that the suspect managed to escape Bondsteel by cutting through the jail's substandard fencing with wire cutters smuggled to him inside a pie. The escape was also facilitated by the existence of a "dead space" within which prisoners could not be seen by guards. (The escapee was later recaptured in Albania and returned to Kosovo authorities for trial.)

Security Measures to Protect Personnel and Institutions

Close protection of individuals is critical to the successful trial and prosecution of serious crimes in postconflict states. Close protection may be needed for a variety of people: judges, prosecutors, and defense counsel who are

subject to intimidation, threats, or physical attacks because of their involvement in high-profile serious crimes cases; persons who are due to testify in serious crimes cases; and even persons accused of serious crimes. Close protection can be a challenge even in stable states with fully functioning and well-resourced criminal justice systems. In a postconflict environment, lack of infrastructure, corruption, ease of obtaining weapons, and heavily armed political and criminal factions conspire to make the protection of vulnerable persons (VPs) exceptionally difficult and put a premium on the development of an effective plan to secure both VPs and strategic locations such as courthouses and residences.

Defense Attorneys Killed in Iraq

Judges, prosecutors, and witnesses are not the only people who need effective security measures; sometimes defense attorneys also need protection. This is especially true if the defense of one accused person might conflict with or weaken the defense of another.

A case in point involves the trial of former Iraqi dictator Saddam Hussein. Sadoon Janabi and Adil Muhammed al-Zubaidi, lawyers for Hussein's codefendants, Awad Hamad Bamdar (the former chief judge of Hussein's Revolutionary Court) and ex-vice president Taha Yassin Ramadan, were

gunned down within three weeks of each other in late 2005. Janabi was shot in the head after being abducted from his office; al-Zubaidi was killed when three gunmen shot at the car he was driving in Baghdad. Police said there were no security guards with the lawyers when they were attacked. Kamal Allaw, head of the Iraqi Lawyers Union, noted that there has been "no security provided to the lawyers involved in Saddam's trial nor to any of the union's members." Following the shootings, defense attorneys received protection equal to that provided to judges and prosecutors in the case.

Requirements for the Establishment of a Close Protection Program

In general, a close protection apparatus must be able to identify persons at risk, analyze and categorize threats, and protect VPs in transit and at their places of residence, detention, or work. A comprehensive close protection apparatus would include

- *Overall Commander.* The overall commander and his or her staff are responsible for ensuring the efficient running and coordination of the close protection program. The commander may be a member of a police or military organization or of a separate structure.
- *Analysis Section.* This section is made up of a team of police and/or military intelligence analysts responsible for conducting individual threat assessments on VPs and maintaining overall situational awareness about security issues that may affect operations.
- *Close Protection Teams.* These teams are assigned to protect individuals or groups. The exact composition and level of training required of these teams will vary according to the nature and level of the threat.
- *Site Security Teams.* Site security teams are responsible for protecting static sites, such as residences and courthouses. These teams may not necessarily have specific close protection training but should operate under the command of the close protection commander to ensure proper allocation of resources and interoperability with close protection teams.
- *Support Section.* The support section is responsible for maintaining vehicles, communications, and other infrastructure.

Methodology for Establishing Close Protection Teams

In establishing close protection teams, it is important to establish terms of reference and the command relationship. Are the teams part of a larger security apparatus already providing close protection, or have they been formed to work on specific serious crimes? Who do they work for and whom are they permitted to protect? Close protection resources are normally very scarce; therefore, the scope and limitations of the close protection program must be clearly established at the outset.

The first step in providing effective close protection is to conduct a thorough and impartial threat assessment of those persons potentially at risk. Normally, threat assessments should automatically be conducted for persons in highly vulnerable positions such as prosecutors, judges, defense lawyers, witnesses, and accused persons in sensitive cases. In addition, persons may apply for close protection based on a perceived threat, in which case a process must be established to vet requests. In cases

where an immediate threat may exist, interim close protection should be assigned until a thorough threat assessment can be conducted.

After the threat assessment is complete, it should be presented (ideally in person, by one of the analysts involved) to a threat assessment committee, which will review the assessment and any recommendations and decide what level of protection, if any, will be provided. The committee should consist of an expert group of security personnel drawn from relevant organizations (those providing protection as well as those able to provide perspective on the assessment), who have been carefully vetted and selected to ensure that protection is afforded to those requiring it in an impartial and efficient manner.

Personnel Required for a Close Protection Team

Close protection is a complex and dangerous task, and personnel must be carefully selected to ensure they perform their mission effectively. Given that a rapid expansion of teams may be necessary, a sufficient number of personnel with close protection experience must be available to train and command teams.

Teams must be tailored to the specific requirements of the threat and the mission area. For example, while police and diplomatic security personnel may be ideally suited to working in a relatively urban environment such as Kosovo, personnel with experience navigating, fighting, and surviving in a military situation may be better suited to working in rural areas of Afghanistan.

Where foreign assistance providers arrange for close protection teams, teams could be seconded from donor governments in their entirety, raised from international forces in the mission area, or contracted from a private security company. The most important factor for success is ensuring that teams are appropriately selected, trained, and equipped for the wide variety of close protection tasks they might be assigned, from relatively simple, low-risk tasks to high-risk/low-profile and high-risk/high-profile assignments.

Areas of Concern in Implementing a Close Protection Program

Operational Security

The security of communications and information (both paper and electronic) is of critical importance to the conduct of close protection operations. Poor operational security will render even the largest, most efficient close protection team useless. Measures must be taken to ensure that any information that may be useful to opposing forces is secure and compartmentalized.

The most important step in ensuring operational security is to select personnel who are used to working in a highly secure and compartmentalized environment and thus understand the challenges and dangers involved. Universal training is vital: everyone—not only members of the close protection team but also anyone with access to information about the mission—must follow the same standards and procedures and be made aware of the consequences of breaching these procedures. Concrete disciplinary or administrative sanctions must be available to deal with any persons who accidentally or deliberately compromise operational security. In addition, extreme care must be taken when employing persons in sensitive cases. No matter how honest and dedicated employees are, they are at risk of being coerced to betray operational secrets. This risk is especially pronounced for locally recruited personnel, who may well have families in the area and may thus be vulnerable to threats against family members.

Medical Planning

A medical evacuation and treatment plan is a critical component of any close protection operation. Ideally, medical support should be available within each team, and an efficient medical evacuation plan should be in place.

Resources

Close protection diverts scarce personnel and other resources away from other aspects of law enforcement and security. Close protection requirements may vary depending on caseload and may suddenly jump to unexpected levels, requiring rapid expansion in the number and size of teams, a fact that cannot be allowed to dictate the training and composition of teams, since quality must not be sacrificed for quantity.

Resource-Driven Threat Assessment

Threat assessments must be conducted impartially, without regard to available resources. If many people require high-level close protection but insufficient personnel are available to provide that level of protection, assessments should not downplay the dangers so as to reduce the demand on available resources. Assessments should reflect the true nature of the threat, and any resource limitations should be noted so that attempts to rectify shortfalls can be made.

Witness Protection Programs

Providing witness protection helps ensure the willingness of victims and witnesses to report serious crimes and of criminal offenders to work with police and agree to be cooperating witnesses. In some cases, the absence of witness protection measures makes it impossible to get the evidence

needed to prosecute and convict serious crime perpetrators. In many cases, physical protection of witnesses is necessary to ensure the safety of the witness during the investigation and trial and even after the trial.

Chapter 3 discusses the kinds of witness protection measures that can be incorporated in a state's legal framework. As noted there, procedural laws often have to be adopted to permit the establishment of witness protection and relocation programs, just as procedures have to be devised that spell out the operational and administration aspects of the program (e.g., how records are kept secure so as to maintain the confidentiality of witnesses, procedures for transporting and relocating witnesses). This section addresses some of the considerations in providing physical protection of witnesses.

The temporary physical protection of a witness means engaging the police in the provision of security for the witness and his or her family. It may include providing safe housing under police protection. Physical protection is usually provided before a trial and continues until the trial is concluded and a final verdict has been delivered. Providing for physical protection of witnesses may require amendments to police law and administrative and operational procedures, as well as adequate funding for housing, food, and related costs. A police force may opt to establish a specially trained witness protection unit. Alternatively, witness protection may be provided by a close protection unit. In some states, even if a formal witness program, including a dedicated witness protection unit, is not created, protection of witnesses and changes of identities are granted by the courts on an ad hoc and exceptional basis in emergency cases.

Witness Protection Challenges in Kosovo

Intimidation of witnesses has been a recurrent problem in Kosovo for a number of years, leading UNMIK to implement a variety of witness protection measures. In 2001, a Witness Protection Unit (WPU) was set up under the authority of the UNMIK police commissioner. The WPU mandate was to provide secure shelter facilities in Kosovo until a witness had given testimony, with the option of relocating the witness to another country after testimony if necessary. Since the unit's formation, a number of distinctive risk groups have been identified, leading to the formation of ancillary units, such as the High Risk Escort Unit and Regional Escort Units, that divide protection services into dif-

ferent areas of responsibility. Applications to the WPU for protection come from a variety of sources, including investigators, prosecutors, judges, and NGOs, and a special panel assesses each application. Due to insufficient resources, coordination challenges, and difficulty in persuading other countries to accept witnesses and cooperating defendants (especially those with criminal records), witness protection remains a challenge in Kosovo. During 2002–3, UNMIK and OSCE documented instances of witness intimidation, assassination, and attempted assassination, most notably in high-profile political and war crimes cases and in organized crime cases.

Most of the operational principles that apply to close protection apply also to witness protection, and close protection units and witness protection units are likely to share many of the same command, intelligence, and support structures. Even so, given the differences in the scope of these two activities, the best practice is to have separate units, one for witness protection and one for close protection.

Witness protection, it should be noted, is different from victim assistance. As discussed earlier in this chapter, some police departments and prosecutors' offices have victim assistance units or dedicated personnel available to help victims obtain medical assistance, mental health counseling, and information on the criminal justice system.

Among the specific considerations that must be taken into account with regard to witness protection are the following:

- *Low profile versus high profile.* While it may be possible to house witnesses in a secure compound and to transport them in the same manner as high-profile persons, it may also be necessary to secure witnesses in a covert manner. Where witnesses are protected in a low-profile manner, teams must be familiar with high-risk/low-profile protection operations, surveillance, surveillance detection, and countersurveillance, as these skills will be critical to mission success. In addition,

Failure to Keep Information Confidential Puts a Witness at Risk

In Kosovo, the need for confidentiality regarding the relocation of at-risk witnesses was made evident when information about one such witness was released to an unauthorized person. This occurred despite great efforts by police personnel to keep the witness's name, place of relocation, and other information confidential. The information was even kept from the close protection team that assisted in escorting the witness out of Kosovo. Unfortunately, someone connected to the case inadvertently reported the witness's whereabouts after relocation, perhaps thinking that the witness was no longer in danger. This report placed the witness and family in danger, as the defendant's family tried to locate them. This incident shows that individuals unfamiliar with witness protection programs do not always understand the gravity of the situation and that confidentiality mechanisms and training must be in place to ensure compliance.

Witness Protection Program Established in Bosnia

It took almost ten years from the formation of the Federation of Bosnia and Herzegovina until a witness protection program was established in the state. Finally, in late 2004, the Witness Protection Department was established within the state police force. The department operates out of secure office premises. An international witness protection adviser works with the department and coordinates ongoing specialized training programs for staff. The department deals with witnesses involved in organized crime and war crimes cases.

when housing a witness in a covert location and transporting him or her in a low-profile manner, operational security becomes critical. Strict compartmentalization of information is necessary to ensure that a witness's safety is not compromised.

- *Ethnic/religious/political considerations.* Ethnic, religious, political, and similar factors impinge on witness protection in several ways. Members of the witness protection team must not, of course, be vulnerable to any kind of effort to play upon their ethnic, religious, or political sympathies. At the same time, the team members should be well versed in the nuances of the local environment so as to be able to make safe and sensible decisions about such subjects as the location of a witness's housing and transportation routes.
- *Risk of flight.* As it is likely that many witnesses will themselves be implicated in criminal activity, it is important to consider that a witness may not only have to be protected from harm but also prevented from fleeing.
- *Families.* It is critical to remove any potential for coercion of the protected witness. Therefore, it may be necessary to provide interim protection or relocation for the witness's family. Doing so may place severe strain on protection resources and increase the chance of security being compromised, as it is difficult to covertly house and transport an entire family. ☞