Chapter 4

Guiding Principles for the Criminal Law Reform Process

Reforming criminal laws in any state is a time-consuming, intensive, and laborious process, requiring institutions and individuals with the requisite skills, expertise, and resources, as well as political will. Often, law reform efforts focus more on the final products than on the process by which laws are drafted. It is a mistake, however, to disregard the modalities of the law reform process as irrelevant. The process is integral to determining whether new laws are viable, practicable, and acceptable both to the general population and to the criminal justice community in the post-conflict state that is expected to apply the laws.

During the preparation of the Model Codes, in-depth research was conducted on the law reform process in post-conflict states, including extensive interviews with both national and international actors involved in past reform efforts. What follows is a summary of key recommendations for future processes, distilled into eight guiding principles.

1. Assess the existing laws and criminal justice system

The first step in law reform should be to assess both the applicable legal framework and the criminal justice system. This point may seem self-evident, but it is not unknown in post-conflict states for law reform actors to draft a new law without even checking to see if a law on the same subject already exists.

Assessment of the legal framework involves gathering all applicable laws, which may include the state's constitution, legal codes, legislation, regulations, bylaws, standard operating procedures, relevant and binding precedents, and even executive or presidential edicts or decrees. (For a discussion of exactly what constitutes a state's legal framework, see chapter 3 of Colette Rausch, ed., *Combating Serious Crimes in Postconflict Societies: A Handbook for Policymakers and Practitioners,* published by the United States Institute of Peace.) This task can be far more challenging than one might expect, either because some post-conflict states possess a multitude of contradictory bodies of applicable law or because copies of the existing laws are simply very hard to

find (in some instances, researchers have had to look abroad to find a copy of a country's laws). The assessment of the criminal justice system should focus not on the law on paper but on the law in action. Investigators should determine how the criminal justice system is, or is not, functioning in the implementation and application of domestic criminal laws. As part of this effort, it is important to ascertain the types of crimes prevalent in the post-conflict state, so that the legal framework and the criminal justice system can be assessed in light of their respective abilities to tackle current crime problems; this assessment will help to identify which provisions need to be repealed, amended, or replaced and which new provisions need to be added. New provisions are often needed to ensure compliance with international human rights or criminal law treaties to which the state is a signatory. (See the section "Further Reading and Resources" in this volume, pages 421–25, for a list of those treaties.)

The Criminal Justice Reform Unit of the United Nations Office on Drugs and Crime has created a standardized and cross-referenced set of assessment tools for conducting a criminal justice assessment. The Criminal Justice Assessment Toolkit is designed for use both by UN agencies and by outside organizations and governments. Grouped by criminal justice system sectors (police, justice, and prisons), each tool provides a practical and detailed guide to the key issues to be examined and the relevant standards and norms. The toolkit is designed to be used around the world and with a variety of legal traditions and is particularly useful for countries undergoing transition or post-conflict reconstruction. (For details, see "Further Reading and Resources," page 442.)

All relevant actors—for instance, government institutions, national bar associations, faculty members of national law schools, non-governmental and international organizations that have been monitoring human rights abuses, and international legal experts—should be invited to contribute their perspectives on gaps and deficiencies in the legal framework and other impediments to enforcing criminal justice. It is also important to find out attitudes among the local public. Such sociological investigations can be conducted through a variety of means, including holding public meetings or organizing a campaign to solicit written opinions. (See also Principle 6, below.)

In evaluating the effectiveness of the existing legal framework and criminal justice system, it is important to be aware of any customary, nonstate, or traditional systems of justice that may exist in the country and to assess their role in the post-conflict state and their relationship to the state-run criminal justice system.

2. Criminal law reform is a holistic enterprise; a change to one part of the law may have side-effects in other parts of the law

Law reform actors must decide whether to work with the law as it is and postpone reform until a comprehensive program of reform can be conducted or engage in a small-scale reform process by pressing ahead immediately with ad hoc and minor reforms to specific elements of the law or reform of discrete segments of the legal framework (in hopes, perhaps, of a more holistic reform being conducted subse-

quently). Such small-scale, or targeted, reforms are often essential in post-conflict states (for instance, they may be necessary to deal with a particular crime problem that is plaguing the state and is not adequately addressed by existing laws) and, indeed, are conducted on an ongoing basis in many states around the world. However, in a post-conflict context, where the entire criminal law framework is often grossly inadequate, a more holistic reform process may be required in order to be effective. This process should address all criminal law in the state, including the criminal code, the criminal procedure code, prisons laws, and provisions governing police activities.

Where actors choose the small-scale, or targeted, option, they should recognize that making a change in one area of the law usually has side-effects in other areas of the law. In amending existing provisions of law or adding new provisions, reform actors should assess the relationship between new, amended, and existing provisions across the criminal justice continuum and the broader legal framework. For example, changes to criminal procedure laws may have implications for laws on police powers or laws on detention; changes in the criminal code, such as the addition of new criminal offenses, may require changes in criminal procedure laws. The commentary to many provisions in the Model Codes points out the linkage to other provisions elsewhere in the codes that would require a coordinated approach of this sort.

3. Coordination of reform efforts is often best entrusted to a single, independent body

Many states have a dedicated, permanent, and independent law reform commission or body tasked with studying existing domestic laws with a view to their systematic development and reform. Law reform commissions have worked effectively and dynamically in many states, providing policy advice to governments or legislatures on areas of law in need of reform or drafting legal provisions or larger pieces of legislation. Where they are independent, impartial, and have the ability to undertake an open, transparent, and inclusive process, law reform commissions are often considered good vehicles to drive fair and effective reform efforts.

If the decision is made to establish a permanent law reform commission in a post-conflict state, a variety of factors need to be considered. For example, new legislation needs to be drafted to establish the commission; budgetary, staffing, and operational plans have to be developed; and provision must be made for the full financing, housing, and outfitting of the commission. Strategic plans should set out the fundamental principles underpinning reform efforts (e.g., openness, inclusiveness, responsiveness, and multidisciplinary approaches) and determine the process by which the law reform commission will undertake its work. A secretariat and a research component of the law reform commission need to be established and staffed, and commissioners need to be appointed.

Where small-scale, rather than large-scale, reform efforts are undertaken in a post-conflict state, the task of coordination may be performed by an ad hoc, non-permanent working group focused on priority law reform in the immediate term. Such an arrangement requires adequate financial support, often including provision for a dedicated secretariat and a research component. Such a working group should be

independent, impartial, and adhere to the same fundamental principles as a full-time law reform commission.

4. Set realistic time frames for large-scale reform efforts; expect the process to take years, not months

Given the inadequacies of domestic legislation in some post-conflict states, the urge to push ahead quickly with large-scale reform is perfectly understandable. But such urgency can lead to laws being drafted so hastily that, when put into practice, they prove to be unworkable.

Large-scale law reform is an intensive and complex endeavor that requires time—often, five to ten years in the case of a functioning, peacetime legal system to conduct effectively. Post-conflict states that set deadlines of a few months or, at most, a few years for the completion of the entire reform process ignore this fact and, typically, pay the consequences. Given the length of time required, it is essential to prioritize the areas in need of reform and work on the most important first.

5. Examine other legal models but take care if engaging in transplantation of laws from one state to another

The transplantation of legal provisions from one legal system to another is not uncommon. Legal drafting frequently involves reference to other models, which can save the drafter from having to reinvent the wheel. The key to whether or not a transplant will be successful, however, is process. Among other factors, careful consideration must be given to local conditions and culture and recourse should be had to a range of different legal models that could potentially be used. Foreign sources of law used in drafting new laws will likely require adaptation for use in the new context.

6. The process should be as broad and inclusive as possible

It is important to seek input from a wide range of criminal justice actors: police officers, judges, lawyers, paralegals, prosecutors, prison officials, court administrators, the staff of civil society organizations and victims' groups that focus on criminal justice issues, law professors, and so forth. Some of these actors should have a general knowledge of criminal laws and procedures, police laws, and prison laws, while others should be experts in specific areas such as organized crime or human rights. Many law

reform bodies or commissions also engage the services of experts from different disciplines, including sociologists, anthropologists, political scientists, and psychologists.

7. Calculate the resource and financial implications of law reforms

Some new criminal laws have significant resource implications. For example, new laws on witness protection may require evidence to be given remotely or videotaped in advance; implementation of new provisions on covert surveillance measures may require the purchase of sophisticated electronic equipment; new laws on prisons may require substantial changes to prisoner registration systems and even infrastructural changes to prisons (such as the creation of separate facilities for juveniles). In some post-conflict states, new laws have not been implemented because of a lack of resources.

The resource implications of new laws should be considered both before and during the drafting process. Among other things, a financial analysis of the projected costs of proposed reforms must be undertaken to enable drafters to weigh the theoretical merits of a new law against its practical viability.

8. The law reform process does not end once laws have been enacted

Putting new laws on the books does not necessarily mean that those laws will be implemented. During and after the drafting and adoption of a new law, attention should be focused on its application. Perhaps the most important key to effective implementation is to ensure that criminal justice actors are aware of the new law and to train them in its provisions before they come into effect. Training institutes and universities will also need to adopt their curricula. It is also important to cultivate awareness of their new legal obligations and rights among the general population; public education campaigns are vital in this regard.

Some states have established oversight mechanisms for the implementation of new laws. In some states, a body originally tasked with reforming laws was transformed into implementation/oversight bodies to assess and oversee the application of new laws.