



UNODC

United Nations Office on Drugs and Crime



Criminal justice reform in post-conflict States

A guide for practitioners

UNITED STATES INSTITUTE OF PEACE

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Developed jointly with
the United States Institute of Peace



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Foreword

The reform of criminal justice systems has become a priority for the international community in its efforts to assist transitional and post-conflict societies in re-establishing the rule of law. In different parts of the world—from Afghanistan to Iraq, Haiti to Liberia—numerous international and regional organizations, bilateral donors, and non-governmental organizations are engaged in a variety of activities aimed at rebuilding or developing criminal justice systems.

The men and women sent by the international community to advise post-conflict States on specific facets of criminal justice reform are talented, dedicated, and hard working. However, their determination to make a difference can lead them—especially those unfamiliar with the requirements of operating in unstable and unpredictable post-conflict environments—to focus solely on their own aspects of criminal justice reform and lose sight of the challenges and complexities of criminal justice reform as a whole.

While focusing on one's own reform project is understandable, such a focus is decidedly detrimental to the prospects of rebuilding an effective criminal justice system. These systems may have many moving parts that do not function in isolation; but rather are elaborately interconnected, with each component affecting all others. For instance, a seemingly modest change in the law on domestic violence may influence the number of arrests made by the police, which may have a cascading affect on the caseloads of prosecutors and defence counsel, the work of the courts, the number of people sent to prison, and the programmes to reintegrate offenders back into society.

Such connected systems cannot be successfully reformed in an unconnected fashion. One should not expect to improve policing in a post-conflict State merely by redrafting police procedures and giving the police more resources. Significant and sustainable improvements in policing also depend on changing the capacity of the courts, enhancing respect for human rights, remoulding public attitudes towards law enforcement, and introducing a range of other measures, some of which may seem only distantly related to policing.

In recognition of these complexities, the United Nations Office on Drugs and Crime (UNODC) and the United States Institute of Peace (USIP) have collaborated to produce a guide designed to introduce individuals whose experience in promoting the rule of law may be limited—whether in extent or scope—to the entire landscape of criminal justice reform. Previous studies by other organizations have explored specific areas of criminal justice reform, but this guide seeks to examine the full breadth of activity, from policing to courts to prisons, from the formal justice system to customary courts to civil society.

Over the course of the project, UNODC and USIP enlisted experts in all facets of criminal justice reform and experienced practitioners of programmes in many different post-conflict and transitional countries and areas (e.g., Afghanistan, Bosnia and Herzegovina, Cambodia, El Salvador, Haiti, Iraq, Kosovo, Liberia, Malawi, Nepal, Sudan, Timor-Leste) to contribute their knowledge and experience to the project. That expertise has been distilled into this volume through a process of review and revision designed to create a work of substantive quality and practical value.

This guide's chief ambition is not to offer detailed advice to specialists, but rather to provide a general overview and to enable specialists in all areas to see their own activity within the broad context of the criminal justice reform process. The guide examines particular facets of reform activity (courts, detention, police reform), surveys the wider landscape of criminality in post-conflict and transitional States, and addresses key skills (such as programme management and capacity development) pertinent to all types of reform. It also encourages readers to delve more deeply into particular areas and lists a wide range of further reading and resources to facilitate such explorations.

The breadth of coverage in this volume reflects the scope of interests of the two organizations that conceived and piloted the project. UNODC is mandated by the United Nations Commission on Crime Prevention and Criminal Justice to assist nations in reforming their criminal justice systems with international standards and norms, and it operates in all regions of the world through an extensive array of field offices. USIP is mandated by the United States Congress to promote research, education, and training in the prevention, management, and resolution of international conflict, and conducts or supports work that seeks peaceful solutions to conflicts around the globe. Among the many ways in which these two institutional missions overlap is the interdependence of security, rule of law, and development. As is increasingly recognized, the presence of security and the rule of law provide a platform for development in the economic, social, and political arenas. Development, in turn, can assist in strengthening long-term security and the rule of law.

UNODC and USIP's partnership on this project is a natural outgrowth of past collaboration between two organizations recognized as leaders in the field of criminal justice reform. Members of USIP's Rule of Law programme participated in reviewing drafts of UNODC's *Criminal Justice Assessment Toolkit*, and UNODC's partnership was valuable in the development of USIP's *Model Codes for Post-Conflict Criminal Justice*. Both the *Criminal Justice Assessment Toolkit* and the *Model Codes* have been widely hailed for their authoritative and original contributions to a rapidly evolving and highly challenging field of international endeavour. We trust that this new guide will prove equally valuable to those individuals and organizations who strive to help the citizens and governments of post-conflict and transitional States rebuild the rule of law.

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I. Introduction

This guide describes a cross-section of the key challenges and lessons that have emerged from recent international efforts to strengthen and reform criminal justice administration in post-conflict and transitional States. Although the body of literature in this field is growing, few publications to date share the goal of this guide: namely, to introduce basic issues, resources, strategies, and programming options to professionals who are joining the field.

As befits a guide for practitioners, this book has a decidedly pragmatic focus. Although it covers many of the scholarly issues involved in criminal justice reform, it devotes the bulk of its attention to describing, in the most practical terms possible, a body of knowledge that an international justice advisor (hereafter simply “advisor”) needs in order to be effective immediately upon deployment in a foreign country.

The intended audience for this guide consists of the men and women who are sent abroad by governments, intergovernmental organizations, and non-governmental organizations to advise and consult with local counterparts on how to develop and improve local criminal justice systems. These advisors are drawn from a variety of professional backgrounds—for example, the legal profession, the judiciary, the police, the corrections and the development community, as well as non-governmental organizations (NGOs) and civil society communities—and bring with them an equally broad range of expertise and experience. Each advisor is likely to work on a discrete element of criminal justice reform. However, if an advisor is to work effectively and to integrate his or her efforts with the work of colleagues, he or she must understand all the elements involved in the criminal justice system as a whole.

As an advisor becomes more involved in assisting in the reform of a particular justice system, a multitude of complex issues will naturally arise. This guide does not explore all such issues in great detail; instead, it is designed to serve as an introduction.

Although this guide focuses on the role played by international advisors and the issues that they are likely to face, much of the material in the following chapters may also be helpful to their national counterparts. These national counterparts, however, often confront a number of issues and challenges that advisors do not face. These issues are outside the scope of this guide.

1.1 Terminology and definitions

Rule of law

The United Nations Secretary-General defines the “rule of law” as follows:

The “rule of law” is a concept at the very heart of the [United Nations’] mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.¹

This definition, which has been widely accepted by practitioners and policymakers in the rule of law community, describes an ideal end-state to work towards, one that features a system of government that is transparent and accountable and embodies other checks and balances. Criminal justice reform is seen as being subsumed within the broader rule of law reform agenda. The work of the advisor is to translate this definition into a series of executable assistance programmes that reach achievable benchmarks, demonstrating incremental progress towards the end-state.

Post-conflict

This book is concerned with post-conflict States. This term, however, can be a vague one. As used throughout this guide, “post-conflict” refers to the aftermath of a conflict and usually applies to a post-war situation—but it can also apply to the aftermath of an internal rebellion, a situation that does not necessarily fit conveniently into standard conceptions of war.² Moreover, there is often no clean divide between a “conflict State,” meaning a State experiencing conflict, and a “post-conflict State.” While a conflict may have officially ceased, small-scale conflict may still be ongoing.

Another term used frequently is “transitional State,” referring to a State that is emerging from a totalitarian regime and moving towards a State built on the rule of law. Operations in post-conflict States and in transitional States have obvious differences but also share a number of similarities. For example, a transitional State that is moving away from a totalitarian past may have the same pressing need for code reform that a post-conflict State does. Although much of the discussion in this book focuses on post-conflict circumstances, it may be equally relevant to transitional environments.

¹ United Nations Security Council (UNSC), *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies* (2004), UN Doc S/2004/106, para. 6.

² This definition of a post-conflict State is from United Nations Development Programme (UNDP), *Programming for Justice—Access for All: A Practitioner’s Guide to a Human Rights-Based Approach to Access to Justice* (Bangkok: United Nations Development Programme, 2005), 178.

1.2 Guiding principles for criminal justice reform efforts

In April 2008, on the heels of his 2004 report *Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*,³ the Secretary-General issued the *Guidance Note of the Secretary-General: UN Approach to Rule of Law Assistance*, which provides a set of eight guiding principles for United Nations' rule of law activities in all circumstances, including in crisis, post-crisis, conflict prevention, conflict, post-conflict, and development contexts.⁴ For those within the UN system, these guiding principles shape all rule of law activities, including criminal justice reform-related activities. For those outside the system, the principles are equally valuable not least because they draw together best practices in the field of rule of law.

The eight principles are described as follows in the *Guidance Note of the Secretary-General: UN Approach to Rule of Law Assistance*.

1. Base assistance on international norms and standards

The normative foundation for UN rule of law work is the Charter, together with the four main pillars of the international legal system: international human rights law, international humanitarian law, international criminal law and international refugee law. The countless UN treaties, declarations, guidelines and bodies of principles represent universally applicable standards. As such, they incorporate a legitimacy that cannot be said to attach to exported national models reflecting the values or experience of donors and assistance providers. These standards form the normative parameters for UN engagement, for example: the UN will neither establish nor directly participate in any tribunal that allows for capital punishment nor endorse peace agreements that allow for amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights. All UN approaches to rule of law issues should take their guidance from, and be developed in conformity with, the applicable international standards.

2. Take account of the political context

The international community has sometimes underestimated the extent of political will necessary to support effective rule of law development and invested inadequately in political dialogue on rule of law promotion. Rule of law activities take place in neither an economic nor a political void, and require changes in the legal framework and the institutional structures of governance and their functioning. Rule of law development, like all national reforms, generates winners and losers. They are therefore political questions as well as technical ones. Rule of law assistance has often overemphasized technical dimensions and paid less attention to political and strategic considerations. Until national stakeholders see the utility in supporting rule of law development, technical assistance will have little impact.

³ UNSC, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, UN Doc S/2004/106.

⁴ United Nations, *Guidance Note of the Secretary-General: UN Approach to the Rule of Law Assistance* (14 April 2008), http://www.unrol.org/doc.aspx?doc_id=2124.

Senior UN representatives in the field need to understand the political nature of strengthening the rule of law, and dedicate attention to supporting both the political and institutional aspects of rule of law development. In cooperation with Headquarters and in partnership with the national political leadership and other stakeholders, UN leadership at the field level is responsible for fostering political space for reform and insulating the rule of law from inappropriate political influence or abuse.

3. Base assistance on the unique country context

Effective and sustainable approaches to strengthening the rule of law must begin with a thorough analysis of national needs and capacities, and the mobilization of national expertise to the greatest extent possible. The UN must consider carefully the particular rule of law and justice needs in the specific context of each country, including the condition and nature of the country's rule of law system (both formal and informal/customary/traditional) and the culture, traditions and institutions that underlie that system, including the role of gender in society, the position of minority groups, and the situation of children. The UN must assess carefully the many factors giving rise to the need for rule of law assistance, such as the nature and causes of any recent conflict or any history of human rights abuse, and construct its assistance accordingly. The UN needs to promote this approach among all stakeholders in strengthening the rule of law.

4. Advance human rights and gender justice

The UN faces many challenges in developing effective responses to sensitive political, cultural and operational contexts in its support for rule of law development. In providing assistance, the UN must not overlook the entitlements that have been established under international law for women, children, minorities, refugees and displaced persons, and other groups that may be subjected to marginalization and discrimination in the country. Gender-based discrimination permeates all cultures, and dedicated attention to gender equality issues is needed in all dimensions of rule of law work. The UN maintains a responsibility to help establish the rule of law for all on a basis of equality, and with due attention to the rights and specific vulnerabilities of children. Solutions to rule of law challenges that serve to advance the rights of dominant social groups while leaving others behind must be avoided.

5. Ensure national ownership

No rule of law programme can be successful in the long term if imposed from the outside. Process leadership and decision-making must be in the hands of national stakeholders. Rule of law development requires the full and meaningful participation and support of national stakeholders, inter alia, government officials, justice and other rule of law officials, national legal professionals, traditional leaders, women, children, minorities, refugees and displaced persons, other marginalized groups and civil society. Experience indicates that the rule of law is strengthened if reform efforts are credible and adhere to the principles of inclusion, participation and

transparency, facilitating increased legitimacy and national ownership. Meaningful ownership requires the legal empowerment of all segments of society.

6. *Support national reform constituencies*

UN programmes must identify, support and empower national reform constituencies. The UN must facilitate the processes through which various national stakeholders debate and outline the elements of their country's plan to strengthen the rule of law and secure sustainable justice. The aim is to help national stakeholders to develop their own vision, agenda, approaches to reform and programmes. Public consultation and public understanding of and support for reform are essential. The UN must encourage outreach to all groups in society, and support public awareness and education campaigns and public consultation initiatives. Civil society organizations, women's groups, national legal associations, human rights groups and advocates of victims and of prisoners, as well as those who might otherwise be excluded (e.g., non-criminal former regime members and ex-combatants) must all be given a voice in these processes. Children and adolescents must also be enabled to participate and their role as constructive agents of change be acknowledged.

7. *Ensure a coherent and comprehensive strategic approach*

Rule of law promotion is more than the provision of technical legal expertise. UN rule of law assistance is most effective if it draws on a wide-range of expertise and perspectives, inter alia, in the political, legal, human rights, development and social science fields within and outside the UN system. A comprehensive approach that supports all aspects of effective and efficient justice systems, and their management and oversight is likewise necessary. The UN must develop a holistic and strategic approach, within the context of existing planning processes, that involves: (1) conducting joint and thorough assessments with the full and meaningful participation of national stakeholders to determine rule of law needs and challenges; (2) supporting the development of a comprehensive rule of law strategy based on the results of the assessment; (3) developing a joint UN rule of law programme guided by the strategy; and (4) assigning accountabilities and implementation responsibilities.

8. *Engage in effective coordination and partnerships*

Strengthening the rule of law encompasses a multitude of activities carried out by many entities across the UN system and the wider international community. Past engagement has sometimes been piece-meal, incongruous and donor-driven, resulting in uneven and contradictory development of rule of law institutions and short-term, superficial gains at the cost of longer-term, sustainable reform. Successful rule of law assistance requires the support and active engagement of all stakeholders working through a comprehensive strategy in a coordinated fashion. All UN entities involved in rule of law assistance must operate according to shared approaches and strategies, including effective coordination, and must recognize that the success of UN engagement is linked to the extent of its partnerships and support for national ownership.

1.3 How the guide is organized

This guide is divided into thirteen chapters, including this introduction. Collectively, the chapters (a) describe the context and background of criminal justice in post-conflict States (chapters 1–3); (b) explain how to assess, design, implement, monitor, and evaluate a criminal justice strategy (chapter 4); and (c) discuss various elements of criminal justice reform, both within the State justice institutions and beyond (chapters 5–13).

Individually, chapters 2–13 cover the following issues:

- *Chapter 2: Criminal justice institutions and actors.* This chapter describes a set of institutions, counterparts, and circumstances that advisors should be prepared to encounter and work with in a post-conflict State.
- *Chapter 3: Residual violence and post-conflict criminality.* Post-conflict States often experience high levels of residual violence and criminality. This chapter discusses these phenomena and the challenges they present to criminal justice reform efforts.
- *Chapter 4: Managing criminal justice reform initiatives.* Advisors are not generally trained in project/programme management, a necessary skill for working on criminal justice assistance initiatives. This chapter provides guidance on the four steps of the project/programme management cycle: assessment, design, implementation, and monitoring and evaluation.
- *Chapter 5: Addressing the needs of vulnerable groups.* Certain groups of individuals may be vulnerable, marginalized, or disenfranchised by reason of their status in a society and may be treated unequally, specifically by the criminal justice system. In some situations, this treatment contravenes international standards. And in some situations, it might have fostered conflict or might be contributing to post-conflict instability. This chapter discusses these issues in the context of criminal justice reform.
- *Chapter 6: Capacity development.* This chapter describes capacity development as a stand-alone initiative, as well as a component that should be integrated throughout criminal justice assistance programmes.
- *Chapter 7: Legal empowerment.* The concept of legal empowerment, and the role it plays in building individual and community knowledge (which is vital to the development of a vibrant civil society), is increasingly accepted as a mainstream initiative within the field of criminal justice reform. This chapter provides ideas for engaging civil society and citizens in legal empowerment programmes.
- *Chapter 8: Law reform.* The laws in many post-conflict States are often problematic, in that they often do not comply with international human rights norms and standards and they do not address complex crimes occurring in a post-conflict State in need of reform. This chapter discusses an approach and methodology for the reform of laws in post-conflict States.

- *Chapter 9: Police reform.* Significant efforts have been undertaken over the years to reform police in post-conflict States. These efforts have included vetting the police, reforming and restructuring institutions, reforming police law, developing capacity, and building relations between the police and public. Chapter 9 provides an overview of these efforts.
- *Chapter 10: Courts, prosecution and defence reform.* In the aftermath of conflict, three institutional pillars of the justice system—courts, prosecution, and defence—may be in need of reform. Drawing upon the experiences in many post-conflict States, this chapter provides examples of initiatives designed to reform or improve these institutions.
- *Chapter 11: Detention and prisons reform.* Detention and prison facilities may be compromised or even destroyed in the aftermath of conflict and in need of reform. This chapter discusses initiatives aimed at improving pre-trial detention standards and reforming or improving prisons in a post-conflict State.
- *Chapter 12: Working with customary and non-State justice systems.* Recent experience in post-conflict environments shows that informal, or non-State/customary, systems of justice play a significant role in dispensing criminal justice, regardless of whether or not this role is recognized by the State. The extent to which these systems support or obstruct efforts to strengthen and reform the formal justice system is an issue of major concern. This chapter describes some key considerations and approaches to working with non-State/customary systems of justice.
- *Chapter 13: Promoting a culture of lawfulness.* Rule of law is now frequently discussed in connection with the notion of a culture of lawfulness or a culture of the rule of law. A culture of lawfulness is an important post-conflict goal because when a culture of lawfulness is present—even if only in part—societal support for the criminal justice system greatly enhances the prospects for sustainable legal reform. This chapter explores the meaning of a culture of lawfulness and examines how such a culture may be fostered in a post-conflict environment.

2. Criminal justice institutions and actors

2.1 Introduction

In the typical post-conflict setting, advisors should be prepared to work with a wide variety of institutions and actors. Assessing the system of criminal justice in a post-conflict State, which may consist of different systems and subsystems of justice, some operated by the State and some not, presents a challenging task. Justice institutions are linked or sometimes overlap with “security institutions,” and a neat and separate categorization of security institutions and justice institutions may not be possible. Therefore, for the purposes of this chapter, a broad picture of justice and security institutions is set out so that advisors can see both their interconnections and the framework within which they may be working.

Post-conflict criminal justice institutions are often under-resourced, have low capacity, and lack basic infrastructure. They may suffer from a dearth of personnel, many of whom may have fled during the conflict, others of whom may stand accused of human rights violations or corruption and thus may be unsuitable for service in the criminal justice system. Criminal justice institutions or actors are often politicized, and they may have political agendas or they may compete amongst themselves for power and resources. To make the post-conflict situation yet more daunting, a plethora of international donors and actors is likely to be involved in criminal justice reform. Ideally, reform efforts should be well coordinated and work with a common agenda. Unfortunately, as is discussed later in this chapter, this is not always the case.

2.2 State institutions and actors

Although it is important to focus on the unique nature of each post-conflict setting, many of the same kinds of actors and institutions are likely to be present in most situations. The following list is not exhaustive but it does describe the State institutions and actors most commonly encountered. It is divided as follows: criminal justice delivery; criminal justice management; criminal justice oversight; lawmaking and law reform bodies; legal education institutions; inter-agency cooperation mechanisms; and other relevant institutions and actors.

2.2.1 *Criminal justice delivery*

Police. In almost all countries, a police force is the chief front line law enforcement agency, charged with preventing crime, conducting the initial investigation of any crime

committed, and upholding public order. The term “police” can encompass a wide range of law enforcement officials, some of whom may be specialized, such as border and customs police. Policing in post-conflict environments is discussed in more detail in chapter 9. In some countries, policing duties may also be unofficially carried out by non-State actors such as vigilante groups or neighbourhood watch groups. Non-State justice systems, briefly discussed later in this chapter and more fully in chapter 12, may also have “police” working with them.

Courts. Courts encompass judges, court administration staff (including court clerks), and other court personnel. Judges may include investigating judges, who have the responsible for leading a criminal investigation in some countries. Court structures may vary greatly depending on the legal system in place. In some systems, courts are specialized (e.g., criminal courts, administrative courts) and each type of court has its own supreme court. In other systems, courts deal with multiple areas of law, and just one supreme court presides over the entire court structure. Many systems have not only a supreme court but also a constitutional court. In some countries, special courts are established with limited jurisdiction, such as jurisdiction over organized crime or war crimes. Lower-level State courts (e.g., local courts) in some countries have a relationship to the non-State/customary justice system. This is discussed further in chapter 12.

Prosecution service. The role played by the prosecution service varies substantially from one country—and one legal tradition—to another. In some countries, prosecutors have the authority to assemble and present a complete criminal case, whereas in others they are limited to supervising police work. Prosecutors may be under the direction of an investigating judge, and they invariably have a relationship with the police. Advisors, in mapping the criminal justice actors, should determine the exact relationship, role, and powers of the prosecution service in the specific post-conflict setting.

Detention and prisons. Suspects and accused persons who are awaiting trial or who are detained pending trial are kept in police detention or jail; convicted persons are held in prison facilities. A clean divide between detention facilities and prison facilities, however, is not often found in a post-conflict State. When mapping the detention and prisons actors, advisors might also bear in mind that individuals may be held in non-State detention facilities (e.g., in facilities run by the customary justice system or by former rebels to the conflict). Chapter 11 deals with detention and prisons in greater detail.

Lawyers. Lawyers are governed by their State’s law as regards rule of law practice and professional accountability. Some countries require that lawyers take a test and become part of a bar or lawyers’ association. Some of these associations have professional standards and a system of accountability, discipline, and removal. Others do not, and any misconduct by a lawyer must be handled within the justice system.

Criminal defence. Criminal defence encompasses both criminal defence lawyers hired by accused parties and mechanisms that provide legal aid to individuals who cannot afford it. Many different kinds of mechanisms may deliver criminal defence. In some States, this role is left to the private bar, lawyers’ associations or NGOs, which might take on a legal aid capacity and be funded by donors or the State. In others, a State-funded legal

aid system exists. This system may have a dedicated service with an office that has the same resources as the prosecutor's office. A paralegal aid system may also exist. Any combination of these systems might operate in a post-conflict State. The mechanisms for providing criminal defence, and related reform initiatives, are discussed in more detail in chapter 10.

2.2.2 *Criminal justice management*

The justice sector is managed by one or more ministries or government departments. The main ministries that relate to criminal justice are the ministry of justice and the ministry of the interior (sometimes called the ministry of home affairs). The ministry of justice is often the primary source of legislative and regulatory initiatives in the criminal justice arena, and it may have a supervisory role and/or budget control over certain criminal justice institutions, such as the courts, prosecution, or the prisons service. In countries without a ministry of the interior or home affairs, the ministry of justice may also have a supervisory role over the police. The distribution of power between the ministry of justice and other institutions may be a source of conflict. The ministry of the interior may have a supervisory role and/or budget control over criminal justice institutions, in addition to broader powers relating to immigration and national security.

Other ministries relevant to the criminal justice system may include the ministry of finance, which may control the budget of the criminal justice institutions; the ministry of human rights; and the ministry of women and children.

2.2.3 *Criminal justice oversight*

In an effective system, there are at least six interdependent pillars of oversight and control across the criminal justice system:

- Internal oversight, such as police internal affairs bureaus
- Executive control, such as through ministries or national security advisory boards
- Parliamentary oversight, such as through parliamentary committees
- Judicial review and inspections through the courts
- Independent bodies, such as an ombudsman, a commission of inquiry, or a national human rights commission
- Civil society oversight, such as NGO monitoring of or media reporting on the criminal justice system⁵

Advisors should determine if any of these oversight mechanisms are legislated for and/or are operational in the post-conflict State in which he or she is working.

⁵ Organisation for Economic Cooperation and Development, Development Assistance Committee (OECD DAC), *OECD DAC Handbook on Security Sector Reform* (Paris: OECD, 2007), 112–13, <http://www.oecd.org/dataoecd/43/25/38406485.pdf>.

2.2.4 *Lawmaking and law reform bodies*

The ministry of justice is often the primary source of legislative and regulatory initiatives in the criminal justice arena. New laws may be drafted by a division of the ministry; however, other bodies or institutions, including a law reform commission, a judicial reform commission, or ad hoc working groups or groups of experts, may be responsible for law reform activities.

The primary lawmaking body is usually the legislature or parliament. Legislation may provide derivative lawmaking powers to criminal justice institutions such as the police and courts so that they can operationalize the laws. For example, legislation may give the power to create implementing guidelines or standard operating procedures for police.

2.2.5 *Legal education, police and corrections training institutions*

Legal education varies around the world and includes third-level education of criminal justice actors and continuing legal education and training that qualifies these actors to practice. In terms of the basic education of judges and prosecutors, some systems require that after individuals complete their university studies, they attend a magistrate's school and complete a vocational legal education component. In systems where there is no magistrate's school, judges, prosecutors, and lawyers may have to complete another form of professional training between university and vocational legal education. In addition, judges, prosecutors, and lawyers generally have continuing legal education requirements, meaning that they must undertake a certain number of hours of training per year in order to maintain their legal qualification. Police generally attend a police training academy for basic training and face continuing training obligations to maintain their competence and to qualify for promotion or join a specialized unit (i.e., a unit that focuses on addressing a specific crime like human trafficking or cybercrime). Corrections officers must also undertake training prior to taking on their role, in addition to undertaking continuing training throughout their careers.

2.2.6 *Inter-agency cooperation mechanisms*

Inter-agency cooperation mechanisms are established to foster communication among the various criminal justice institutions and to provide a platform to address and resolve ongoing systemic issues affecting all the institutions. They may also be established to address particular problems affecting the country. For example, a task force drawing from institutions that includes representatives from the police, prosecution, courts, and borders and customs officers may be established to address organized crime. In some countries, enabling legislation (or at the least a formal memorandum of understanding) is required to set up such a task force, and each institution appoints a representative to sit on the task force. Such mechanisms are not often found in the immediate aftermath of conflict but are often established as part of criminal justice reform efforts.

2.2.7 Other relevant institutions and actors

Intelligence services. Multiple intelligence agencies—both civilian and military—may be working in a post-conflict State. The challenges that these pose and the reform of these bodies are outside the scope of this book.⁶ The focus here is on a professional, standards-based criminal intelligence service that gathers information on general crime trends, specific criminal activity, and preparatory acts. Ideally, such information is gathered by a specialized unit such as a criminal intelligence division under the ministry of interior or a special unit within the police. Such units do not often exist in post-conflict States but they are something that post-conflict States often work to create as they reform their legal systems.

The military. Generally operating under the auspices of the ministry of defence, military personnel and units may have jurisdiction over any number of areas of domestic law enforcement, ranging from intelligence gathering to public order. Jurisdictional lines regarding the roles and responsibilities of the military vis-à-vis the police are often hazy in a post-conflict State. The role of the military in criminal justice matters may be contentious and reform efforts may need to address its role and its relationship with law enforcement agencies.. In addition to the domestic military, in the immediate aftermath of conflict, international military forces operating as part of a peace operation may engage in law enforcement activities. This is discussed in more detail in chapter 9.

2.3 Customary and non-State systems of justice

In many countries, customary and non-State systems of justice and actors play a significant role in criminal justice, particularly for those communities and individuals who live outside a capital city and do not have immediate access to courts or police. In fact, 80 per cent of total cases are accounted for by customary legal systems.⁷ There is no universally agreed-upon definition of customary and non-State systems of justice. The term “non-State justice systems” has been defined by the United Kingdom’s Department for International Development as “all systems that exercise some form of non-State authority in providing safety, security and accessible justice,” including criminal justice.⁸ This definition includes a range of traditional, customary, and religious-based justice systems that tend to operate and be embedded within local socio-cultural communities. While some of these systems are derived from traditional norms and structures, they are not static; they evolve and mutate as a result of social and political dynamics and in mutual interaction with formal systems. These systems may operate independently of the State justice system, or they may be integrated in a variety of ways, including through formal legal recognition of their jurisdiction or incorporation into the formal justice system. In this respect, the term “non-State” is not entirely accurate. The systems are often based on a paradigm of

⁶ For a more detailed discussion on criminal intelligence and its role in the criminal justice process, see Colette Rausch, ed., *Combating Serious Crimes in Postconflict Societies: A Handbook for Policymakers and Practitioners* (Washington, DC: United States Institute of Peace Press, 2006), 114–22.

⁷ See United Kingdom, Department for International Development, “Policy Statement on Safety, Security and Accessible Justice” (October 12, 2000).

⁸ United Kingdom, Department for International Development, “Non-State Justice and Security Systems,” DFID Briefing, (April 2004), <http://www.gsdrc.org/docs/open/SSAJ101.pdf>.

justice that emphasizes restorative, rather than punitive, remedies and subordinates individual interests and rights to those of the community, posing challenges in harmonizing these systems with Western and international standards.

The term “customary and non-State systems of justice” also encompasses a variety of more recent innovations of informal mechanisms that deal with dispute resolution and security matters, including dispute resolution handled by former rebels to the conflict, a common phenomenon in post-conflict States, and more local forms of ad hoc justice and security providers such as neighbourhood watch groups.⁹ These systems generally operate without State authority. Yet, because they can be the primary means of obtaining justice and security for a large percentage of the population, advisors must understand their roles and their potential for contributing to the rule of law. Chapter 12 discusses customary and non-State systems of justice in greater detail.

2.4 Civil society and related actors

Various non-State actors may not be directly involved in the administration of justice but may play valuable roles nonetheless, such as oversight of the criminal justice system or engagement in criminal justice reforms. Advisors should map the various non-State, civil society actors that play, or who have the potential to play, such a role. These actors include NGOs and charities. Related actors that also play a role in the criminal justice system or its reform include professional organizations, interest groups, community and religious leaders, think tanks, researchers, academics, and the media.

2.5 International donors and actors

A post-conflict environment includes a multitude of international and regional organizations, NGOs, donor agencies, and implementers. Each one has its own governance structure, funding source(s), agendas, and priorities.

Advisors should map which international actors are engaged in criminal justice reform and ascertain their programmatic priorities and where they are providing assistance as part of reform efforts. The mapping should also identify those actors that may not be directly involved in criminal justice reform but whose activities impact or are linked in some way to the reform process. This broader cast of actors might include actors working on non-criminal justice reform efforts, for example, property rights, immigration, banking, financial reporting, and public-sector administration. It is important to engage with fellow international actors to share information and work together. Therefore, it is useful for advisors to determine if a donor coordination group exists. In some post-conflict States, rule of law coordination groups operate with the goal of fostering information sharing and collaboration in the rule of law sphere.

3. Residual violence and post-conflict criminality

3.1 Introduction

Criminality and residual violence are commonly found in most post-conflict environments. Although one might assume that the signing of a peace agreement or the cessation of hostilities begins an era of peace and non-violence, in reality this is not generally the case. A post-conflict environment is often a breeding ground for violence and criminality for a number of reasons, including the culture of violence that surrounds the conflict; the free flow of weapons; the presence of a large number of ex-combatants; the breakdown of the criminal justice system; the lack of accountability mechanisms; and the existence of “spoiler” groups that were either not part of the peace process or that reject the results of the peace process and that turn to violence to pursue their objectives. Such crimes and levels of violence have a deleterious impact on peace, security, and development.

3.2 Categories of crime

For the purposes of this guide, post-conflict violence and criminality can be divided into three categories: residual violence, general criminality, and criminal activity linked to State or political structures.

- **Residual violence:** Often a continuation of the conflict or tied to it, residual violence can include revenge attacks by one ethnic group on another or violence by splinter groups of a faction to the peace agreement. Residual violence may also be perpetrated by spoilers excluded from the peace process.¹⁰
- **General criminality:** Crime rises markedly after conflict, including petty crime (e.g., theft, looting), domestic violence, and violent crime (e.g., serious assaults, arson, rape, murder, kidnapping). Organized crime may be prevalent, including drug trafficking, trafficking in persons, smuggling of people and goods, and money laundering. In addition, natural resources such as timber, minerals and endangered animals may be plundered.
- **Criminal activity linked to State or political structures:** Crimes may be carried out within State or political structures or by individuals who are employed or otherwise associated with them. This kind of criminal activity may include petty

¹⁰ The role of Disarmament, Demobilization and Reintegration (DDR) processes in addressing residual violence should be noted. The Guide does not address DDR. For more information, please refer to the United Nations Disarmament, Demobilization and Reintegration Resource Centre: <http://unddr.org/>.

or serious acts of corruption and other acts such as drug trafficking perpetrated by senior political leaders. In some situations, the government has been “captured” by criminal elements and operates, in effect, as a criminal structure. These criminalized power structures can take many different forms, including, for example, warlords illegally governing regions beyond the reach of the State.

Residual violence in post-conflict States and areas

In parts of the Democratic Republic of the Congo, while the country was apparently on the road to peace in 2003–2004, widespread fighting between armed groups still continued, as did widespread human rights violations, including ethnic massacres and sexual violence.

In Burundi, even after the signing of the Arusha Peace and Reconciliation Agreement for Burundi, war crimes and other grave violations of human rights continued unabated. The activities of spoilers may continue for years after the official cessation of conflict or the signing of a peace agreement. In Northern Ireland in 2006, eight years after the signing of the “Good Friday Agreement,” the Independent Monitoring Commission established under the agreement to monitor the activities of paramilitary groups noted continued, albeit significantly reduced, residual paramilitary violence at the hands of these groups.

In Kosovo, after the NATO-led intervention in 1999, Kosovar Albanians who were believed to have collaborated with the former Serb authorities were targeted in revenge killings. Attacks were also perpetrated on the Serb minority in an attempt to drive them out of Kosovo and to frighten Serb refugees from returning to Kosovo.

These categories may overlap and interlink with each other. For example, residual violence committed by splinter groups may be funded by organized crime involving individuals within the political structure.

3.3 Assessing the nature and scope of criminality and violence

Before developing strategies to address criminality and violence in a post-conflict environment, it is necessary to first assess the nature and scope of these challenges. This is likely to be part of a broader criminal justice assessment (discussed more fully in chapter 4) that explores other issues. However, a number of specific issues closely tied to certain forms of post-conflict criminality and violence merit specific discussion here.

As explained in *Combating Serious Crimes in Postconflict Societies*, published by the United States Institute of Peace, the assessment should identify the specific types of crimes being committed; the motivation behind them; their characteristics and effects; the perpetrators and their linkages to political, paramilitary, intelligence, and other actors; and the related social and economic environment in which the serious crimes flourish.¹¹

3.3.1 *Types of criminality*

The assessment should seek to determine the origins and evolution of crime and violence patterns; identify individuals and institutions that support the crime and violence; and spotlight the regional and transnational aspects of the crime and violence.

3.3.2 *Motivation and catalysts for criminality and violence*

An analysis of the motivation behind the criminal activity may indicate that it is unrelated to a wider social conflict. Alternatively, an analysis may reveal that the criminal activity is part of a larger scheme that has one or more of the following aims: the funding of violent movements by extremist factions who do not agree with the terms of a peace agreement or power-sharing arrangements; the harbouring of war crimes fugitives; the undermining of national or international authority by those aligned with an ousted government and who wish to topple the new authority; the incitement of further conflict (for example, through targeted ethnic violence or attacks on sites of cultural or religious heritage); or, where organized criminal gangs are concerned, the perpetuation or extension of their reach into the political sphere and legitimate businesses. To determine motivating factors and possible catalysts, it is important to assess the following:

- Who benefits and who loses if peace prevails
- Whether revenue gained from crime funds obstructionists to peace who may be engaged in violence, terror, or paramilitary activities
- The extent to which the crime relates to the underlying or unresolved conflict and may be a function of unachieved war aims
- The existence of a party or faction that was left out of the peace agreement and might pose a threat to stability
- The existence of distrust or discord among ethnic or religious groups
- The existence of armed groups or individuals, such as unemployed former combatants, who turn to crime because they have no other way of making a living
- Whether the old regime has disintegrated, thereby leaving a power vacuum and fuelling a battle for power
- Whether insecurity is likely to occur if past wrongs (including war crimes) are not addressed
- The potential for instability due to refugee-related matters (e.g., the presence of refugee camps, property disputes, or resettlement issues)

3.3.3 *Perpetrators of crime and violence*

It is critical to understand who the perpetrators are (specific individuals, leaders, and groups); how they may be related to political actors and other power holders and the existing police force and army; and the existence of linkages between political extremists,

paramilitary groups, intelligence operatives, and criminal organizations. An assessment should gather data and intelligence on the scope of the criminal activity in the country, the identities and affiliations of those involved, and the influence and control criminals have over government officials and actors.

3.3.4 Political, economic, and social factors relevant to criminality and violence

Assessments often focus only on individual components of the criminal justice system (laws, infrastructure, equipment, personnel, training). While an informed understanding of each of these components is essential to developing an effective strategy, an assessment must take a broader view. The root causes and political, economic, and social implications of criminality must be understood and considered.

Failure to understand the political, economic, and social contexts will mean failure to develop effective solutions to addressing serious crime. For example, where entrenched interests control the judiciary and police, efforts to combat crime and violence by training or infrastructure-building programmes alone will achieve little; instead, it will be necessary first to reform institutional mechanisms, such as the processes by which judges and police are vetted, selected, and held accountable. And where crime has become embedded within a society's economy, political life, or culture (for instance, in the case of poppy cultivation in much of Afghanistan and of smuggling in a number of Bosnian municipalities), traditional law enforcement methods alone will be insufficient.

The assessment should therefore examine social and economic factors, such as the extent to which criminal activity is embedded within the fabric of the society and drives its economy. In some situations, the black market dominates the economic picture. The assessment should explore existing and potential opportunities for people to make a living without participating in serious crimes. It is also important to identify who controls access to food, shelter, and utilities (electricity and water, for instance), and whether warlords or private militias, in an effort to gain patronage, might offer the public alternative access in the event of shortages.

4. Managing criminal justice reform initiatives

4.1 Introduction

As well as possessing technical knowledge on criminal justice reform, advisors will also need to be adept at project management. This may be unfamiliar terrain for some. The so-called project cycle has four components: assessment; project design; project implementation; and monitoring and evaluation. This project cycle may be attenuated for a quick-impact project (i.e., a smaller-scale initiative that is planned and implemented more rapidly than is usual). Quick-impact projects are essential in post-conflict environments, where international donors and national counterparts face immediate issues that require funding in the short term. But a longer-term perspective is also vital. This chapter focuses on longer-term projects and assumes the coexistence of quick-impact projects.

4.2 Assessment of the criminal justice sector

Before any criminal justice reform project is undertaken, an assessment must be conducted. Assessment should be an ongoing process rather than a one-time event; continued assessments are crucial in refining the scope and direction of a project in order to ensure its effectiveness.

The need for in-depth and continuing assessments

The United Kingdom's Department for International Development (DFID) funds a large-scale justice programme in Sierra Leone called the Justice Sector Development Programme. It was designed on the basis of an in-depth assessment and was piloted for two years. During the pilot phase, a further assessment of the customary justice system in Sierra Leone was commissioned to find out whether and how assistance measures involving the customary justice system could be undertaken. Without this in-depth analysis, the project design would not have adequately reflected the situation on the ground in Sierra Leone and the unique features of its customary justice system.

Although most organizations conduct their own assessments, there is an increasing trend towards joint assessments, where two or more organizations or donors work together. This joint assessment approach is reflected in the Principle 7 of the UN Guiding Principles (see chapter 1).

Many advisors may not begin work on a particular project until long after the assessment phase has been completed. If this is the case, advisors should get a copy of the assessment report. In other instances, advisors may be involved in the assessment (as an “assessor”).

Criminal justice assessments are generally undertaken through both desk research and in-country visits. Desk research may include reading UN country reports, reports of various UN bodies (e.g., the Human Rights Committee, the Committee on the Rights of the Child, and the Committee on the Elimination of Discrimination against Women) describing the extent to which the country is complying with international standards,¹² NGO reports and newspaper articles. This type of research gives the assessor background information on the post-conflict country. Desk research to ascertain what laws apply in the post-conflict State is also crucial. The assessment team should aim to collect copies of as many of these laws as possible during desk research, and should aspire to collect the remainder of them while in-country. During the desk research phase, the assessment team should verify if any previous assessments have been conducted and read them if they are available. As an alternative, the assessment team may reach out to other organizations and donors to inquire whether they have previously conducted a criminal justice assessment that they would be willing to share, either formally or informally. In addition to locating and reading assessments, the assessment team should also examine any prior or existing criminal justice–related strategies or development plans.¹³

An in-country visit is generally conducted by a team of assessors. Best practice supports the use of a multidisciplinary assessment team composed of criminal justice actors (e.g., a police officer, a judge, a prosecutor, a defence lawyer, a corrections officer) and non-legal experts (e.g., a political scientist, an anthropologist, a sociologist with specialist knowledge of the country’s politics and culture). Best practice also dictates that the team be composed of both national and international colleagues. The time that the team spends in-country will vary; obviously, the more time the team has to assess the criminal justice system, the more comprehensive the assessment will be. Often, because assessment teams are not in-country for a long time, they tend to stay in the capital or major cities of the post-conflict country, to the exclusion of rural areas. This can make for a rather skewed assessment of criminal justice. Generally, the formal justice system operates—albeit inadequately—in the capital city, but is often absent from the rest of the country. An assessor who does not venture outside the capital city may end up designing a project that serves the justice needs of those in urban areas but not those who live in rural areas, where the majority of people dwell. Past experience has shown that hastily conducted, superficial assessments can result in poorly designed, irrelevant, or ineffective criminal justice reform projects.

There is no standard methodology for an assessment of the criminal justice systems, although there have been a number of recent tools that try to do this in a more systematic way. For example, the United Nations Office on Drugs and Crime’s *Criminal Justice Assessment Toolkit* is a standardized and cross-referenced set of tools designed to

¹² For a full listing of the various human rights bodies of this sort, see <http://www.ohchr.org/en/hrbodies/Pages/HumanRightsBodies.aspx>.

¹³ For example, a country may have a poverty reduction strategy paper (PRSP) or a national development plan that outlines criminal justice reforms that the country proposes to undertake. A current list of PRSPs is maintained by the International Monetary Fund and can be found at <http://www.imf.org/external/NP/prsp/prsp.asp>.

enable organizations and individuals engaged in criminal justice reform to conduct comprehensive assessments of criminal justice systems in line with international standards and best practices. This useful resource provides guidance on how to assess the police and intelligence agencies, courts, prosecution service, legal defence, legal aid, and the prison service. It also gives the assessment team a methodology with which to assess juvenile justice, the treatment of victims, and the treatment of witnesses. It has a separate tool to use in working with quantitative information and statistics relevant to the post-conflict State.¹⁴ The UN Department of Peacekeeping Operations has also developed *Guidelines on Mapping and Assessment of Police, Law Enforcement, Judicial and Corrections Institutions*.

The United Nations Office on Drugs and Crime's *Criminal Justice Assessment Toolkit* is a standardized and cross-referenced set of tools designed to enable organizations and individuals engaged in criminal justice reform to conduct comprehensive assessments of criminal justice systems in line with international standards and best practices. This useful resource provides guidance on how to assess the police and intelligence agencies, courts, prosecution service, legal defence, legal aid, and the prison service. It also gives the assessment team a methodology with which to assess juvenile justice, the treatment of victims, and the treatment of witnesses. It has a separate tool to use in working with quantitative information and statistics relevant to the post-conflict State.¹⁵

The choice of methodology depends largely on the mandate and priorities of the organization or donor, and the amount of resources that are available to conduct the assessment. A comprehensive assessment should first map the justice system and its components, which are set out in chapter 2. As previously discussed, the assessment should also inventory the applicable criminal-related laws in the post-conflict State. In terms of assessing the criminal justice system, advisors should assess not just the formal components of the justice system but also the informal components. These include customary justice systems (chapter 12 provides a methodology to assess the customary justice system), religious systems of law, parallel legal systems (such as those run by former rebels or vigilante groups), and other stakeholders that have an interest in criminal justice matters (e.g., NGOs, law schools, and community groups). It may also be necessary to assess the role of the State's security apparatus, such as the military, in the realm of criminal justice.

To assess the formal criminal justice system, its various components should be assessed both individually and in terms of how they work together. As mentioned previously, such an assessment cannot be conducted in a short assessment trip; an initial broad assessment should be supplemented by more targeted and detailed assessments later on. The assessment examines a number of facets of the formal justice system:

- Physical capacity: Buildings, along with their infrastructure, internal hardware, and furnishings; equipment (e.g., weapons and cars)
- Human capacity: Staffing of the institutions in terms of numbers and qualifications

¹⁴ See <http://www.unodc.org/unodc/en/justice-and-prison-reform/Criminal-Justice-Toolkit.html>.

¹⁵ Ibid.

- Mandates, policies, and procedures: Governing laws, regulations, and internal policies that define the duties and powers of the institutions
- Budgetary support: Financial and in-kind support that is officially designated to the institutions¹⁶

It is also crucial to ascertain how the system is working in practice (as opposed to in theory) and the level of communication and interaction—if any—among the various components of the system. In undertaking this assessment, the assessment team may speak to individuals within the system, both at the highest level (e.g., ministers or heads of departments) and at a lower level (e.g., police officers or prosecutors).

Inquiring within the system may prove useful but may not give an entirely accurate picture of the justice system. The assessment team must speak to and understand the perceptions of those outside the system, such as NGOs, legal scholars, and members of the general public, to gain their views of the system. (Public perceptions of the informal system are also important to ascertain.) In evaluating how the justice system is working, the assessor should ascertain whether there are any court or police monitoring organizations. For example, an NGO that monitors the court may be able to provide the assessor with relevant reports or insights. Likewise, the local United Nations peacekeeping mission may have a human rights component that monitors the justice system and has collected valuable data.

In addition, as discussed in chapter 3, the assessment team must determine the types of crime that are troubling the post-conflict State.

Some organizations and donors supplement criminal justice assessments with broader assessments, which can inform key decisions regarding project design. Donors such as DFID commission “drivers of change” reports. These reports are based on the understanding that “effective programmes must be grounded in an understanding of the economic, social and political factors that either drive or block change within a country.”¹⁷ Another example are conflict-analysis reports that “analyse the conflict; better assess conflict related risks associated with . . . assistance; and develop options for more conflict sensitive policies and programmes.”¹⁸

Finally, the assessment should determine what organizations, donors, and agencies are engaged in criminal justice reform in the post-conflict State and their areas of focus. There may be a steering group or a coordination group in-country that has this information. As discussed above, the assessor should also find out whether a justice-sector strategy is already in place that donors are part of or that they are involved in developing.

¹⁶ United Nations Department of Peacekeeping Operations, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), 31, available at http://www.unrol.org/files/UNDPKO_justiceinmultidimensionalpeaceop.pdf.

¹⁷ See <http://gsdrc.ids.ac.uk/go/topic-guides/drivers-of-change> for further information and resources, including sample drivers of change reports.

¹⁸ United Kingdom, Department for International Development, *Conducting Conflict Assessments: Guidance Notes* (2002), <http://webarchive.nationalarchives.gov.uk/+/http://www.dfid.gov.uk/documents/publications/conflictassessmentguidance.pdf>.

Conducting a criminal justice assessment in a post-conflict State may be a challenging task. In the first place, basic data about the criminal justice sector, or those who are processed through it—such as how many people are in detention, the crime rates and trends, and so on—may not be readily available. Second, assessments are inherently political, often touching on sensitive issues that those within the system may not wish to discuss (e.g., high-level corruption). Third, depending upon the experience of national actors dealing with other assessment teams, there may be a resistance to scrutiny by outsiders, especially foreigners. Finally, national actors may experience “assessment fatigue.” A huge number of organizations and donors conduct individual assessments; each dispatches its own representatives to meet with actors who have already met with representatives from numerous other organizations and donors, and been asked the same questions many times.

Assessment fatigue

According to an article entitled “Scramble for Africa” (*Economist*, 4 September 2008), the number of aid projects has skyrocketed in recent years. In 2007, there were more than 150,000 missions in fifty-four recipient countries. Vietnam played host to an average of three visits each working day and so did Tanzania. Government workers in several African countries complain that they are so busy meeting Western delegates that they can do their proper jobs only in the evening.

Anecdotal evidence from many post-conflict States corroborates the picture painted in this article. In some countries, a separate government agency has been set up (e.g., a ministry of coordination) to handle interactions with international donors, and there are now stricter policies regarding advisors meeting with government officials as part of assessments

4.3 Project design

The design of a project should be rooted in a sound initial assessment, coupled with ongoing assessments. Project design is also linked to monitoring and evaluation (discussed in section 4.5 of this chapter), because it is at this time that the monitoring and evaluation framework should be developed.

According to UNDP’s *Programming for Justice: Access for All*, “selection of what to address is a critical step” in the project cycle.¹⁹ This selection of what problems to address should, first and foremost, be undertaken only after determining the national needs in the specific context of the post-conflict State. This determination must take into account the condition and nature of the country’s rule of law system (both formal and informal/customary)

¹⁹ UNDP, *Programming for Justice*, 14.

and the culture, traditions, and institutions that underlie that system. This includes a look at the situation of vulnerable groups, such as minority groups, women, and children. Participation of key national stakeholders in the development of problems to address and therefore programmatic areas will ensure that there is strong local ownership in the design phase. International donors and organizations have been widely criticized for not including local voices in this phase. This is especially likely to occur when the project design is conducted out-of-country, for example, in the capital city of the donor agency's country.²⁰

According to the UNDP, "Experience shows that programming often deals with general capacity development of institutions without focusing on addressing specific . . . problems."²¹ Thus, a problem-solving approach is preferable to one that solely seeks to build institutions. This means balancing assistance between "top-down" assistance, which is institutionally focused, and "bottom-up" assistance, which works with non-State and customary justice systems or civil society. (See, for example, chapter 7 on legal empowerment and chapter 12 on working with non-State justice systems.)

The assessment is likely to have identified numerous problems in the criminal justice system of the post-conflict State. But it can be difficult for advisors to know how to identify an entry point to strengthening criminal justice or what issues to focus on. Advisors should start with the premise that no one donor or organization will be able to address all the issues, and that each organization should concentrate on a limited number of issues, applying the necessary resources to address these. In some cases, a donor or organization may have a particular specialization or strength that makes it an ideal candidate to tackle certain problems (e.g., an organization may have expertise in anti-corruption or counter-narcotic activities). What area or problem an organization will focus on will also depend on other factors, such as whether the political will exists to solve a problem, whether the organization has sufficient funding to engage in the project in the medium term to long term, or whether the organization has fostered good relations with national interlocutors whom it would need to work with on the specific problem. Best practice shows that it is often advisable to develop a pilot or inception project to test the waters and discover if the activities envisioned under the project are useful and effective. This phase could last as long as two years while longer-term planning is ongoing. During a pilot phase, further in-depth assessments can be conducted. This phase is also an opportunity for donors to work with national counterparts on the development of a strategic plan if none exists—a situation commonly encountered in the immediate aftermath of conflict. After the strategic plan is complete, future projects can fit into this broader strategy, whether it is a national development plan, a justice-sector strategy, or even the strategy of an individual justice component (e.g., courts or police). Developing this strategic plan will require national and international cooperation and coordination, a core principle set out in chapter 1.

²⁰ See British Overseas NGOs for Development (BOND), *Guidance Notes No. 4: Logical Framework Analysis* (2003), 3, <http://www.gdrc.org/ngo/logical-fa.pdf>.

²¹ UNDP, *Programming for Justice*, 14.

Taking a strategic approach to rule of law reform

In a UN report issued in 2004, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Countries* (UN Doc S/2004/616), the Secretary-general stated “justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives. Advancing all three in fragile post-conflict settings requires strategic planning, careful integration and sensible sequencing of activities.”

Principle 7 of the *Guidance Note of the Secretary-General on UN Approach to Rule of Law Assistance* requires a comprehensive approach to support all aspects of effective and efficient justice systems. Further, it requires the United Nations to “develop a holistic and strategic approach that involves ... the development of a comprehensive rule of law strategy based on the results of ... [an] assessment.”

One serious challenge faced by donors and organizations in project design is the issue of sequencing, or the ordering of activities. Sequencing encompasses not only the mechanics of arranging proposed activities on a calendar, but also the logical ordering of reform activities.

Another challenge for advisors is the inflexibility of many project designs. According to the Organisation for Economic Security and Cooperation’s *Handbook on Security System Reform*, “Often there is too little flexibility in the design . . . to allow adaptation to a changing local environment . . . [Project] design needs to maintain as much flexibility as possible during the implementation phase. . . . The objectives and activities that seemed appropriate at the outset of a programme may lose their relevance as dynamics evolve.”²²

4.4 Project implementation

Project implementation has both technical and non-technical dimensions. The technical and substantive elements of implementing projects are discussed in other chapters of this handbook. The non-technical elements of project implementation involve the use of soft skills by advisors to sustain the momentum and the support for the project and to foster and maintain good relations among all those involved in project implementation.

The importance of soft skills and relationship building should not be underestimated. Soft skills are necessary for effective coordination, partnership building, and facilitation (all of which are part of project implementation), as well as the other phases of the project cycle. Advisors should practice improving their soft skills in order to foster effective project implementation.²³

²² OECD DAC, *Handbook on Security System Reform*, 70.

²³ For a discussion on soft skills, see Chris Spies, *Resolutionary Change: The Art of Awakening Dormant Faculties in Others*, http://www.berghof-handbook.net/uploads/download/dialogue5_spies_comm.pdf. See also Daniel Goleman, *Social Intelligence: The New Science of Human Relationships* (London: Bantam Press, 2007).

Another competence that is vital to project implementation is “change management,” or the ability to understand and manage change. Given the fact that each activity or project seeks to support positive change in criminal justice institutions, civil society, or the population, the ability to manage change is key for advisors and their national counterparts. In this context, change management refers to “making changes in a planned and managed or systematic fashion.”²⁴ Unfortunately, many advisors are unfamiliar with the concept or operation of change management. A full description of change and change management is beyond the scope of this book. However, a number of initial guiding principles should be borne in mind.

First and foremost, advisors should be aware of the inherent resistance to change by both individuals and organizations. Change is not always welcomed and it should not be assumed that everyone will embrace the kind of changes that a project will bring.

Second, advisors should consider the sorts of changes that their project might bring about—both intended and unintended—and plan accordingly. For example, training police in new approaches to domestic violence can result in a higher number of arrests of violent spouses. This, in turn, will result in more cases being directed to the formal justice system, affecting the caseloads of prosecutors, defence counsel, and judges. Moreover, these developments will most likely lead to an increase in convictions for domestic violence, which will have an impact on the prison population. All of these developments spring originally from a change in police training. The goal of change management in criminal justice reform is to anticipate as many of these corollary effects as possible and take steps to ensure that these consequences, whether intended or unintended, do not derail the reform process.

Third, as discussed earlier, it would be useful for advisors to conduct a formal or informal “drivers of change” study to identify those individuals who are for change (“champions of change”) and those who are against it (“spoilers”). Inherent in such a study is an examination of the motivations of champions of change and the reasons why spoilers are resisting change. This sort of analysis will give advisors the background information needed to develop a change management strategy in the project implementation phase.

Fourth, once the analysis is done, advisors should propose a strategy to support champions of change and to manage spoilers. In supporting champions of change, advisors can bring various champions together as a “guiding coalition” who can coalesce around the change.²⁵ With regard to spoilers, “[m]anaging opposition to change often requires a combination of incentives and facilitating processes that enable entrenched interests to see their own benefits within a milieu (environment).”²⁶

Finally, communication about change is essential. Advisors should have facilitated discussion about change in the assessment and project design phase through participatory processes. In the project implementation phase, further discussions help to “dispel uncer-

²⁴ Capacity Development Group, Bureau for Development Policy, United Nations Development Programme, *Institutional Reform and Change Management: Managing Change in Public Sector Organizations* (November 2006), 6.

²⁵ *Ibid.*, 15.

²⁶ *Ibid.*

tainties and mitigate the potential threat it poses to those that see themselves as likely to be impacted by change.”²⁷ Communication is also important to manage stakeholder expectations.

Given the complexity of a post-conflict environment, project implementation is intrinsically difficult. The changing environment may require midstream changes to the original project design. Effective monitoring systems throughout the lifetime of project implementation may also necessitate such changes in order to maximize the effectiveness of the project.

4.5 Monitoring and evaluation

In many non-conflict countries, criminal justice institutions routinely monitor and evaluate their performance. Advisors may be familiar with such monitoring and evaluation in their own country. In a post-conflict State, different international organizations, donors, and agencies involved in criminal justice reform monitor and evaluate the impact of their own work. At the same time, national actors should also be measuring change throughout the criminal justice system or in their own institutions (e.g., police or prisons) through the same process. Monitoring and evaluation are inextricably linked to sustainability in that their objectives are to measure positive (and potentially negative) impacts of criminal justice projects. Donors often do not adequately think out or invest in monitoring and evaluation. This fact has been detrimental to the effectiveness and sustainability of projects.

Monitoring and evaluation as a rule of law principle

Principle 3 of the “Principles of Engagement” drafted by the Justice Assistance Network (composed of all British government agencies involved in justice assistance overseas) states that “assistance should aim to achieve a measurable and sustainable impact. Proper objectives, monitoring and evaluation of outcomes are therefore clearly necessary.”

The Paris Declaration on Aid Effectiveness (2005), which has been signed by more than one hundred ministers, heads of agencies, and other senior officials, States that partner countries (including many post-conflict States) should “endeavour to establish results-oriented reporting and assessment frameworks that monitor progress against key dimensions of national and sector development strategies; and the frameworks should track a manageable number of indicators, for which data are cost-effectively available” (paragraph 43). It also States that donors should “work with partner countries, to rely, as far as possible, on partner countries’ results-oriented reporting and monitoring frameworks” or, “until they can rely more extensively on partner countries’ statistical monitoring and evaluation systems,” they should work with partner countries to the maximum extent possible on joint formats for periodic reporting (paragraph 44).

Note: The text of the Paris Declaration on Aid Effectiveness is at http://www.oecd.org/document/18/0,3343,en_2649_3236398_35401554_I_I_I_I,00.html.

²⁷ Ibid., 16.

Monitoring and evaluation are usually thought of as the last phase of a criminal justice project. Systems of monitoring and evaluation, however, should be developed at the project design stage. Monitoring is an ongoing and continuous process, conducted throughout the life of a project. “Evaluation” has been defined as follows: “The systematic and objective assessment of an on-going or completed project, programme or policy, its design, implementation and results. The aim is to determine the relevance and fulfilment of objectives, development efficiency, effectiveness, impact and sustainability.”²⁸ Evaluation is generally conducted—by an individual outside the project—at distinct junctures, such as midway through the project, upon its completion, and after its completion. The results of project evaluations will inform not only the current project (e.g., through midstream adjustments to the project) but also future projects by creating valuable lessons learned, which can be applied in other locales. The purpose of monitoring and evaluation is to measure change and its sustainability.

Each organization has its own way of monitoring and evaluating its projects, ranging from informal to highly formal requirements, and from simple methodologies to highly complex ones. Some organizations use “logical framework analysis” to manage, monitor, and evaluate their projects and therefore develop a “log frame” as a reference point for monitoring and evaluating a project. Whatever the monitoring and evaluation framework employed, certain elements are common to them all. First, the goals of the project are set out. Both big-picture objectives are set out (e.g., “goal,” “purpose,” or “supergoal”), as well as lower-level, more specific objectives (e.g., “outcome”). These goals are then linked to a particular “output” or “activity,” the idea being that the output or activity leads to the specific objective, which leads to the big-picture objective.

Sample objectives for a criminal justice project

The Justice Law and Order Sector Reform Programme (<http://www.jlos.go.ug/index.php>) was established in 2001 to conduct a sector-wide approach to justice reform in Uganda. The broad objectives for the initial phase of the project are examples of a criminal justice “goal,” “purpose,” and “outcome”:

- Goal: The improved safety of the person, security of property, and access to justice that ensures a strong economic environment to encourage private-sector development and benefit poor and vulnerable people
- Purpose: To promote the rule of law, increase public confidence in the criminal justice system, and enhance the ability of the private sector to make and enforce commercial contracts
- Outcome: Improved compliance with the law, improved perception of the justice law and order sector, and reduction in the incidence of crime

Source: United Kingdom, Department for International Development, “Justice Law and Order Sector Reform Programme in Uganda: Logical Framework,” <http://www.gsdrc.org/docs/open/SSAJ89.pdf>.

The project goals and objectives need to be measured to see whether they have been achieved and, if they have, to what degree. Goals and objectives are measured by developing “indicators.” An indicator is “a measure that helps answer the question of how much, or whether, progress is being made towards a certain objective.”²⁹ Careful consideration should be given to the indicators and data sources that are chosen. The Vera Institute of Justice’s publication entitled *Measuring Progress toward Safety and Justice: A Global Guide to the Design of Performance Indicators across the Justice Sector* (2003) sets out some noteworthy general guidelines. Goals should be “SMART,” that is, specific, measurable, achievable, realistic, and time-bound.³⁰

An indicator is generally accompanied by “means of verification,” or a data source, by which to measure progress against the indicator. Data sources include surveys, focus groups, observations and interviews, crime statistics, and data from criminal justice institutions (e.g., how many crimes were reported to the police, how many cases were heard by the courts, how many people are being held in pre-trial detention).

Sample indicators and means of verification

The Vera Institute of Justice developed a number of sample indicators and means of verification linked to broad justice goals. The following is an example linking a policing-related goal to an appropriate indicator and means to measure this indicator:

- Goal: To improve public confidence in the police among the poor
- Indicator: Change in proportion of poor citizens who express confidence in the police
- Means of verification/data source: National and local public opinion surveys

Source: Vera Institute of Justice, *Measuring Progress toward Safety and Justice: A Global Guide to the Design of Performance Indicators across the Justice Sector* (New York: Vera Institute of Justice, 2003), 32.

As mentioned above, the creation of indicators and data sources (along with the entire monitoring and evaluation framework) should be done at the project design stage. In this way, the entire project will operate by reference to a set of defined goals and objectives. Moreover, when considered at the beginning of the project, baseline data can be gathered against which to measure progress. For example, if one project goal is to reduce crime, and the indicator is crime rates in a specific area, then it will be necessary to measure the crime rates at the outset of the project and then at the end to ascertain any differences. When designing indicators and means of verification/data sources, it is important to consider the ease with which data can be obtained. It is also important to consider the cost. Monitoring and evaluation can become an expensive business.

²⁹ Vera Institute of Justice, *Measuring Progress toward Safety and Justice: A Global Guide to the Design of Performance Indicators across the Justice Sector* (New York: Vera Institute of Justice, 2003), 2.

³⁰ OECD DAC, *Handbook on Security System Reform*, 69.

Finally, it is worth noting that the monitoring and evaluation of rule of law assistance, as opposed to other areas of post-conflict international assistance, extremely challenging. Efforts are currently underway to develop a framework for rule of law monitoring and evaluation.

5. Addressing the needs of vulnerable groups

5.1 Introduction

Addressing the needs of vulnerable populations in a post-conflict environment might not be a first priority for advisors engaged in improving or reforming the criminal justice system but it is a crucial component of building the rule of law. When vulnerable populations are supported, this can help to safeguard citizens' respect for the rule of law, send a message of support to disadvantaged groups, make a strong contribution to the underlying security environment, and build confidence in a new, fragile justice system. This chapter first defines the term "vulnerable groups." It then outlines how to conduct a needs assessment vis-à-vis these groups. Finally, it provides guidance on programmatic options to meet the needs of vulnerable populations.

5.2 Who are the vulnerable?

Certain groups of individuals may be vulnerable and thus treated differently by their fellow citizens and by the criminal justice system. This treatment is often in contravention of international human rights standards. In some instances, it might have fostered conflict or contributed to instability.

Vulnerable groups can cover a significant social spectrum, from the handicapped to the economically downtrodden and it is often difficult to define. At a very general level, the key criterion for determining what groups within a society are vulnerable is the degree to which there is evidence of discrimination. Vulnerable groups generally include the following:

- Women
- Children, including children accused of crimes; child combatants and those utilized by armed forces during the conflict
- The rural and urban poor
- Indigenous, ethnic, and religious minorities
- Migrants, refugees and the internally displaced
- People living with HIV/AIDS
- People with disabilities
- Gays, lesbians, bisexual people and transgender people

Advisors should keep in mind that an individual can belong to more than one vulnerable or marginalized group. When counted together, vulnerable groups can account for the majority of the population.

Numerous international treaties and guidelines address the rights of vulnerable and marginalized groups. Advisors should pay particular attention to the following:

- United Nations International Covenant on Civil and Political Rights and its two additional protocols
- United Nations International Convention on the Elimination of All Forms of Racial Discrimination
- United Nations Convention on the Elimination of All Forms of Discrimination against Women
- United Nations Convention on the Rights of the Child
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
- United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power
- United Nations Declaration on the Elimination of Violence against Women
- United Nations Declaration of Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live
- United Nations Declaration on the Rights of the Child

5.3 Assessing the needs of vulnerable groups

Each vulnerable group comes with its own history of being discriminated against by society. As advisors listen to and assess each vulnerable group, he or she needs to understand that each group will face different discriminatory practices in different countries.

In assisting vulnerable groups, it is important for an advisor to keep an open mind and make a conscious effort to listen to all points of view and conduct interviews with representatives from the vulnerable groups. Leaders of vulnerable groups are likely to be found within the country's human rights community and civil society, as well as within the legislature and the executive branch and the ranks of journalists. Advisors should reach out to such individuals and nurture close contacts with them.

Advisors should develop a broad understanding of the situation by drawing not only on the accounts of representatives from vulnerable groups but also on human rights reporting from local and international NGOs. NGOs and think tanks frequently report on minority and other vulnerable group issues, as do humanitarian organizations. If a UN mission is operating in the country, it is likely to be another valuable source. The human rights components of a UN mission that conduct human rights reporting may have reports that focus on the treatment of vulnerable groups.

It is also important to understand how various criminal justice institutions and actors contribute to the problems that vulnerable groups face. Each of the tools in the United Nations Office on Drugs and Crime's *Criminal Justice Assessment Toolkit* has a section on how to assess the treatment of vulnerable groups within its area of focus (e.g., courts, prosecution service, police, access to justice). The toolkit also contains specific tools addressing juvenile justice and gender in the criminal justice system. Key overall questions to ask include: Are justice institutions operating in a way that is responsive to vulnerable groups? Are vulnerable groups represented among judges, prosecutors, defence attorneys, and court personnel? Are court personnel educated and trained to recognize and accommodate the needs of vulnerable groups? Are court proceedings conducted in a language familiar to vulnerable groups? How do vulnerable groups perceive the justice system?

The treatment of vulnerable groups by customary and non-State systems of justice also merits examination. This is discussed in greater detail in chapter 12.

News reporting in the media can be invaluable in developing a comprehensive and nuanced picture of the relationship between vulnerable groups and the criminal justice system. A useful resource found in many post-conflict States is a digest of local press produced by the international community.

5.4 Programmatic options to address the needs of vulnerable groups

Having conducted an assessment, an advisor's next step is to develop technical and programmatic responses to the issues and concerns identified by the assessment. This section presents some examples of effective programmes that have been tested in a variety of post-conflict States. This breadth of vulnerable groups—and the sheer numbers of vulnerable individuals—underscores the need for advisors to prioritize. He or she should pick effective points of entry based on the particular context and should not try to address the needs of all vulnerable groups at once. It is important that advisors realize the need to diversify the responses to each vulnerable group depending upon its unique situation.

5.4.1 Quick-impact projects

It is important to build the confidence of host country interlocutors at the outset. Advisors can do this by developing quick-impact projects. What constitutes a quick-impact project? There is no rule about this. In general, however, such projects are usually launched and completed within the first six months of deployment to the post-conflict State or within six months after the cessation of conflict. Quick-impact projects to support marginalized groups in the justice system can take many forms. They can involve, for instance, the dispatch of equipment and supplies to host country agencies, courts, or independent commissions that track the treatment of vulnerable groups; the accelerated training of law enforcement or corrections officers in human rights or the treatment of vulnerable groups; the quick deployment of international experts to advise partners on best practices from around the world pertaining to the rights of vulnerable groups; or the provision of a series of small-grants to local NGOs that focus on the rights of vulnerable groups.

5.4.2 Law reform

Other aspects of programming have a longer-term perspective. Often, vulnerable groups face legal hurdles because laws are either not in place or not enforced. Advisors can help the legislature to pass laws that both adhere to international human rights standards and offer protection to these vulnerable groups. For instance, a woman may have no legal recourse if her boyfriend or husband beats her, as many countries do not have domestic violence laws. Confronted by such a situation, an advisor's first step might be to facilitate the passage of legislation that protects women; subsequent steps could involve improving legal aid or legal awareness. Law reform is discussed in greater detail in chapter 8.

5.4.3 Implementation of laws

Once laws are in place that offer protection to vulnerable groups, the criminal justice system and structures that ensure implementation of the laws must be enhanced. Implementation can range from introducing new regulations elaborating upon the law (and providing the necessary level of detail to ensure implementation) to providing sensitivity training for criminal justice system personnel. Whatever form implementation takes, it must help to persuade vulnerable groups that the formal justice system is not only relevant to their lives but also makes a discernible difference to the quality of their lives.

5.4.4 NGOs and civil society

There are a variety of ways to support NGOs and civil society so as to address the rights of vulnerable groups. As noted in the above discussion of quick-impact projects, providing seed funding to NGOs can help them build capacity to advocate on behalf of vulnerable groups. Training programmes aimed at NGOs and civil society can help them understand the framework of rights and remedies available for vulnerable groups. "Train the trainer" programmes can build and disseminate knowledge even more effectively. These kinds of measures will enable NGOs and civil society to conduct the education and public awareness campaigns that are needed to empower individuals within vulnerable groups and to educate those outside such groups about the fair treatment of them. Working with civil society is discussed in greater detail in chapter 7.

5.4.5 Legal aid

The most common step taken to promote access to justice for disadvantaged and marginalized groups is to create or enhance legal aid programmes. Chapter 8 discusses legal aid services in details.

5.4.6 Training and mentoring

Sustainable training and mentoring programmes can make a significant difference in a post-conflict environment. Police need to know that poor treatment of minorities or other vulnerable groups will not be tolerated. In addition, police need positive leadership

examples within their own ranks to emulate. The same is true for the other components of the post-conflict State's justice system. Quick-impact projects have their place, but any training must consider the long-term development of a culture that respects and seeks to protect the rights of vulnerable groups.

5.4.7 Representation of marginalized and vulnerable groups

Selection and appointment standards for judges, prosecutors, and court staff can have a significant impact on the way in which marginalized and vulnerable groups are represented in the justice system. In many cases, these standards must be amended so that representatives of vulnerable groups are appointed. Such amendments can also enhance understanding of the needs of the vulnerable within the justice system as a whole, leading to more responsive judicial action.

In a similar vein, it is important to promote the representation of vulnerable groups in legislative bodies. Most measures of this kind seek to increase the number of women in a legislature, but the same mechanisms that serve women can also help other disadvantaged groups. Establishing quotas for particular groups is a common measure, but it can be substituted or supplemented with a variety of other actions, such as providing political training and resources with which to campaign for election.

6. Capacity development

6.1 Introduction

In States coming out of conflict, justice institutions and actors will often have gaps in their capacity to administer criminal justice. This chapter explores a systematic approach to developing capacity to fill these gaps. The chapter first defines capacity and capacity development, moves on to discuss how advisors can facilitate capacity development, and then lays out the various elements of the cyclical process of capacity development.

In most organizations, the concept of capacity development is neither well defined nor well understood. Capacity permeates every facet of rule of law reform efforts. Thus, capacity development may be an ancillary result of any reform project. For example, the capacity of the criminal justice sector grows from legal education reform—as judges, prosecutors, and criminal defence attorneys become better educated, their capacity to support a well-balanced criminal justice system is enhanced. Capacity development can also be pursued as a goal of its own. This chapter discusses capacity development as its own systematic process, which is not to say that other projects that include components of capacity development should be overlooked.

6.2 Defining capacity

“Capacity” is often thought of as having two components: tangible capacity and intangible capacity.³¹ Tangible capacities include resources, infrastructure, education, health, organizational structure, and legal framework, among others. Development of these tangible capacities is pursued through technical assistance, which is touched upon in other chapters. Intangible capacities—also known collectively as “human capacity”—are the skills, experiences, values, motivations, habits, knowledge, and traditions of individuals and the organizations for which they work.³²

³¹ Réal Lavergne and John Saxby, Canadian International Development Agency (CIDA) Policy Branch, *Capacity Development: Vision and Implications*, Capacity Development Occasional Series, No. 3 (CIDA, 2001), [http://www.acdi-cida.gc.ca/inet/images.nsf/vLUImages/CapacityDevelopment3/\\$file/CapDevOSNo3-E.pdf](http://www.acdi-cida.gc.ca/inet/images.nsf/vLUImages/CapacityDevelopment3/$file/CapDevOSNo3-E.pdf) 2.

³² Ibid.

6.3 Defining capacity development

“Capacity development,” as used in this chapter, targets intangible, not tangible, capacity. Capacity development is a process used to enhance the human capacity of individuals and organizations.³³ Human capacity development is neither linear nor streamlined; it is a continuous process, with no real beginning or end. The often-used term “building capacity” is misleading in relation to human capacity development, because rather than creating capacity where none previously existed, the aim is to stimulate the growth of existing capacity.³⁴

Although the development of capacity is a never-ending process, programmes directed towards capacity development need structure. The development process will target either individual or organizational capacity gaps; formulate and implement a strategic plan to develop these capacities; and evaluate the results. This process is detailed below, in subsection 6.5.

The growth of capacity will benefit the sector-wide reform process, either by achieving results that spur other reforms or by empowering nationals to solve future problems. According to the United Nations Development Programme (UNDP), “Capacity development starts from the principle that people are best empowered to realize their full potential when the means of development are sustainable—home-grown, long-term, and generated and managed collectively by those who stand to benefit.”³⁵

6.4 Capacity development: supporting factors and inhibitors

Certain elements need to be present in order to ensure the success of any capacity development initiative. First, to facilitate capacity growth, capacity is best developed within existing resources. For example, providing a training course using the latest technology will not help individuals or organizations if, after the training course ends, they are asked to apply the training lessons using outdated technology.

Second, each process should conform to the context within which it is undertaken. The Organisation for Economic Co-operation and Development (OECD) terms this a “best-fit” approach.³⁶ It develops capacity around the overarching reform goals, and utilizes dormant capacities. Post-conflict States often show signs of serious gaps in capacity; however, some of these capacities exist but happen to be dormant. In developing existing capacity, the process should attempt to discover and resurrect any dormant capacity.

Third, the buy-in and support of stakeholders is a vital component of facilitating capacity development.³⁷ If individuals and organizations are to retain the skills and information

³³ Cedric Saldanha, “Rethinking Capacity Development,” *International Public Management Review* 7, No. 2 (2006): 19–20.

³⁴ Organisation for Economic Cooperation and Development, *The Challenge of Capacity Development: Working towards Good Practice* (Paris: OECD, 2006), 12.

³⁵ United Nations Development Programme, *Capacity Development: A UNDP Primer* (New York: UNDP, 2009), 5.

³⁶ OECD, *Challenge of Capacity Development*, 8–9.

³⁷ See Carlos Lopes and Thomas Theisohn, *Ownership, Leadership and Transformation: Can We Do Better for Capacity Development?* (New York: United Nations Development Programme, 2003), 26 “Capacity development is an endogenous process that takes place in every society . . . It can be supported or distorted through external intervention.”

they acquire during a capacity development programme, they need to accept and embrace the need for such a programme. Best practices also suggest participation at all levels of an organization when pursuing capacity development. Stakeholder participation, such as identifying gaps and developing plans, may occur at any point in the process.

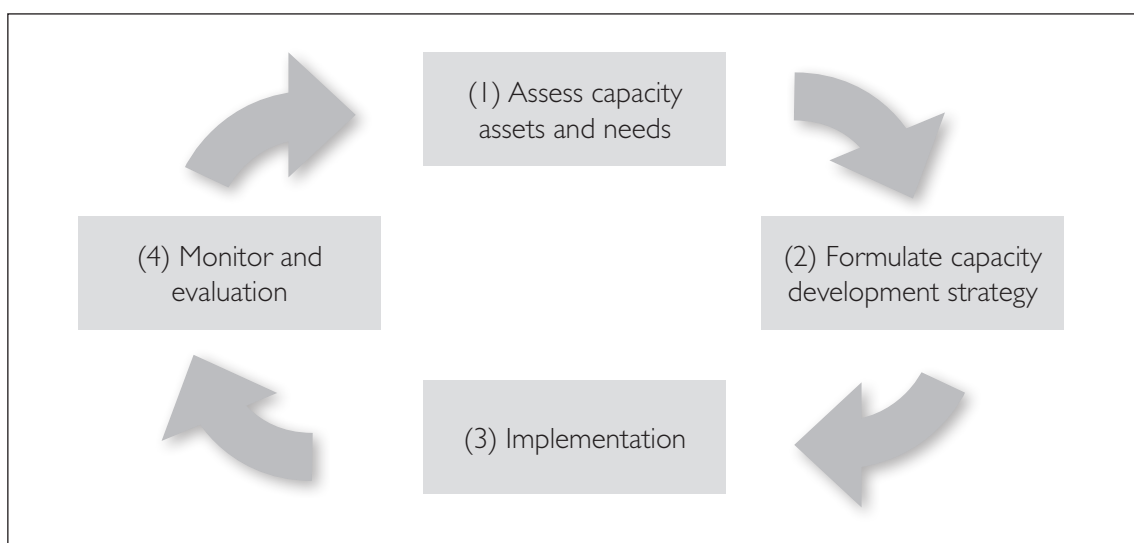
Of course, inhibitors to developing capacity exist. In societies with entrenched corruption, unpredictable staffing and funding, rapidly changing government policies, or continuing conflict, it is difficult to develop either individual or organizational capacity. For instance, corruption inhibits capacity development because corruption changes both the incentives motivating individuals and their willingness to change their behaviour. Unpredictable staffing after conflict will lead to trained staff departing, and the sector will likely fill those positions with less-capable staff.

The timing of capacity development is also important. In post-conflict States, inhibiting factors will always persist. It is important to assess them. If they are likely to ruin the capacity development process, capacity development may have to be postponed. Yet it is possible for one organization, or one group of individuals, to pursue capacity development successfully even if it would be ineffective for the rest of the criminal justice sector to do so.

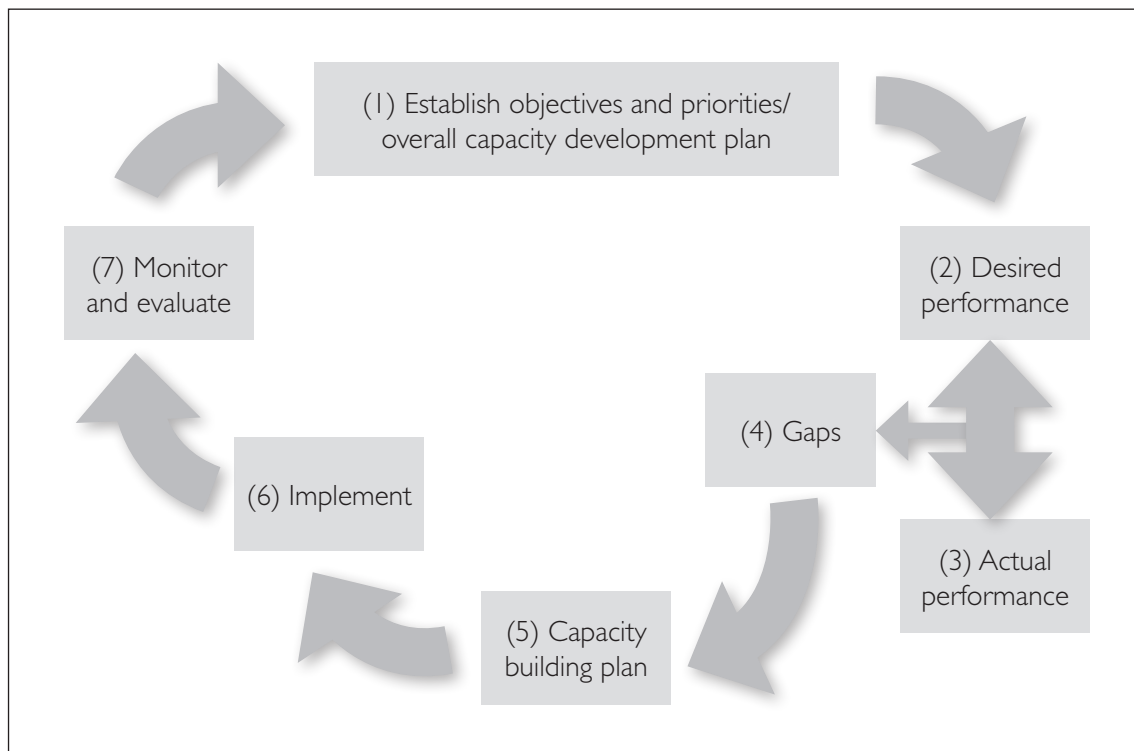
6.5 The capacity development cycle

As discussed above, capacity development is a process with limitless opportunities for growth. It is simplest to conceptualize this process as a cycle. UNDP frames the capacity development process as the four components of the project cycle, as illustrated in figure 1. The OECD, in analysing capacity development of policing, uses a more detailed cycle—see figure 2—but one which follows a similar format.

Figure 1. UNDP: the capacity development cycle



Source: United Nations Development Programme, *Practice Note: Capacity Development during Periods of Transition* (New York: UNDP, September 2007), 8.

Figure 2. OSCE: the capacity development cycle

Source: Frank Harris, *The Role of Capacity-Building in Police Reform*, (Organization for Security and Cooperation in Europe, Pristina, Kosovo, 2005), p. 49–61.

This cycle can be applied to an individual project that targets one specific capacity or a set of interrelated, capacities. To ensure that capacities are developed in a usable manner, a list of overall goals must be created, and these goals must be revisited throughout the cycle. For the projects—and thus the overall process—to be successful, it would be helpful to call in capacity development experts.

6.6 The phases of the capacity development cycle

This section examines and illustrates the different phases of a capacity development cycle.

6.6.1 Establishing a planning body and developing overall goals

The first phase in a capacity development cycle is to establish a capacity development planning body. Best practice suggests that this body should be nationally led and supported by international actors. If capacity development efforts focus on a specific institution, then the planning body is likely to be populated by senior staff and managers of this institution, along with other relevant actors. This body will be the focal point for developing the goals of capacity development, the assessment, strategy development, and the evaluation of efforts. Not only will the establishment of this body ensure a locally owned

process, but it will itself have a capacity development function, as it will provide national actors with the opportunity to learn how to plan their own growth.³⁸

The first task of the planning body will be to develop capacity development goals. Human capacity is a broad category, and gaps in some areas of capacity are virtually inevitable and will often be overwhelming, especially in the aftermath of conflict. When confronted with such daunting capacity gaps, it is helpful to set specific, defined, and measurable goals in advance of an assessment in order to manage the sheer scope of the project. Without these goals, the magnitude of the capacity development process may erode the actors' morale.

6.6.2 Assessing and identifying capacity in light of goals

The next phase in a capacity development process involves assessing and identifying existing capacity.

An assessment should ordinarily be conducted with reference to the capacity development goals just discussed and also to defined standards or core competencies relating to the organization and individual. In a post-conflict setting, however, these standards may not exist. Their development may be part of a separate process of institutional development.

Although no capacity assessment toolkit exists that is geared specifically towards the criminal justice sector, there are resources that will assist advisors in conducting an assessment. As noted in the discussion of assessment in chapter 5, the United Nations Office on Drugs and Crime's *Criminal Justice Assessment Toolkit* addresses the issue of capacity as it relates to different justice institutions (e.g., courts, prosecution, police, prisons/corrections). UNDP has also developed general capacity assessment tools. These tools give the assessor a step-by-step approach to assessing capacity.³⁹

Where actual performances and skills do not match what is desired, a capacity gap exists. All gaps should thus be analysed to determine their cause. Some gaps may be caused by environmental circumstances that have little relation to human capacity but that can alter performance. For instance, the OECD's *Security Sector Reform Handbook* notes that "capacity development interventions have failed because the wider governance constraints (e.g., systematic corruption) have not been understood."⁴⁰ As discussed later in this chapter, the assessment and eventual capacity development strategy should take account of the enabling environment, which will inform the capacity development process of these cross-sector constraints.

6.6.3 Formulating the capacity development strategy

A capacity development strategy should be developed in light of the overall goals and the assessment. It should also specify the targeted results: the knowledge imparted and performance expected. This will be vital to the evaluation phase.

³⁸ See OECD DAC, *Handbook on Security System Reform*, 88.

³⁹ United Nations Development Programme, *Five Step Process—Step 2: Assess*, <http://www.undp.org/capacity/assess.shtml>.

⁴⁰ OECD DAC, *Handbook on Security System Reform*, 86.

Capacity development efforts can focus on four areas: the enabling environment, the organization, specialized groups, and individuals.

The enabling environment. The enabling environment has two components: the hard environment and the soft environment. The hard enabling environment is composed of legislation, regulations, procedures, and so forth. The soft enabling environment consists of informal norms, rules, values, and so forth. Other chapters discuss developing the hard enabling environment. The soft enabling environment is very difficult to target for capacity development. International and national actors alike are sensitive about conducting projects that might be seen as overt efforts to change local customs, norms, and values and that might thus be perceived as cultural imperialism. The other three areas—the organization, specialized groups, and individuals—are easier targets for a capacity development strategy.

The organization. An organization's capacity comprises elements such as the organizational structure, resources, policies, procedures, vision, and organizational culture.⁴¹ Capacity development efforts can focus on any one of these areas or on several or all of them simultaneously.

Developing capacity in “change management” is also highly important in facilitating positive organizational development. Change management processes are becoming more popular because capacity development evaluations have found that in many cases skills have been acquired but have not been put into use.⁴² Managing change involves both managing the environment of change and executing the change itself.⁴³ When undertaking the first of these tasks, the organization's leadership should create momentum and empower the stakeholders within the organization. Managing the environment of change also involves developing an analysis of the stakeholders who are likely to be winners—and those who are likely to be losers—from the change. The second component, executing the change, will require nurturing ownership of the change and building consensus. An essential aspect of executing the change is communicating necessary information to both the members of the organization and the wider public. This is especially important in the criminal justice sector, where interactions between police and citizens or the judicial process will affect the public. As with other areas of capacity development, change management experts are vital to the process of change. Their expertise enables them to facilitate each component of change management.

Another potential organizational capacity development initiative is the development of good incentive structures. “Incentives and incentive systems are fundamental to developing capacities and translating developed capacities into better performance,” notes the UNDP.⁴⁴

⁴¹ Lavergne and Saxby, *Capacity Development*, 2.

⁴² OECD DAC, *Handbook on Security System Reform*, 94.

⁴³ United Nations Development Programme, “Institutional Reform and Change Management: Managing Change in Public Sector Organisations,” (UNDP Conference Paper No. 5, November 2006), 8.

⁴⁴ United Nations Development Programme, “Incentive Systems: Incentives, Motivation and Development Performance” (UNDP Conference Paper No. 8, November 2006), 5.

Incentives function at both the individual and the organizational level. Individual incentives can be monetary, such as pay, salary, benefits, scholarships, or subsidies—as well as non-monetary—such as flexible work schedules, pleasant work environments, transportation, job security, continuing education, prestige, recognition, or status. Organizational incentives “refer to both the reasons for staff to join an organization, and the way an organization rewards and punishes its staff. Incentive systems can encourage or discourage employee and work group behaviour.”⁴⁵ Improving incentive structures to decrease corruption and increase staff retention will improve an organization’s capacity.

Leadership is also a crucial component of capacity, and thus leadership development is an important means of improving capacity. At the individual level, it involves developing interpersonal abilities, negotiating and analytical skills, and the core values of staff in leadership positions. At the organizational level, it can involve fostering more effective ways of conducting business.⁴⁶ Leadership programmes need to define a clear target population, employ a mix of training methods, embrace long-term perspectives, and appreciate the local context and culture.⁴⁷

Specialized groups. Some organizations have specialized groups. For example, police organizations may have specialized units dealing with organized crime, drug crimes, and so forth. A specialized group will share common processes, knowledge, and skills that are unique to the group’s mission. The same organizational and individual capacity development processes can be implemented at the group level, in addition to capacity development of core knowledge and skills related to the specialized group’s area of competence (e.g., organized crime or drug crime investigation).

The individual. Individual capacities are usually made up of three components: knowledge, skills, and performance. These often relate to the specific job the individual performs within the organization. They also relate to the core capabilities of all individuals, regardless of job profile. “Core capabilities,” explains the UNDP, “refer to the creativity, resourcefulness and capacity to learn and adapt of individuals.”⁴⁸ These core capacities include the abilities to solve problems, to learn, and to build relationships. Developing these core capacities will develop an individual’s desire to continuously grow, and thus develop his or her sense of purpose. These core capacities do not directly relate to the criminal justice sector, but instead apply across all sectors. Yet any capacity development process targeted at the individual level will want to acknowledge these capacities and include them in the development process.

⁴⁵ *Incentive Systems: Incentives, Motivation and Development Performance: A UNDP Capacity Development Resource* (November 2006)

⁴⁶ United Nations Development Programme, “Leadership Development: Leading Transformations at the Local Level,” (UNDP Conference Paper no. 8, November 2006), 5.

⁴⁷ *Ibid.*, 8.

⁴⁸ *Ibid.*

6.6.4 Implementation

Implementation of capacity development initiatives can be done formally and informally.⁴⁹ Formal capacity development is essentially training. Training usually entails lectures, case studies, and exercises. Alternative formal delivery strategies often use technology, such as computer simulations and Internet-based training. E-learning, for instance, takes place in a virtual classroom, with training materials being delivered through the Internet instead of in person. Another alternative is distance learning, where students are given self-teach guides.

Using different implementation designs in Venezuela

A World Bank-funded project to improve the Venezuelan judiciary built coalitions between members of the judiciary and members of civil society. The objectives of project leaders included improving transparency and reducing corruption within the court system. To implement their project, the leaders of the project first collaborated with a United States-based NGO, the Council for Court Excellence, which had experience developing and training individuals in the use of judicial tracking systems. One key to success was involving this experienced NGO. A second key tactic was using different design systems.

First, project leaders devised training programmes for judges and civil society members—trained together rather than, as is usually the case, separately—that consisted of discussion focus groups in addition to technical trainings. Participants were selected on the basis of their integrity and trustworthiness and so as to ensure balanced representation in terms of gender, age, and geography. In the focus groups, judges discussed the challenges they faced, while civil society participants drew up a list of actions that would help the judiciary regain credibility among the public. Each group then went through technical trainings. Finally, a series of workshops brought the two groups together to share their concerns and objectives.

Source: World Bank, "Building Coalitions for Change: Venezuela Judicial Infrastructure Development Project," *Social Development Notes*, No. 61 (2001)

Informal approaches can also be critical to the development of individual capacity and include tutoring and mentoring. Tutoring, or coaching, usually takes place in the first or second year of a job, and matches a trainee with a more senior staff member. Some programmes provide senior staff with coaching skills in an effort to enhance effectiveness. In a mentoring programme, a skilled and trusted individual within an organization is paired with other staff members. The mentor helps the staff manage their own development. Mentoring is not just for new trainees, and can involve staff members at all levels of the organization.

⁴⁹ See Frank Harris, *The Role of Capacity-Building in Police Reform* (Pristina, Kosovo: Department of Police Education and Development, OSCE, 2005), 139–51.

6.6.5 *Monitoring and evaluation*

Monitoring and evaluation should be built into the overall process of capacity development. The goal development phase establishes the objectives for monitoring and evaluation and also provides the basis for the development of measurable indicators of success. The objectives and indicators should be integrated into the capacity development strategy, which should also set out a strategy for monitoring and evaluation. Specific timelines, modalities, and budget streams to facilitate monitoring and evaluation should be detailed in the strategy. Chapter 5 addresses the topic of monitoring and evaluation in greater detail and can be easily applied to capacity development initiatives.

7. Legal empowerment

7.1 Introduction

In post-conflict environments, the voices of the poor, vulnerable, and marginalized may go unheard. Their fears and needs merit attention, however. Legal empowerment strengthens the “voice” of the people and enables them to gain access to mechanisms, processes, and a range of various channels to solve their immediate problems. The essence of the concept of “legal empowerment” is enabling ordinary people (many of whom will be poor, marginalized, or vulnerable) to help themselves to resolve their problems through lawful means and thereby gain some control over their lives (i.e., become “empowered”). This concept places emphasis less on the formal, State justice system—which may be non-existent in many areas of a post-conflict State—and more on equipping people with legal know-how and supplying them with an array of services (conventional and unconventional) and informal mechanisms that provide tangible and meaningful remedies and thereby provide justice.

7.2 General features of legal empowerment

Legal empowerment is discussed here under five separate categories or programmatic areas of assistance:⁵⁰

- Identifying the justice needs of the poor (and especially vulnerable groups) rather than the provision of services identified by the legal establishment
- Strengthening the roles, capacities, and power of the population and civil society, as opposed to focusing on State institutions
- Establishing processes and organizations that may lie outside the recognized justice sector but that seek to address the justice needs of the population
- Developing partnerships between civil society and the State where it is possible to do so, and working with civil society to apply pressure on the State where it is not possible
- Drawing on the lessons learned and experiences from other post-conflict and developing countries rather than on Western imports

⁵⁰ The elements of “legal empowerment” discussed in this chapter are from Steven Golub, “The Rule of Law and the UN Peace-building Commission: A Social Development Approach,” *Cambridge Review of International Affairs* 20, No. 1 (March 2007).

7.3 Identifying the needs of the ordinary person

In the urgency to rebuild the rule of law, advisors sometimes overlook the fact that the State was part of the problem in the first place, and that—seen through a human rights lens—the State still is the problem. A user survey of the justice system in a post-conflict State is an important component of the assessment process. This survey should also include vulnerable groups, an assessment of which is discussed in chapter 5. Most likely, it will reveal a number of findings common to many post-conflict situations. In general, citizens of a post-conflict State want speedy, local, understandable, and affordable resolution—acceptable to all concerned—of their disputes. They want police to keep the public peace and not to act as predators.⁵¹ They may want courts nearby, but they also want them to be “user friendly.” They may want prisons in which to keep dangerous people safely and securely, but may see the public interest as being better served by providing alternative sanctions in minor cases (such as community service). They may shrug when asked about lawyers and representation because, outside the major urban centres, they will be as rare as an electric light bulb and anyway unaffordable. They will want general advice on and assistance with obtaining a legal remedy and an education on the laws of the land.

These surveys are empowering because only rarely do people in authority ask ordinary people what they think or what they want. The surveys are even more empowering if they provide a snapshot of the country as a whole rather than just the views of elites in the capital city. The information acquired needs to be collated centrally and analysed, so that it can be fed into a national justice plan. By helping to define national priorities, user surveys assist advisors in determining what sort of assistance to provide.

7.4 Strengthening the roles of the population and civil society

Civil society is made up of a range of actors. Some organize themselves into interest groups (e.g. vulnerable groups) and form community-based organizations. Some create faith-based organizations—centred on a church, a temple, or a mosque. Still others are respected members of the local community and include traditional authorities. The fabric of the civil society in a post-conflict State will have been damaged by conflict and trust will have been attenuated.

A key element in strengthening civil society is to rebuild the trust that has been lost between various groups and individuals. Consequently, it is useful from the outset to take an inclusive approach to the needs assessment outlined in section 7.3 and also to the other programmatic options outlined in this chapter, inviting the views and opinions of all and excluding none. By maximizing participation, a process may start at a pace set by those concerned. By taking the time to consult all the actors involved, advisors will earn respect (as an honest broker). In addition, an advisor will identify change agents (often in unlikely places) and be guided in how to deal with and bring on board any local spoilers. Such an approach will catalyse a change process that may continue long after an advisor or mission has left the country.

Much can be achieved with few resources. Often, problems can be solved through closer communication, cooperation, and collaboration between the actors and agencies concerned. Advisors may initiate and facilitate meetings at the local level on a monthly basis to review the rule of law in the local area and provide a forum for exploring local solutions to local problems. These forums engender the participation of the State, the local population and local civil society groups. The budget for such a meeting—the cost of light refreshments and reimbursement of participants’ local transport costs—can be minimal. These regular meetings at the local level can be formalized to create a specific mechanism focused on the criminal justice system. They go by many different names. In Uganda, they are called “case management committees;” in Kenya, “access to justice committees;” in Malawi, “court user committees;” in Pakistan, “tri-partite committees;” and in Bangladesh, “case coordination committees.” Despite their variety of names, their purpose is the same: to bring people together to discuss the criminal justice situation and agree joint actions.

Another way to strengthen the role of the population and civil society is through public education and awareness campaigns. For little cost, advisors may include local residents in a range of initiatives to increase public awareness of and stimulate debate on the justice process, rights, and fundamental freedoms. Pamphlets in the vernacular, accompanied by strong visual aids, enable people to navigate the justice process at the local level. Interviews, stories, and soap operas on the local radio; plays staged in villages on related themes, followed by public discussion; and video shows, followed by discussion—all serve to clarify issues, provoke debate, and encourage local participation and engagement.

By working visibly with local groups, advisors may boost the confidence of these groups and their prestige within the community. This method of working is similar to how UN human rights officers and rule of law advisors work alongside UN police officers and corrections advisors to allow people to see police and prisons in a different light—to recognize that they, too, can be human rights defenders.

A legal empowerment approach will balance reliance on foreign expertise, on the one hand, with awareness of local needs and contexts, on the other. Advisors rely on the people living in the community to guide them on how to engage with the community and their leaders (the “entry points”) as well as on security concerns and cultural etiquette. Those in the community rely on advisors to catalyse the process of change by furnishing insiders with the means to start the process.

7.5 Establishing processes and organizations to address the justice needs of the poor

By establishing a variety of innovative processes and organizations, the advisor can enhance legal empowerment, help ordinary people resolve their disputes lawfully, and, more generally, enable the criminal justice system to function more effectively. Such initiatives can target the police, the prisons, the courts, and the customary justice system.

7.5.1 *Working with police*

A variety of steps can be taken to build relationships between police and the community at the local level (chapter 8 discusses police reform more broadly, including at the national level) and to consequently increase legal empowerment and the rule of law more generally. Police posts and stations can be opened up to greater engagement with civil society. Police officers can be encouraged to get out into the community to discuss local concerns and begin the process of working in partnership with the community.

Community police forums

In Indonesia and Bangladesh, the Asia Foundation promotes community-oriented policing (COP). This method of policing reshapes traditional police management and operational strategies by facilitating collaborative working relations between citizens and police, based on a problem-solving approach that is both responsive to the needs of the community and sensitive to the challenges that police face in performing their duties. An improvement in police services nurtures public trust and respect between police and members of the communities they serve; promotes improved communication and collaboration; and contributes to increased public satisfaction with police services—all of which translate into safer communities. The COP programme establishes local community police forums (CPFs) as focal points for dialogue.

A typical CPF includes 20–25 members drawn from police, civil society organizations, and the ranks of local leaders (school principals, teachers, businesspeople, clerics, farmers, and so forth). They meet once a month and focus in these meetings on the local public security environment. Some CPFs have established subcommittees that mediate in law and order issues; others have established information booths in towns to inform the public about COP and provide general advice on criminal justice. CPF activities include school programmes to raise student awareness and address issues of concern to students. CPFs have established good relations with local media outlets, which cover COP activities and the benefits they have generated.

The impact of COP has been a decline in crime, resulting from collaboration between citizens and police (especially with regard to drugs, gambling, harassment, and other issues of common concern); a high level of community participation by senior local police officers, who have acted on the concerns of the community and listened to their views; a readiness of police to give their time to form CPFs; and a willingness of political parties to set aside their political differences and work together on CPFs.

The programme has stimulated a call in both Indonesia and Bangladesh for the broader adoption of COP by police.

Note: A film of COP in Bangladesh is available on the website of the Asia Foundation (Bangladesh). See <http://asiafoundation.org/media/view/video/Yj0Y9UklCYg/community-oriented-policing-in-indonesia>

Such initiatives pave the way for broader community policing reforms, which are gaining momentum in many countries. Similarly, victim support units need not be the sole preserve of police officers: paramedics from the local community have a role to play, as well as respected figures within the community. The “space” that the police occupy within the

community needs to be enlarged early on if the notion of the police as a service rather than a force is to become a reality. Just as police need to “get out” more, civil society needs to be invited “in.”

It is generally accepted that a person detained by the police is at greatest risk of intimidation and physical ill treatment in the period immediately following detention. Consequently, a detainee’s access to independent assistance during this period is a fundamental safeguard against his or her ill treatment by the police. It is unlikely that a lawyer will be available to sit in on an interview at a police station immediately after a person has been detained, but a paralegal—a non-lawyer who has received some legal training—might be. The presence of an outsider at an interview will not only deter oppressive interviewing techniques but also protect the investigating officers against unfounded allegations of mistreatment. Paralegal aid projects are gaining increasing recognition and are discussed at length later in this chapter.

Paralegals sitting in on interviews in Malawi

In Malawi, the police initially refused the request of paralegals to sit in on interviews of suspects. But when the paralegals offered to help police trace the parents of juvenile suspects in custody, their offer was gladly accepted. For several months, paralegals worked with police officers to develop a screening form to divert juveniles from the police station after arrest (similar to the innovation developed in Timor-Leste and described in chapter 12). Several months later, paralegals and police jointly evaluated the program. As a result, police invited paralegals to extend their services to other police stations and to sit in on interviews of adult suspects.

Source: Information provided by Clifford Msiska, national director, Paralegal Advisory Service Institute, Malawi.

Once paralegals have been given the opportunity to sit in on police interviews, and the initiative has been viewed favourably, it may be possible for paralegals to provide additional services to the police service and detainees alike. Access may be sought to police lock-ups so that police can be assisted with the provision of blankets, food, and other materials to those held in detention. This will also enable paralegals to monitor detainee conditions and the amount of time that detainees spend in custody. A simple code of conduct can be drawn up with police officers to regulate the activities of non-police personnel in the police station and to establish the “rules of the road.”

7.5.2 *Working with prisons*

Prisons may have corrections advisors in place to help develop capacity among the newly recruited prison officers. Prisons may already be open to the presence of outsiders in the form of representatives of the International Committee of the Red Cross, who will be providing health care, assisting with sanitation and hygiene, and supplying food for prisoners. Other agencies and organizations, such as Médecins Sans Frontières, may also have a presence. Locally based outsiders, such as prison chaplains, may also have access. The benefits that accrue to the prison authorities from these organizations are self-explanatory and prison authorities are usually happy to have this assistance, which helps them in very concrete ways.

Despite this assistance, there will inevitably be huge issues with prison overcrowding and delays in proceedings. Many of those kept in prison will be awaiting trial.⁵² Lawyers will be in short supply, if not non-existent. Paralegals, however, can be rapidly trained to operate under an agreed-upon code of conduct to help the prison authorities and prisoners push their cases along.

Paralegals can screen the caseload and, by working with the prosecuting authorities and courts, identify those who face serious charges and those who do not. In the case of a detainee who is not facing serious charges, a paralegal may assist in organizing his or her release on bail or ask the court to discontinue a case where the detainee has served a longer time in pre-trial detention than he or she would have served if convicted. Paralegals can conduct legal clinics in prison to educate those accused where they are in the process and how they might apply the law in their own cases. They act as a link in the criminal process, connecting the detainee with the court. In so doing, paralegals can inform the monthly meetings of court user committees, of the sort previously discussed, about the situation and provide advice and assistance to prisoners appropriate to their needs.

Paralegals working in prisons to reduce prison overcrowding

The Paralegal Advisory Service was developed in Malawi with the assistance of Penal Reform International, which linked four NGOs working in the four regions of the country on a common objective: providing advice and assistance to people on the front line of the criminal justice system. The programme has been replicated in Darfur, Kosovo, Benin, Kenya, Uganda, Niger and Bangladesh.

Paralegals have been credited by the justice agencies with reducing the remand population in the prisons. In Kenya, paralegals reduced the remand population by 80 per cent in one prison within six weeks. In Uganda, the remand population dropped from 63 per cent to 58 per cent in a five-month period. In Malawi, paralegals reduced the remand population from 40 per cent before they started work to an average of less than 25 per cent. In each country, the justice agencies and prisons attribute the drop to the work of paralegals.

Source: Adam Stapleton "Empowering the Poor to Access Criminal Justice: A Grassroots Perspective," in *Legal Empowerment: Practitioners Perspectives*, ed. Steven Golub (Rome: International Law and Development Organization, 2010), 41.

7.5.3 Working with formal courts and customary and informal systems of justice

In those post-conflict States whose formal courts are operational, paralegals can inform the members of the public about the court system: where to go, what to do, and what to expect when dealing with a court. They can help people who are accused, who are witnesses, or who are victims by offering general advice and assistance.

⁵² In Liberia, the percentage of prisoners in detention who have not yet faced trial is 97 per cent; in Haiti, 84 per cent; and in Timor-Leste, 71 per cent. Roy Walmsley, *World Pre-trial/Remand Imprisonment List* (London: International Centre for Prison Studies, 2008), <http://www.kcl.ac.uk/depsta/law/research/icps/downloads/WPTRIL.pdf>.

Paralegals can also work within the customary, informal justice system in a variety of ways that benefit local communities, as discussed in the feature box on the Timap for Justice Programme in Sierra Leone. See chapter 12 for a more detailed discussion of customary, informal justice systems.

Timap for Justice: paralegals working with the customary justice system

Timap for Justice in Sierra Leone is supported by the Open Society Justice Initiative to train and equip an association of paralegals to provide community legal services to poor Sierra Leoneans. With only 100 lawyers in the country (90 per cent of whom are in the capital, Freetown), and a high degree of local trust in and reliance on customary law, Timap for Justice in Sierra Leone focused its efforts on justice at the chiefdom level.

Thirteen paralegals were recruited to work in five pilot sites. They received a two-week intensive training in law and were closely supervised through on-the-job training. These paralegals employ diverse working methods as they seek to improve the handling of justice problems such as domestic violence, child abandonment, forced marriage, corruption, police abuse, economic exploitation, abuse of traditional authority, and denial of the right to education and health care.

For individual justice-related problems, the paralegals provide information on rights and procedures, mediation services, and practical assistance in dealing with government and traditional authorities. For community-level problems, they engage in community education and dialogue, advocate for change, and organize communities to take collective action. In so doing, the paralegals draw on both customary and formal institutions, depending on the needs of a given case. In some extreme or important cases, they refer the matter to lawyers for representation. Community oversight boards have been established in each pilot site (made up of community leaders) to monitor the work of the paralegals. In 2007, the programme won a grant from the World Bank to expand nationally.

Another legal empowerment initiative related to the customary justice system that has enjoyed success is the establishment of mediation models that serve as an alternative dispute resolution mechanism to the customary justice system. The Madaripur Legal Aid Association in Bangladesh, described in the accompanying feature box, provides a good example of alternative mediation.

Providing alternatives to the customary justice system in Bangladesh

In Bangladesh, the Madaripur Legal Aid Association (MLAA) took a different approach to that adopted by Timap for Justice, one that was just as empowering. In the wake of the devastation wrought by Bangladesh's war of independence with Pakistan, the MLAA developed the Madaripur mediation model (MMM), which has been widely replicated in Bangladesh and is being introduced in Malawi and Sierra Leone.

The MMM has six phases. First, MLAA identifies local contact persons to whom to disseminate information on mediation as a viable alternative to the court system in the project area. Second, MLAA establishes community-based organizations (CBOs) and trains all the members in human rights, the law, and mediation processes. Third, MLAA appoints a mediation worker to each CBO to provide dedicated support. The mediation worker's tasks are to receive applications for mediation, send letters to the parties concerned, arrange mediation sessions, supervise mediation sessions, follow up on and monitor the solution agreed upon, and report to the head office. Fourth, the mediation worker at the village level reports to a mediation supervisor; who is responsible for supporting and supervising all mediation workers in his or her area. Fifth, the supervisor, in turn, is overseen and supported by a district coordinator, who works with the central office coordinator to ensure consistency in mediation support. And sixth, a MLAA monitoring, evaluation, and research group maintains updated information on mediation procedures and data on sessions and outcomes.

NGO-mediated settlements can provide a more equitable settlement of a dispute, especially where women are concerned. Another characteristic of NGO-mediated settlements is that NGO staff, as well as local members of CBOs, follow up on the settlements reached to determine if they are being carried out by all parties concerned. If not, either the parties are brought back for further mediation or societal pressure is applied to encourage compliance with the settlement. Where differences are irreconcilable or one party does not comply with the terms of the settlement, the community is made aware of the failure and/or the matter is taken up for adjudication in the formal system.

Traditional authorities have welcomed NGO-mediated settlements, which reduce the authorities' caseload and allow them to focus on cases where arbitration, not mediation, is required. In the case of NGO initiatives in Bangladesh and Sierra Leone (see the accompanying feature boxes), it was found that the credibility and influence of the NGO can itself influence the parties to participate in the process and reach a settlement. In addition, these services provide users (i.e., poor people) with choices. They can elect to have their matter heard in the traditional way or in a court, or they can seek to resolve the matter themselves.

As chapter 12 cautions, denunciations of traditional authorities' corrupt practices and "top-down prohibitions" against, for instance, trial by ordeal are ineffective and can be counterproductive. When alternative approaches (tried and tested elsewhere) are demonstrated, people can evaluate for themselves which process they prefer.

7.6 Private–public partnerships

State and non-State actors have come to recognize the value of public-private partnerships in the administration of criminal justice and throughout the reform process. The unmet needs identified by the user survey mentioned early in this chapter and the justice demands of ordinary people can be fulfilled by local justice agencies in large part through

public-private partnerships. The justice system directly benefits from this sort of partnership. As police adopt a more service-oriented approach that empowers the community, their ability to obtain intelligence from informants will improve. As paralegals work to serve the legal needs of detainees, the prison service benefits from the reduced prison population and the courts are able to process massive case backlogs.

International support will be gradually withdrawn as the political situation within the country stabilizes. Consequently, from the outset, advisors need to promote a patchwork of public-private links and associations, so that the benefits of communication, coordination, and cooperation are realized and sustained.

7.7 Drawing on experiences from other post-conflict countries

Advisors have access to knowledge networks, resources, and the Internet to an extent that is almost certainly not available to his or her national counterparts. Legal empowerment is oriented to problem solving. The focus of activity should be on the community and building links to the formal system, rather than on the formal system itself. The emphasis should thus be less on importing technical expertise from the West and more on building on lessons learned and South-South exchanges.

Sharing knowledge and raising questions with those working in other post-conflict States should be a continuous task of advisors. Many in the rule of law community talk about the need to “not re-invent the broken wheel.” In recent years, networks of rule of law professionals have been established specifically to share knowledge and advisors are encouraged to join these networks and learn about legal empowerment approaches being pursued in other countries.

An international network to share lessons learned

The International Network to Promote the Rule of Law (INPROL) is a dynamic online community of 1,300 practitioners from 90 countries. Established in 2007, INPROL (www.inprol.org) is run by the United States Institute of Peace, in collaboration with facilitating organizations. INPROL

- Provides a reach-back capacity so that rule of law “lessons learned” in one post-conflict State become “lessons applied” in others;
- Engages and connects community members in sharing information, insights, and best practice to help them solve the problems they face in the field; and
- Empowers members with knowledge, resources, and access to leading experts as a vehicle for informal learning and capacity development.

Members have access to a variety of features, including an online, interactive forum in which members can post requests for information and receive extensive and well-researched responses; a digital library of tools, best practices, and other materials; a listing of job opportunities in the rule of law field; and news of developments in the rule of law field.

The problems facing the justice system in post-conflict countries differ from those in other developing countries more in scale than in content. Therefore, much can be learned from countries that have enjoyed a period of peace but are constrained by a lack of resources. They act as useful nurseries for practices, and some of these practices developed may be adapted to the context in which an advisor is working. Criteria that help determine whether a legal empowerment initiative is realistic and sustainable may include the following:

- They are generally low cost
- They have a high impact
- They require the participation of a number of different actors
- They often involve partnerships with civil society
- They catalyse reform processes and help to change institutional attitudes
- They conform to national constitutional guarantees and international human rights standards
- They pursue an approach that benefits the vulnerable and poor
- They are transferable from one country to another⁵³

When so much has changed as a result of conflict, the introduction of yet more change can be bewildering. Building on local initiatives by adapting what has proved effective in similar countries serves to develop a local momentum and ultimately to foster legal empowerment and the rule of law.

⁵³ Penal Reform International, *Reducing Pre-Trial Detention: An Index on Good Practices* (Penal reform International, 2005), <http://www.penalreform.org/publications/reducing-pre-trial-detention-index-good-practices-developed-africa-and-elsewhere>; and Penal Reform International, *Index of Good Practices in Providing Legal Aid Services* (2006), <http://www.gsdrc.org/docs/open/SSAJ151.pdf>.

8. Law reform

8.1 Introduction

Faced with grossly inadequate laws in many legal spheres—from criminal law and police law to property law, business law, and administrative law—national and international actors in post-conflict States often work together to reform these laws. Their aim is to bring these laws into compliance with the rule of law principle and international human rights norms and standards. With a few exceptions, however, post-conflict criminal law reform does not have a good track record. Significant mistakes in the substance of newly drafted laws have been compounded by deficiencies in how the law reform process itself is managed. Moreover, mistakes made in one post-conflict locale are often repeated in others. The lack of success is largely attributable to the current overhasty approach to law reform in many post-conflict States. Reflecting on what has been done poorly can result in better practice in the future. This chapter looks at past law reform experiences—both positive and negative—and sets out a series of best practice standards based on the lessons that have been learned to date.⁵⁴

8.2 What are the applicable laws in the post-conflict State?

It is important to review the applicable laws in a post-conflict State before addressing the topic of reform. Such a review will indicate which of the State's laws may need to be reformed and what international obligations need to be incorporated in any new or rewritten laws. The term “applicable laws” or “legal framework” describes the laws that apply to the citizens of a particular country. The applicable laws include both the country's domestic laws and international laws that set out its obligations at the international level that must be adhered to domestically. In this chapter, the focus is on written law, although it is acknowledged that unwritten norms and customs also play a crucial part in regulating the population's conduct in a post-conflict State (see chapter 12).

All legal systems are organized around a hierarchy of laws that defines which law will prevail when two laws conflict. In general, the constitution sits at the top of a hierarchy of laws. Below the constitution are codes and ordinary legislation. Examples of codes include the penal code, the code of criminal procedure, the civil code, and the

⁵⁴ Portions of this chapter have been drawn from Vivienne O'Connor, “The Model Codes for Post-Conflict Criminal Justice: A Tool to Enhance the Substance and Process of Post-Conflict Law Reform” (PhD diss., National University of Ireland, Galway, 2007).

commercial code. A minor offences code, a traffic code, and a juvenile justice code may also be in place. Implementing regulations (e.g., standard operating procedures and implementing/clarifying regulations), which give effect or add details to codes or ordinary legislation, are next on the hierarchy. In legal systems that operate under a system of “precedent,” case law will also form part of the legal framework, as will presidential decrees. Where exactly case law and presidential decrees sit in the legal hierarchy will vary from State to State. Finally, during a conflict, rebel groups may have developed their own legal systems, complete with laws. Although their legal status may be unclear, it is important to understand that these laws exist and may have been (or may still be) applied.

International law (e.g., international human rights instruments) may also be applicable in a post-conflict State. Its exact position in the legal hierarchy, and whether it needs implementing legislation to have domestic effect, will depend on the legal system in the particular post-conflict State. In “monist” legal systems, international law has domestic effect once the State has ratified the international treaty (although it is standard practice to draft legislation to provide details on how the treaty will be enforced). In “dualist” States, implementing legislation is required for the treaty to have domestic effect. Peace agreements and Security Council resolutions will also form part of the legal framework of a post-conflict State.

For those engaging in criminal justice reform, it is also important to ascertain the laws or regulations governing the justice system. These include the following:

- Laws on courts and the selection, appointment, and removal of judges
- Laws on prosecutors and the selection, appointment, and removal of prosecutors
- Police laws
- Laws relating to legal practice in the country, including legal aid laws and laws on bar associations
- Relevant codes of ethics for judges, prosecutors, lawyers, and police
- Laws on any law reform agencies or bodies
- Laws on legal education
- Laws on non-State justice systems and the relationship between these systems and the formal State system
- Laws on private security providers
- Laws on immunities of State figures and public servants
- Laws on associations (including NGOs)
- Laws establishing special courts or transitional justice mechanisms

The issue of how to assess and analyse these laws is discussed in section 8.6 of this chapter.

8.3 Why Is law reform necessary?

Numerous factors motivate post-conflict law reform. The requirement to reform laws may be included in a peace agreement and therefore binding on the parties to the agreement; law reforms may also be required as the result of the findings of a truth commission (see the examples from Burundi, Afghanistan and El Salvador in the accompanying feature boxes). In other cases, laws may need to be drafted or amended so that legislation complies with the provisions of a newly drafted constitution.

Law reform mandated for Burundi and Afghanistan in a peace agreement

The Arusha Peace and Reconciliation Agreement for Burundi provided that “the transitional National Assembly shall as a priority review all legislation in force with a view to amending or repealing legislation incompatible with the objectives of the transitional arrangements and the provisions of the present Protocol” (Article 16.2). It also provided for a commission of the Transitional National Assembly to monitor reforms of the administration of justice (Article 17).

The Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions (the “Bonn Agreement”) provided for a judicial commission “to rebuild the domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions” (Section II [2]).

Law reform recommended by a truth commission

The Commission on the Truth for El Salvador made numerous recommendations to reform domestic criminal procedure law, including *amparo* and habeas corpus laws, measures to address extrajudicial confessions, the presumption of innocence, time limits for police detention and the right to defence.

Source: Commission on the Truth for El Salvador, *From Madness to Hope: The 12 Year War in El Salvador: Report of the Commission on the Truth for El Salvador*, (July 1992), available at <http://www.usip.org/resources/truth-commission-el-salvador>; recommendations B2 and B6.

Often, law reform is not mandated by a report or peace agreement but is simply conducted as a reaction to inadequate laws in a post-conflict State. In many post-conflict States, law reform is needed because there is no clarity about what law applies. A post-conflict environment can be a elusive. How can this be? The most common reason for post-conflict legal chaos is the disorganized state of the law, where an answer to the simple question “What is the applicable law?” is framework. The vast majority of post-conflict States—and, indeed, non-post-conflict States—are legally pluralistic, with a *mélange* of formal written laws, customary legal systems, and religious-based legal systems. This is confusing enough, but even after isolating the formal law, one often finds layers and layers of overlapping and conflicting laws from different ruling regimes. When a new regime entered power, it may have introduced new laws without repealing the old ones. Alternatively, the formal

legislative process may have been abrogated while a dictatorial regime generated executive decrees, orders, or fiats. In some instances, law making may have ceased entirely, and an autocratic regime may have dispensed its own version of justice.

When laws are too short, too laconic, or too complex for application in a post-conflict context, reforms may be necessary. Outdated laws or laws that have substantive defects are also prime targets for reform. In most post-conflict States, according to the *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, laws “often show the accumulated signs of neglect and political distortion contain discriminatory elements and rarely reflect the requirements of international human rights and criminal law standards.”⁵⁵ In particular, laws may discriminate against vulnerable and marginalized groups (e.g., women, children, or minority groups) and may prevent them from gaining access to justice. Moreover, the laws may not respond to the current social reality and may lack the core elements necessary for the proper functioning of society. In criminal law, for example, existing laws may not address core crime problems occurring in the post-conflict State, thus fostering an environment of impunity.

8.4 What are the aims of law reform?

First and foremost, the aim of law reform is to ensure that laws comply with the basic tenets of the rule of law. The UN Secretary-General’s definition of “rule of law” provides ample guidance on both the process of law reform and the substance of new laws.⁵⁶ In terms of the substance of new laws, they must:

- Ensure that all persons and institutions, public and private, are held accountable to the law and that separation of powers is maintained (including judicial independence);
- Be consistent with international human rights norms and standards; and
- Be “legally certain” and “legally transparent,” meaning that the laws must be precise and clearly drafted and accessible to the public such that the public understands what conduct is legal or illegal.

With regard to the process of drafting new laws, the rule of law requires that new laws:

- Be drafted with “procedural transparency,” meaning that the public can easily see the process by which a law is drafted, including what body is drafting new laws and any process by which the public can make comments on proposed laws;
- Be publicly promulgated and published; and
- Ensure “participation in decision-making” so that the legal community, civil society, and the public can be part of the lawmaking process.

⁵⁵ UNSC, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, para. 27.

⁵⁶ *Ibid.*, para. 5.

Where laws in post-conflict States are outdated, reform efforts should ensure that existing laws are modernized, that obsolete or anomalous provisions are repealed, and that new laws meet changing social needs. Law reform efforts should also aim to dispel legal chaos and to simplify the legal framework.

8.5 Past experiences in post-conflict law reform

The learning curve in post-conflict law reform has been steep and mistakes have been made along the way. An examination of these mistakes is merited not for the purposes of admonishing those involved or belittling the entire law reform process, but so as to learn from them, so that future efforts are more successful. Section 8.6 frames these mistakes in terms of best practice standards.

8.5.1 *Failure of new laws to comply with international human rights norms and standards*

The aim in drafting new laws—particularly when the United Nations is involved in the process—is to ensure that they comply with international human rights standards. However, newly drafted laws in many post-conflict States (despite being drafted with significant international input and advice) have sometimes failed in this regard.

8.5.2 *Improper drafting of new laws*

Legal drafting is a complex initiative. Expert legal drafters are responsible for crafting the text of new laws in non-conflict countries. This best practice is often not followed in post-conflict countries, however. National expert legal drafters may not be available. In other cases, in the haste to draft new laws, lawyers (who are not trained in legal drafting) are given the onerous task of turning legal policy in legal provisions. The lack of expertise in the drafting process has had a negative impact on the final quality of new laws.

8.5.3 *Lack of consultation and participation*

One of the biggest criticisms levelled against past post-conflict law reform processes is that they failed to include a consultation and participation component. In some cases, new laws were drafted through a “star chamber system,” in which a small group of legal experts, chosen in part by international donors, quietly drafted new legislation without meaningful public participation.⁵⁷

⁵⁷ Wade Channell, “Lessons Not Learned about Legal Reform,” in *Promoting the Rule of Law Abroad*, ed. Thomas Carothers (Washington, DC: Carnegie Endowment for International Peace, 2006), 140.

8.5.4 *Overuse of foreign legal experts and the inappropriate transplantation of foreign laws.*

Foreign legal experts play a role in almost all post-conflict law reform processes. In the past, too much emphasis was placed on “foreign experts, foreign models and foreign-conceived solutions to the detriment of durable improvements and sustainable capacity.”⁵⁸ In some instances, foreign experts have completely excluded national actors while drafting new laws. These experts—many of whom are unfamiliar with the laws or legal traditions of the post-conflict State—typically try to promote parts of their own domestic laws for inclusion in newly drafted laws. This can result in the transplantation of alien legal concepts into the domestic law of a post-conflict State.

8.5.5 *Ad hoc efforts and lack of a holistic vision of reform*

In many post-conflict States, an overall law reform strategy has been absent. Without a strategy, law reform efforts are reactive and ad hoc, resulting in conflicting and overlapping new laws. This serves to exacerbate any legal chaos that already exists.

8.5.6 *Failure to coordinate with other law reform actors and sectors*

Almost universally, reform actors in post-conflict States have confined themselves to their own reform sector, excluding actors and organizations involved in other law reform efforts.

Lack of coordination on law reform in Bosnia and Herzegovina

In Bosnia and Herzegovina, the Independent Judicial Commission was responsible for coordinating civil law reforms, while the Office of the High Representative was charged with coordinating criminal law reform efforts. Without proper coordination, there were numerous discrepancies in areas where the codes overlapped: “The terminology used and some of the solutions in the Civil and Criminal Procedure Codes that could have been harmonized, such as the way experts are used, the method of dealing with requests for disqualification of a judge, the remaining extraordinary legal remedies and the methods of recording evidence, are now different.”

Source: Independent Judicial Commission, *Final Report of the Independent Judicial Commission: January 2001–31 March 2004* (November 2004), 183, available at http://www.hjpc.ba/reports/pdf/final_report_eng.PDF.

8.5.7 *Failure to prepare for implementation of new laws*

New laws often bring huge changes to a post-conflict State’s legal system. They may even establish or modify certain institutions (e.g., laws may obliterate the institution of the investigating judge and replace it with a prosecutorial service). Given the substantial changes to the law, all those actors who are part of the justice system—judges, prosecutors, police, defence counsel, and court administrators—need comprehensive training.

⁵⁸ UNSC, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, para. 15.

8.6 Post-conflict law reform: best practices

The following best practices have been distilled from law reform efforts in post-conflict States and, more generally, from reform efforts in developing and developed countries.

8.6.1 *Weigh the merits of early legal restatement*

In some States, legal chaos reigns because no one is sure what law applies. In such instances, “legal restatement” may be necessary to identify the applicable law. At the outset of the law reform process, such restatement might not appear to be a difficult task as it is just a matter of designating a particular body of law; in practice, however, it has proven to be notoriously challenging. In many post-conflict States, a particular body of law has been designated as the applicable law, with the caveat that it should be read “in compliance with international human rights norms and standards.” This modifier of pre-existing laws, while theoretically sound and well-meaning—in the sense that it attempts to address shortcomings in existing laws vis-à-vis international human rights standards—has created less legal certainty, not more.

As important as it is to have clarity in choosing an appropriate law solution, it is also vital to have political buy-in. Without political support, the designated law runs the risk of being rejected. Dialogue and consultation, discussed later in this section, are therefore key to developing a method of restating legally chaotic laws.

Political rejection of the legal restatement solution in Kosovo

In Kosovo, the United Nations originally designated the Serb law as the applicable law, a position that was rejected by Kosovar Albanian judges, who chose instead to apply the pre-1989 Kosovo law, which they believed had been illegitimately and illegally repealed by the Serbian parliament. In hindsight, the United Nations recognized the error of its ways. One official from the Office of Legal Affairs, who had been involved in drafting UNMIK Regulation 1999/1 on the Authority of the Transitional Administration in Kosovo, stated, “[W]e had blinders and did not understand the political problems in designating an applicable body of law.”

Source: Mark Baskin, “Lessons Learned on UNMIK Judiciary” (paper commissioned by the Department of Foreign Affairs and International Trade of the Government of Canada, 2001) 15.

8.6.2 *Carefully consider the timing and speed of law reform*

A key question is whether to begin reform efforts immediately after the cessation of conflict or later on. In the past, advisors in some locales, conscious of the inadequacies of existing laws, have pushed national actors to undertake large-scale reform quickly or to make multiple reforms in quick succession. Unless part of a broader strategy, however, this sort of “legal stuttering” does not produce a coherent legal framework. In other post-conflict States—recognizing that more intensive law reform would come later—law reform efforts have consisted of a few targeted reforms to address only the most pressing issues. Finally, in some instances, no law reform has occurred in the short term. This

approach is often supported on the basis that the justice system is so broken down that law reform will not make a substantial difference in how the law operates. What, if any, law reform initiatives should take place in a post-conflict State, depends largely on the particular context at hand. The timing of law reform should also depend on whether there is political will for it and national buy-in to the process. Without either of these, legal reform will fail.

8.6.3 *Recognize that every sound law reform process begins with a sound assessment of the existing laws*

The first step in the law reform process is a sound assessment of the domestic and international legal framework. First off, all the applicable constitutions, codes, laws, regulations, and so on—previously outlined in this chapter—should be gathered, translated (if necessary), and catalogued. This process is not always straightforward, because in a post-conflict State it may be difficult to locate a full set of the laws. It may be necessary to reach out to members of the legal diaspora living outside the post-conflict State. Once they are gathered, the laws should be analysed fully. Issues such as whether and how they violate international human rights norms and standards or international criminal law standards should be considered, as well as whether the laws are laconic or unclear. Part of the assessment should be an analysis of current social problems (e.g., crime and security problems) occurring in the aftermath of conflict that are not legally regulated. This problem-identification component will be the foundation for finding legal solutions later on.

The assessment should involve both national and international actors. These actors should be a mixture of practitioners (e.g., judges, prosecutors, police, and lawyers) and academics (to get the theoretical as well as the practical perspective on the laws). And they should include both lawyers and non-lawyers (e.g., an anthropologist who can place the laws within the broader social context). Civil society should play a role in this assessment phase. Moreover, the general public should be widely consulted at this early stage to determine what problems and challenges they are facing and how they think the current laws should change. A full assessment can take as long as two years and therefore should be started well in advance of the formal law reform process.

8.6.4 *Support the development of a nationally owned law reform strategy*

As discussed above, the lack of a law reform strategy creates more legal chaos because ad hoc legislation conflicts and overlaps. A law reform strategy can be developed for a whole sector (e.g., the justice sector) or for a particular area of law (e.g., criminal law). If the strategy is not sectoral, it should link to and take account of other law reform initiatives (e.g., criminal law reform should take account of civil law reform). Law reform will require international and national actors to work in a coordinated and transparent manner. Within the strategy, a designated body to coordinate reforms should be identified. This might be a law reform commission, a working group, or a ministry department. The strategy should also identify the vision for reform, the required human resources and other resources required to run the reform process, and the coordination and participatory strategy.

Additionally, it should set out a timetable for writing, reviewing (in consultation with other actors), and vetting draft laws.

8.6.5 *Set an achievable timetable for reform*

Too often, post-conflict States face excessive pressure to quickly reform their laws. Unrealistic time frames are often pushed by the international community. The most generous timeline for law reforms in a developing State is five years, whereas, the normal law reform timeline is between two and seven years.⁵⁹ Why does law reform take this amount of time? “Because it is a process and, as such, it requires careful preparation, meticulous planning, effective execution, elaborate coordination of public officials and disparate institutions, as well as the agreement of or at least acquiescence of those directly affected by it.”⁶⁰ Inevitably, there is tension between the need to reform laws quickly—especially in a post-conflict State, where the legal framework is often seriously deficient—and the need to ensure a comprehensive law reform process. The law reform process, however, cannot be accelerated. The only way out of the process is through it.

8.6.6 *Make law reform inclusive and foster widespread participation*

The term “participation” is often ill defined and not realized in practice. In principle, “participation” could involve not just senior officials or elites but everyone in the country. Clearly, it is not feasible to consult with the entire population, but a concerted effort should be made to include a cross-section of the population in law reform. A participation strategy should be developed to facilitate a conversation among various stakeholders and lawmakers, including those in the justice system, civil society groups, community leadership, vulnerable and marginalized groups, and, indeed, ordinary members of the population at large. Debates should not be restricted to the intelligentsia, the elites, or the literate community. There are a myriad of ways to engage in popular consultations, including public hearings or community meetings; consultation forums; publication of discussion papers; requests for written submissions; consultation through the media, surveys, public opinion polls, and questionnaires; and even online consultations. The consultation process may need to be preceded by a public education and awareness campaign to inform the public about the law reform process and what potential reforms are being discussed.

In addition to involving the population and other stakeholders, multidisciplinary actors should be engaged in law reform efforts. Many argue that actors from a range of disciplines—such as social scientists, sociologists, political scientists, and anthropologists—should be included to better inform the process. Law is not divorced from considerations of politics and society, and neither should the law reform process be isolated from the broader social and political context.

⁵⁹ Channell, “Lessons Not Learned,” 142.

⁶⁰ Julio Faundez, “Legal Reform in Developing and Transitional Countries: Making Haste Slowly,” in *Comprehensive Legal and Judicial Development: Towards an Agenda for the Twenty-first Century*, ed. Randell Van Puymbroeck, 370 (Washington, DC: International Bank for Reconstruction and Development, World Bank, 2000).

8.6.7 *Pay attention to how codes are drafted*

It has been noted that often little attention is paid to the way new codes are drafted.⁶¹ To begin with, new laws should be drafted by a person with experience in legal drafting. Lawyers with a substantive knowledge of an area of law tend to believe that they are competent to draft legislation on that subject. Legal drafting, however, is a separate skill set, and so an experienced drafter is required. Where there is no domestic drafting capacity, the international community can assist in developing such a capacity. In general, it is a good idea for new laws to be drafted by a single drafter, rather than by a drafting team, because the latter results in confusing texts and too many “voices” in the legislation.

The drafting team should adopt a particular drafting style. Many English-speaking countries have adopted the “Plain English” style. This new style represents a break from the old style of legal drafting, with its lengthy and complicated sentences, archaic legal expressions, and language that is inaccessible to the layperson. A Plain English style, in contrast, uses “language that is not artificially complicated, but is clear and effective for its intended audience.”⁶² The structure and layout of new laws should also reflect this style.

Plain language does not remove important details from the law, however. New laws must have sufficient levels of detail to be understood and applied correctly, particularly in a post-conflict State, where there may be many novice criminal justice actors applying the law. Leaving provisions open to interpretation is not wise, nor is it wise to rely on secondary legislation, which may take years to draft, to provide the detail. A helpful trend in many countries, including post-conflict countries, is to provide commentaries that give the reader greater context and detail on the new laws.

8.6.8 *Use outside experts wisely*

Outside expertise on law reform in general and on specific areas of law will be important in the law reform process. Excessive reliance on outside experts or the drafting of new laws exclusively by foreign experts, however, is not a good idea, because it fails to promote capacity development and national ownership. A coordinated, partnership approach to law reform, in which international assistance providers support national actors, should be established. Outside experts can bring rich experiences from reform measures in other countries; such experiences will be yet more valuable if they have been acquired in countries from the same region or in other developing countries. These outside experts should see themselves as resource persons or providers of comparative knowledge and information. It may be helpful to facilitate exchanges between those who have already completed law reform and those currently engaged in it. South-South dialogue is usually far more productive than exchanges in which Western practitioners explain what works in their stable and affluent countries to reformers from post-conflict countries.

⁶¹ Linn Hammergren, *Code Reform and Law Revision* (Washington, DC: Center for Democracy and Governance, Bureau for Global Programs, Field Support, and Research, U.S. Agency for International Development, August 1998), 32.

⁶² Peter Butt and Richard Castle, *Modern Legal Drafting: A Guide to Using Clearer Language* (Cambridge: Cambridge University Press, 2001), 58.

8.6.9 *Ensure adherence to human rights standards*

New laws should comport with international standards. The assessment discussed above will reveal where new laws are not in compliance with international human rights norms and standards, and also what international obligations apply to the post-conflict State (i.e., where the State has ratified certain treaties but has not domestically implemented them). Capacity development initiatives, such as trainings or dialogues with outside experts on international standards, would be useful in this process. It is especially important to integrate key international standards concerning vulnerable and marginalized groups, including women, children and minority groups.

8.6.10 *Carefully consider the use of models and foreign laws in the reform process*

Law reform is not about adopting models but about solving problems.⁶³ Opinions vary about “legal transplantation,” which is “the moving of a rule or a system of law from one country to another, or from one people to another.”⁶⁴ Some argue that law and culture are so intrinsically linked that it is impossible to import one provision of law into another setting. Others argue that legal transplantation has been successfully occurring for hundreds of years. No one doubts that legal borrowing, or transplantation, has occurred and continues to occur. The larger issue is whether foreign legal norms will be not only received but also accepted. This is not often the case. Empirical studies show that “[t]he way in which a country received its formal law is a much more important determinant of [its] current effectiveness”⁶⁵ than the mere passing of a new law. The successful integration of new provisions into a State’s existing corpus of law is more likely to occur when those provisions are adapted to meet the needs of citizens in the new locale.⁶⁶ The process of adaptation means that an informed choice about alternative options is made or that extensive comparative research is conducted in advance of adopting a foreign provision of law.⁶⁷ Foreign laws and models can be useful, but their employment should be carefully considered. Exposure to other countries’ practices and approaches to legal issues can be extremely enlightening and helpful to participants in the reform process.

Model codes as a reform tool

The United States Institute of Peace and the Irish Centre for Human Rights, in cooperation with the United Nations Office on Drugs and Crime and the United Nations Office of the High Commissioner for Human Rights, have created a set of model codes: a Model Criminal Code, a Model Criminal Procedure Code, a Model Detention Act, and a Model Police Powers Act.

⁶³ United Nations Development Programme, *Access to Justice Practice Note* (2004), 9.

⁶⁴ Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd ed. (Athens, GA, and London: University of Georgia Press, 1993), 21.

⁶⁵ David Berkowitz, Katharina Pistor, and Jean-Francois Richard, “The Transplant Effect” (1 CID Working Papers on Law and Development, 2000), 7–8.

⁶⁶ *Ibid.*, 28.

⁶⁷ *Ibid.*

Available in print and online (at <http://www.usip.org/programs/initiatives/model-codes-post-conflict-justice>), these model codes are not meant to be transplanted into post-conflict States but to serve as a starting point for discussion or a potential source of inspiration in the law reform process. In some cases, provisions of the model codes could be adapted and used in new criminal legislation after conflict. The model codes have been used by drafters of new criminal laws in Haiti and Afghanistan.

8.6.11 *Consider new codes as legal hybrids*

Legal systems are often described as being either common law systems or civil law systems. In reality, however, such neat distinctions can be hard to draw. Significant sharing and cross-fertilization among common and civil law legal systems has occurred, with the result that most legal systems and their laws are essentially hybrids. In post-conflict States, drafting new laws is not a matter of sticking with a common law or civil law system or adopting a new one; it is about creating laws by blending components of both systems in order to make the best laws possible. Thus drafters can draw upon the laws of many legal systems in creating new laws, not just the system it has historically adopted. (This method is subject to the caveats in the preceding discussion of transplantation and adaptation.)

8.6.12 *Consider the relationship with the non-State justice system*

In some countries, the non-State justice system is regulated under law, and a statutory relationship exists between the systems. Sometimes, non-State justice systems operate throughout a post-conflict country but are unregulated by law. When areas of law are being reformed or when reforms are being enacted in order to address particular disputes commonly dealt with by the non-State justice system, questions of jurisdictions, appeals, and so forth should be considered. This subject is discussed more fully in chapter 12.

8.6.13 *Plan for implementation of new laws*

As discussed above, sometimes reforms of the law are not fully implemented, because there was no planning for implementation during the law reform process. In order to ensure that laws can be implemented, law reform actors need to create a plan of action early on in the process that details the resource and training requirements for new laws. A carefully researched impact assessment that looks at the probable costs, consequences, and side effects of new laws will yield this information.

The period between the promulgation of a new law and its enforcement is often termed the *vacatio legis*. This is the time when legal actors are trained and new institutions are set up, or old ones are reorganized to comply with new laws. Laws should not come into effect the day that they are passed. Instead, a significant period of time should be allowed to meet the training and resource needs of new laws, and to permit the new laws to be published and publicized. A public education campaign should explain the new laws, and should pay particular attention to the population's new rights and obligations.

9. Police reform

9.1 Introduction

Police reform is a complex challenge in any environment. It is particularly daunting, however, in post-conflict situations in which the police have been separated from the populations they are meant to serve and protect, and have operated more like an occupying army than public security officers. The police may also have perpetrated serious human rights violations, which, in turn, may well have fuelled conflicts. Transforming such police forces into rights-respecting police services that simultaneously provide protection and fight crime has challenged local and international reformers around the world.

Given the fast pace and wide scope of police reform activities, it is difficult to assess experiences and draw out lessons from the broad array of initiatives conducted. In addition, new challenges in Afghanistan, Iraq, and Somalia test what we think we have learned about post-conflict police reform.

All this experience has shown that there is no one model of police reform, no “silver bullet” or magic formula that will yield the desired result. Moreover, each post-conflict country presents unique circumstances and challenges; a danger exists in applying cookie-cutter reform models, or “templates,” that may have worked in country X but could yield disastrous results in country Y. Yet some lessons or good practices do emerge from the welter of reconstruction efforts of war-torn countries, and they are outlined in this chapter. (The topic of police vetting is often conducted as part of transitional justice initiatives after conflict. It is not covered in this chapter.)⁶⁸

Two provisos are in order. First, police reform never ends but rather is an ongoing process that must be constantly reviewed, reassessed, and retooled. One of the first challenges in police or any organizational reform is successfully inculcating this “learning culture,” which rewards self-assessments, self-criticism, and adaptability. Second, police reform never occurs in a vacuum. Society and the police’s culture must also change if the role and practices of the police, and the population’s relationship with the police, are to evolve.

⁶⁸ For a complete discussion on vetting, see Office of the High Commissioner for Human Rights, *Rule of Law Tools for Post-conflict States: Vetting—An Operational Framework*, <http://www.unhcr.org/refworld/category/POLICY/OHCHR,,,46cebcd62,0.html>.

9.2 Understanding the context of post-conflict policing

In undertaking police reform of any and all kinds, advisors must recognize and acknowledge the local context. A failure to anchor programmes in local realities means that the programmes will fail. Broad-based expertise is required. Advisors should be familiar with the local history, traditions, and culture of policing and security; a deep understanding of how the police were structured and organized and how they operated in the past is essential. Advisors must also understand past criminal patterns, networks, and gangs—both inside and outside the old police—and how they operated.

In post-conflict countries, the police were often part of the problem that caused the conflict. Cut off from the community they were meant to be protecting and serving, in certain post-conflict countries the police often acted like occupiers, squelching any perceived criticism of the authorities and not hesitating to use violence to maintain control. In these and other post-conflict countries, most people's interactions with the police have been negative.

The importance of understanding local police laws

Advisors should know relevant domestic law governing police practice. For example, who has the power to arrest? Are written arrest warrants necessary in all cases, or are there exceptions? When are searches legal? In Haiti, arrests and searches cannot be made between the hours of 18:00 and 06:00, unless the police witness a crime being committed. UN observers, because they knew of this provision, were able to point out to the police that certain arrests were illegal and that those detained had to be released. Training then covered this provision of the law, and observers documented a decrease in the number of illegal arrests and searches.

The population in countries riven by conflict usually has had no experience with police who provide services and protect and observe human rights, so advisors must be ready to help citizens demand new, responsive policing. Although it is difficult to overcome this legacy, “there is a repressed demand for responsive, sympathetic policing.”⁶⁹ Despite understandable scepticism, born from decades of abusive police behaviour, most people want to have a good experience with the police—they want to rely on the police for protection and the prevention of crime. Advisors should know the local history, down to details such as the colour of the old police uniforms and the names of notorious police units. Reform efforts must not in any way even hint that discredited and abusive symbols, units, or tactics will continue to be used; instead these symbols, tactics, and units must be abandoned and new ones adopted or recruited. Moreover, these positive changes should be widely publicized.

⁶⁹ David Bayley, *Democratizing the Police Abroad: What To Do and How To Do It* (Washington, DC: National Institute of Justice, 2001), 25.

9.3 Engaging multidisciplinary teams

The type of understanding needed to undertake police reform requires broad-based expertise. Improving human rights performance in the police is too important and complex to be left to human rights or police experts alone. It is not enough for a human rights expert to lecture a group of cadets in a police academy on international human rights standards, or for a police expert to discuss how to conduct a “stop and frisk.” Police reform is a multifaceted, multidisciplinary effort that takes careful coordination among numerous actors and will require many years and much money. The question of how to ensure the sustainable generation of financial resources within the State—local taxes and fees—to avoid dependence on foreign largesse is yet another major challenge.

Given the complexity of reform, those with expertise in management, human resources, logistics, communications, procurement, data management, institutional reform, psychology, sociology, criminology, public information campaigns, anthropology and community relations must also participate. No single entity—not the United Nations, the African Union, the European Union, or the Organisation for Security and Cooperation in Europe (OSCE), let alone donor countries or NGOs—has the range of competence, the expertise, and the resources to conduct all facets of police reform. Reform will require the joint effort of several organizations and agencies.

9.4 Timelines for transformation

Police reform takes time and involves transforming power relations in a society. Reform of the police, like any effort to change an institution, is intensely political. Power distribution and relationships will change, and resistance is to be expected. Many in the old order will see reform as a direct threat, a zero-sum game where they stand to lose and others will gain. People invested in the old structure will resist change. Advisors must manage a built-in tension between the desire to “take local ownership seriously and the reality that the very need for reform means that what exists locally is inadequate and requires change.”⁷⁰

An advisor embarking on police reform must understand from the outset that the exercise requires more than technical tinkering with police doctrine, laws, or practice. Local counterparts will interpret every project, every training session, and every logistical support as a political initiative, and, accordingly, will calculate what they stand to gain or lose from the effort.

Police reform requires the population to have confidence in the police and expects the police to serve the public regardless of political agendas. Such a dynamic represents a pivotal change in how society is governed in most post-conflict and crisis States. “Policy makers and critics have to recognize that civilian police missions are an integral part of a vast and ambitious project of conflict management and political and socio-economic

⁷⁰ Charles Call, *Challenges in Police Reform: Promoting Effectiveness and Accountability* (New York: International Peace Academy, 2003), 4, <http://pbpu.unlb.org/PBPS/Library/Challenges%20in%20Police%20Reform.pdf>.

development.”⁷¹ In addition, they must recognize that this effort will take years, not months, and budget accordingly.

9.5 Moving from problems to solutions

Advisors must offer more than just criticism of police misconduct; identified problems require concrete solutions. Another important lesson gleaned from international efforts to reform police is that merely monitoring and reporting on human rights abuses does not automatically lead to reform or improved respect for human rights. And an attempt to blame or shame the police into reforming their behaviour by publicly exposing their abuses can be counterproductive.

This does not mean that advisors should hide, soft-pedal, or, worse yet, attempt to justify police misconduct or criminal behaviour. Rather, a shift in tactics or approach may yield the desired results without compromising principles. Some human rights monitors or police reformers have relied on exposing abuses as the way to attract attention to a problem and then fix it. But most police will not accept outsiders lecturing or hectoring them. Feeling under siege, the police may refuse to cooperate, share information, or participate in reform efforts; if pushed, they may revert to past behaviour. New police may see the reform community as the “enemy,” a dangerous situation that has occurred in many countries.

Experience across several peacekeeping operations shows that a “diagnostic approach” works better. Here, the human rights or policing experts analyze the situation, pinpoint any abusive behaviour, try to understand what causes the human rights violations, and then seek to work with the responsible authorities to fix the problem. The authors of a major study on human rights in peace operations have concluded:

Perhaps the most important lesson from the field mission experience is the complementarity between human rights monitoring and institution building. Monitoring gave missions the ability to identify the sources and scope of human rights problems throughout the country. This information could then be used to design reform measures and training programmes. Finally, field monitoring provided direct feedback on the effectiveness of reform strategies or programmes as they were implemented.⁷²

As noted in chapter 4 of this book, the cycle of assessment, design, implementation, and monitoring and evaluation has proven to be an effective approach to police reform in post-conflict countries. It also has the added benefit of involving various actors and harnessing the expertise needed for reform, so that it is not seen as just a human rights project. The police themselves must be active and meaningful participants, another element essential for success.

⁷¹ Annika S. Hansen, *From Congo to Kosovo: Civilian Police in Peace Operations*, Adelphi Paper No. 343 (Oxford: Oxford University Press, International Institute for Strategic Studies, 2002), 13–14.

⁷² Thomas Hammarberg and Patrick Gavigan, “Introduction and Overview,” in *Honoring Human Rights*, ed. Alice Henkin, (The Hague: Kluwer Law International and the Aspen Institute, 2000), 183.

If, however, advisors have made good faith efforts to work cooperatively with the authorities to solve problems and offer solutions, and the government has denied that there are problems and delayed or failed to take necessary action, then the advisors should not hesitate to criticize publicly both the violations on the part of the police and the inaction or cover-up on the part of the authorities. This public shaming is the tool of last resort, not the first.

9.6 Managing change

Organizational change of any kind is never easy. Altering the culture or ethos of an institution is a challenging undertaking in the best of circumstances. It is far more challenging when it involves reshaping the nature of policing in a post-conflict or crisis country. For most post-conflict and crisis States, the overarching goal of police reform is to “move from a model of policing based on repression and social control to a model based on prevention and investigation.”⁷³ Yet changing the political culture concerning security questions is difficult even for countries at peace. One policing scholar notes that police institutions are inherently conservative and identifies the “almost intractable nature of policing which resists change at all levels. Existing societal roles, organizational arrangements and working cultures of officers reflect powerful domestic forces and are difficult to change.”⁷⁴

Moreover, in post-conflict settings, the population often has a well-founded distrust and fear of the police, who often actively participated in systematic violations of human rights and perpetrated war crimes and crimes against humanity. In most cases, the police will not admit—let alone seek forgiveness for—their abusive behaviour. So advisors who seek support from the population to help in the task of police reform, including efforts to reach out to women and to urge them to report crimes to a police they fear and distrust, often face formidable hurdles. Similarly, populations in war-torn societies may resist efforts to collaborate with the police to fight crime and to participate in “community policing” initiatives, which have become increasingly popular in police reform efforts around the world.

As the United Nations Development Programme’s Bureau of Crisis Prevention and Recovery notes, “Ironically, those most in need of professional and well-functioning justice and security sector services, the poor and socially vulnerable, are generally those not only most suspicious of them, but also most likely to be unable to obtain the public service that the sector is supposed to provide.”⁷⁵ The population’s historic and well-justified mistrust of the police must be overcome, and this will take time. The new or reformed police must earn the trust of the population, and one mistake or reversion to the past can have a devastating impact. There is almost no room for error, especially in the early days of police reform, so getting off to a good start—and generating short-term wins as a way of building credibility, momentum, and support for reform—is vital.⁷⁶

⁷³ Rachel Neild, *Police Training: Themes and Debates in Public Security Reform: A Manual for Civil Society* (Washington, DC: Washington Office on Latin America, 1998), 11.

⁷⁴ Otwin Marenin, “The Goal of Democracy in International Police Assistance Programs,” *Policing: An International Journal of Police Strategies and Management*, 21:1, (1998): 160.

⁷⁵ United Nations Development Programme, Bureau of Crisis Prevention and Recovery, *Security Sector Reform and Transitional Justice: A Crisis Post-Conflict Programmatic Approach* (March 2003), 6.

⁷⁶ John P. Kotter, *Leading Change* (Cambridge, MA: Harvard Business School Press, 1996), 119.

9.7 Consulting with police in the ranks

Another key element in police reform is the time-consuming and difficult work of consulting police officers to get their views on what works and what does not. Reform cannot be simply decreed from above; although the support of top management is crucial, each person in the police service must feel that he or she has a stake in change.⁷⁷ The rank and file must have a say and be listened to, or reform efforts will not take root. Indeed, a study of efforts to implement community policing found that some of the best ideas came from the police themselves, not from the outside “experts” or the police hierarchy.⁷⁸ This “bottom-up” approach must be combined with skilful and committed leadership that sets clear standards on what is proper behaviour and what will not be tolerated in the new police.

9.8 Balancing crime fighting and human rights

Another core aspect of police reform in post-conflict or crisis States centres on the concern that protecting human rights will be equated with being soft on crime. Advisors must counter this perception by emphasizing that effective crime fighting and respect for human rights go together. The police themselves will reject reform if they believe that it will lead to increased crime or will undermine their effectiveness as police officers. Police will not change their behaviour unless they see that it is in their personal and professional interest to do so. As police expert David Bayley notes, word of mouth among police officers is more important than any training course. Police telling other police that a change has meant an improvement in their performance or is effective in fighting crime is powerful motivation.⁷⁹ Police must believe that crime and disorder will decrease as a result of the reform. Part of the challenge for an advisor is to combine the human rights perspective on policing (by, for instance, revising codes of conduct and establishing oversight bodies) with the professional law enforcement and crime control perspective. All too often, the former has predominated in reform initiatives.

Some maintain that controlling crime requires “tough” policing, and that the population, too, will call for more robust police action if they feel threatened by crime, even if this encroaches on human rights. Such public clamour for tougher policing has arisen in several countries with histories of vicious and brutal police behaviour. This demonstrates that if people feel vulnerable to crime, they will advocate for the police to take almost any actions necessary to combat crime. Thus, reform must support policing that is simultaneously effective and respectful of human rights. This can be challenging, especially in the violence and disorder typical of a post-conflict setting, in which most State structures, to the extent that they ever functioned, have dissolved. Police reformers must convince the public that “democratic policing is not weak policing.”⁸⁰

⁷⁷ Ibid.

⁷⁸ Rachel Neild, *Themes and Debates in Public Security Reform: A Manual for Civil Society: Community Policing* (Washington, DC: Washington Office on Latin America, 1998).

⁷⁹ David Bayley, *Democratizing the Police Abroad: What to Do and How to Do It* (Washington, DC: National Institute of Justice, 2001), 20.

⁸⁰ Ibid., 40.

Gender and police reform

An increase in the number of women in the national police has figured in several post-conflict reforms and is a crucial factor in strengthening outreach to the population. Specific, mandated targets for women in the police force are crucial: everyone should be on notice that increasing the number of women is a top priority. The UN Mission in Kosovo (UNMIK) declared at the outset that the recruitment and selection process for the Kosovo Police Service (KPS) should strive to ensure that no less than 20 per cent of police officers are female. Today, women make up 18 per cent of the KPS, a historic high for the region—and one of the highest percentages in the world. Similarly, women accounted for 22 per cent of the Timor-Leste police force before the May 2006 upheavals, and for 13 per cent of the police in Sierra Leone. Training programmes for new police recruits in Sierra Leone have a target of 30 per cent women. The first elected female president in Africa, Ellen Johnson-Sirleaf, has stated that she wants the Liberian National Police to have 20 per cent women. After a long, intensive, and expensive effort, South Africa has the highest percentage of female police officers in the world at 28.6 per cent.

Sources: Based on author's own experiences. Details on Liberia can be found at the UN Mission in Liberia's website, <http://unmil.org/!content.asp?ccat=gender&zdoc=1>; for details on percentage of women in police forces, Tracey Fitzsimmons, "Engendering Justice and Security after War," in *Constructing Justice and Security After War*, ed. Charles T. Call, (Washington, D.C., USIP Press 2007), 358.

The United Nations, African Union, European Union, and OSCE have overwhelmingly focused on raising awareness of human rights standards among the police themselves, civil society, NGOs, and local communities. The corollary to this awareness-raising is a heavy emphasis on training, creating materials for training courses, and conducting public information campaigns. For example, the United Nations has designed training modules on human rights for the police, the courts, the prison system, the ombudsperson office, parliament, and other official entities charged with law enforcement and security. The Task Force for the Development of Comprehensive Rule of Law Strategies for Peace Operations, created by the United Nations Executive Committee on Peace and Security (ECPS), produced a report in August 2002 surveying training efforts for the police, judiciary, and prisons.⁸¹ In its report to the ECPS, the task force discussed more than fifty training modules and manuals created by UN agencies or departments in the rule of law area, which includes the police.

In addition to training modules on human rights, the United Nations Office on Drugs and Crime and the United Nations Department of Peacekeeping Operations have co-published a pocket-size handbook entitled *United Nations Criminal Justice Standards for United Nations Police*, which collates the main human rights standards applicable to policing.

Innovative practices, such as sustained mentoring of police by experienced outsiders, can reinforce what is learned in the police academy. UN Civilian Police (UNPOL) in Bosnia, Haiti, Kosovo and Timor-Leste have mentored local police with good results, particularly when the two were co-located and the mentors were carefully managed and trained. Tools

⁸¹ UN Executive Committee on Peace and Security, Task Force for the Development of Comprehensive Rule of Law Strategies for Peace Operations, *Report of the Task Force for the Development of Comprehensive Rule of Law Strategies for Peace Operations to the ECPS* (August 2002).

such as laminated pocket guides for the police—containing translated summaries of the core UN human rights principles for policing—and police involvement in community projects have become typical aspects of police reform efforts.⁸²

The United Nations has developed human rights education materials for schools, professional organizations, journalists, community groups, and local human rights organizations. Radio and television broadcasts illustrating human rights principles flourish on the airwaves of many countries. These broadcasts are especially important in places such as Haiti, Rwanda, Burundi, Timor-Leste, the Democratic Republic of Congo, Liberia and Cambodia, where a high percentage of the population is illiterate.

Innovative initiatives to fight crime and build relationships

The Kosovo Police Service sends officers to schools to explain basic traffic safety, describe the dangers of drug and alcohol abuse, and alert children to how criminals involved in trafficking of persons work. This sort of awareness-raising about trafficking was especially important after a wave of kidnappings of teenage girls in 2000, which led many parents to keep their children home from school. In Timor-Leste, police sponsor sports contests and song competitions for young people as a way to counter the influence of martial arts gangs, which grew in influence in 2005–2006. These initiatives are part of a broader effort to make people feel safer and more secure; they also help the police to see that protecting human rights and fighting crime are mutually reinforcing, not antithetical.

9.9 Management tools, administration practices and fiscal control

Many experts maintain that in addition to human rights training and public awareness campaigns, police reformers must engage in sustained efforts to build integrity, professionalism, and discipline in a police force. This means that modern management tools, sound administration, fiscal controls, and objective standards for judging performance are all pivotal issues, and are as important to an advisor as knowledge of human rights. Strong leadership, in the police and in wider government officialdom, will also help determine the success or failure of police reform.

International efforts at police reform have achieved only limited success outside the areas of training, creating human rights education materials, and raising awareness. Advisors should pay more attention to—and devote greater resources to—those issues that fall under the rubric of institutional strengthening. The United Nations' experience and expertise with regard to good governance and capacity building need to be coupled with the technical knowledge and experience of police and human rights specialists. No one sector should have a monopoly on police reform; the effort will not succeed without collaboration across disciplines.

⁸² See UN Office of the High Commissioner for Human Rights, *Human Rights Standards and Practice for the Police*, Professional Training Series No. 5/Add. 3 (2004).

A framework for institutional reform

There are many components and subcomponents to institutional reform. While practitioners may only be focusing on one element of institutional reform, it is helpful to be aware of the bigger picture and how the different elements relate to one another. The Capacity and Integrity Framework (CIF) was originally developed by Serge Rumin and Alexander Mayer-Rieckh to assess police capacity but it also provides a framework basis for institutional reform. It has been applied in several UN peacekeeping operations.

Capacity and integrity framework

	<i>Personnel</i>	<i>Organization</i>
<i>Capacity</i>	<ul style="list-style-type: none"> • Education • Experience • Aptitude 	<ul style="list-style-type: none"> • Resources • Infrastructure • Management
<i>Integrity</i>	<ul style="list-style-type: none"> • Background • Conduct • Incorruptibility 	<ul style="list-style-type: none"> • Accountability • Service • Representation

Source: The framework is presented, for example, in Office of the High Commissioner for Human Rights *Rule of Law Tools for Post-Conflict States: Vetting: An Operational Framework*, 15–16, <http://www.ohchr.org/Documents/Publications/RuleoflawVettingen.pdf>

9.10 Police oversight bodies

Internal and external bodies responsible for oversight of the police must be independent, objective, transparent, and effective. In addition, they must have the power and resources to do their job. Effective, transparent, and fair accountability mechanisms, both internal and external, will help ensure police discipline and secure public trust, and are among the most important aspects of improving police respect for human rights. Reform hinges on eradicating police impunity; the police must no longer be able to literally get away with murder—or with torture, rape, and extortion. Any misbehaviour by the new police will have devastating impacts on reform, and a dangerous dynamic will quickly develop if the population comes to view the new police as just like the old, unworthy of public trust or support.

Accountability and oversight in Haiti

In Haiti in 1994–1995, an energetic inspector general of the new Haitian National Police disciplined, suspended, and even turned over for prosecution misbehaving and abusive police officers. This revolutionary development sent a clear signal to both the police and the population: Impunity is over—you can lose your job and even go to prison if you violate the law or the police code of ethics.

Around this time, the inspector general's office of the new police force began to give a weekly press conference, announcing the number of complaints made against the police, actions taken—including the referral of serious cases for criminal prosecution—and updates on the status of earlier cases. This openness encouraged the population to work with the police to provide information and tips, identify suspects, and prevent crime.

Experts argue about whether internal oversight is better than external civilian review boards. Likewise, the precise structure, organization, and powers of control mechanisms have been debated in many studies. Although these are important issues, a key element of success is creating and maintaining dynamic relationships among the police department, civil society, and the oversight body.⁸³ Civilian oversight itself can never substitute for good, visionary police leadership and effective internal monitoring.

The public needs to know what the complaint procedure is and have confidence in it; if a police officer has done something wrong, a citizen should be able to file a complaint and be sure that it will be acted on. Police should conduct a public information campaign describing how citizens can lodge complaints about police misconduct. The public should be informed about who is under investigation (as in the case described in the feature box, “Accountability and oversight in Haiti”).

An effective police oversight mechanism helps reinforce the twin goals of respectful and effective policing: disciplined police behaviour means fewer rights violations and more public cooperation, which in turn leads to lower crime. Although some police officers resist oversight, especially from external bodies, interpreting it as a hindrance to effective crime-fighting, advisors should avoid framing the issue as a trade-off between oversight and effectiveness. Instead, they should show how accountability and human rights can be seen as management and performance issues.

Police control mechanisms serve important purposes in addition to assessing behaviour and punishing misbehaviour. The internal affairs unit or inspector general's office assists in “analysing and changing the regulatory and management systems and practices of the police to refine their capabilities and improve their performance, both in effectiveness and ethics.”⁸⁴ As opposed to criminal prosecutions, which affect very few officers and have limited direct impact on behaviour, internal disciplinary mechanisms, if fair and objective, have a great potential to encourage good behaviour, because they directly influence an officer's career. Performance assessments go into personnel files, which then affect promotions, transfers, raises, assignments, and opportunities for further training and skills enhancement.

Overall analyses by both internal oversight bodies and external civilian review boards reveal patterns, trends, and problems in the cases/complaints filed with each body. Such

⁸³ See Vera Institute of Justice, “Policing in Democratic Societies,” http://www.vera.org/project/project1_1.asp?section_id=2&project_id=31.

⁸⁴ Rachel Neild, *Themes and Debates in Public Security Reform: A Manual for Civil Society: Internal Controls and Disciplinary Units* (Washington, DC: Washington Office on Latin America, 1998), 1.

information generates policy changes and recommendations, as well as adaptations in training and the incentive structure. Developing analyses of patterns of abuse, “hot spots,” and tactics that lead to abuse is essential for corrective action and reform.

In tandem with the establishment of police oversight bodies, codes of conduct for police officers will need to be developed. These codes of conduct specify to police what is acceptable and unacceptable conduct and spell out the principles to which police officers must adhere. The UN Code of Conduct for Law Enforcement Officials and the Guidelines for the Effective Implementation of the Code of Conduct provide useful guidance in this regard.⁸⁵

9.1.1 Incentive, recruitment and promotion structures

The entire system of incentives and rewards needs to reflect the new police ethos of serving and protecting the public; recruitment and promotion must be based on objective criteria, not nepotism or political favouritism. As a corollary to accountability, a new police culture that rewards ethical behaviour and punishes corruption and abusive practices must be established. Police reform must address the institution’s entire system of incentives and rewards, and must elevate integrity as the ultimate value. Recruiting must be based on fair, transparent, and objective criteria that are publicly announced, and promotions, salary increases, and legitimate perks must derive from a rigorously objective assessment of performance. Reforms should realign incentives and punishments to promote integrity and competence in every aspect of the police, embedding these values in every procedure and policy.⁸⁶ This requires an effective and powerful coalition within the police that will promote this change, clarify the vision, and create a sense of urgency. It is not enough to say that top management must support the change; the process must go deeper and also include department heads and station chiefs. Integrity and the “right way” must be recognized and rewarded, or the new policing culture will never take hold.

As a leading expert on policing argues “Major change is often said to be impossible unless the head of the organization is an active supporter. What I am talking about here goes far beyond that. In successful transformations, the president, division general manager, or department head plus another five, fifteen, or fifty people with a commitment to improved performance pull together as a team. . . . [I]n the most successful cases, the coalition is always powerful—in terms of formal titles, information, expertise, reputations and relationships, and the capacity for leadership.”⁸⁷

Police do not operate in a vacuum, and it is often the national political ethos and system of incentives and punishments that need reforming. Corruption is another concern. It is a persistent problem with police in post-conflict countries, and although training and

⁸⁵ The UN Code of Conduct for Law Enforcement Officials is available at <http://www2.ohchr.org/english/law/codeofconduct.htm>. The Guidelines for the Effective Implementation of the Code of Conduct can be found at <http://www.coe.int/t/dghl/cooperation/economiccrime/cybercrime/cy%20activity%20interface2006/un%20Guidelines%20CoC%20Law%20Enforcement%20Officers.pdf>.

⁸⁶ Gordon Peake, *Policing the Police: Police Reform Experience in Kosovo, Southern Serbia and Macedonia* (London: Saferworld, 2003), 22.

⁸⁷ Kotter, *Leading Change*, 6.

anti-corruption campaigns go some way to combating the scourge, additional efforts are needed if it is to be significantly reduced. Poor salaries, for example, do not alone cause corruption, but they can certainly encourage it. The government's capacity to raise sufficient revenues fairly, so that all public servants, including the police, receive an adequate salary, is thus part of an overall context of governance reform that has an impact on effective and respectful policing.

Public perception studies as part of police reform in Kosovo

The United Nations Development Programme (UNDP) in Kosovo pioneered an important initiative in police reform: the first comprehensive opinion survey examining public perceptions of the police and gauging the general sense of security, or lack thereof, across Kosovo's 30 municipalities. This UNDP survey which was published under the title *Light Blue: Perceptions of Security and Police Performance in Kosovo*, sought to understand what the population, the primary client of the police, thought of the police's performance in preventing crime and providing security. It clarified what the public knew about the Kosovo Police Service (KPS)—its training, deployments, and activities—and measured the public's perception of the KPS's "professionalism."

- The survey asked 6,000 people a range of questions, including the following:
- How many police officers are assigned to the station in your area, and how often do you see them on foot patrol?
- How often do you encounter a KPS officer and what is the nature and quality of the interaction?
- Do you see the KPS as effective partners, working to help the community?
- Do KPS officers treat people with respect?
- How quickly do KPS officers respond when called for in emergencies?
- Do you feel safer now than you did one year ago?
- Is crime increasing or decreasing in your municipality?

The results of the survey provided an empirical basis for evaluating and reformulating professional development priorities, operational guidelines, and policy planning. The main finding was that a majority of Kosovars "now perceives the police as a trusted and credible institution," and that the KPS "must further broaden public trust and engage communities through regular dialogue about steps to jointly improve current levels of safety and security." The very process of conducting the survey, done largely by Kosovars, built local expertise in security-sector reform, creating a core of local experts capable of conducting similar initiatives in the future. The survey also promoted widespread awareness of public security issues, prompting constructive discussion and debate in a society not used to such open discourse.

Source: United Nations Development Programme, *Light Blue: Perceptions of Security and Police Performance in Kosovo* (Prishtina, Kosovo: UNDP, June 2004); the quotation is on page 13.

A methodology for public perception surveys

The Vera Institute of Justice is conducting a study of how to design and interpret public opinion surveys on police performance. Working with the New York Police Department, the institute is trying to elicit more precise information from the public about how they view the police. "Unlike general opinion surveys that tend to measure the residual effect of news stories and other second-hand accounts of police misconduct and heroism, this project documented and quantified how people feel about their own first-hand experiences with police officers and police commanders"

Source: Robert C Davis, Vera Institute of Justice, "The Use of Citizen Surveys as a Tool for Police Reform" (Vera Institute, New York, July 2000), http://207.5.76.189/publication_pdf/citizenssurveys.pdf.

10. Courts, prosecution and defence reform

10.1 Introduction

This chapter explores strategies and programmatic options for working with courts, prosecutors, and defence counsel in a post-conflict country. The aim is to provide a practical framework and platform for action that is in line with local practice, experience, and the demands of the situation on the ground. The chapter also seeks to demonstrate that the challenges faced may be converted into opportunities for making justice more accessible to ordinary people.

In the aftermath of a conflict, a basic criminal justice system needs to be in place to address the culture of impunity that violent conflict will have fostered, as well as to protect members of society by providing legal remedies or sanctions. Countries emerging from conflict usually do not possess a fully functioning justice system. In such an environment, the justice system will lack capacity in terms of the ability of courts to handle cases and in the number of qualified judicial and legal personnel, including defence counsel.

Public opinion surveys may well reveal little public confidence in the justice system not only during but also preceding the outbreak of conflict. Surveys may disclose that the courts are seen as remote (culturally as well as geographically) from the communities they serve and confusing to users; that the judicial process was slow before the onset of hostilities, with long delays and substantial case backlogs; and that legal aid did not effectively exist. Victims may report that they are not protected after they have brought a charge, that the system is neither independent nor impartial, that sentences are either inadequate or not enforced, that perpetrators escape from prison with the collusion of prison staff, or that there is no provision for reparation for the victim.

In the absence of a functioning formal justice system, and where customary/traditional justice systems are not resorted to, people may take justice into their own hands, which may result in mob violence and the use of unlawful punishments for wrongs committed.

The development of an effective response to a debilitated justice system is a highly complex process, involving a number of actors across the sector, including judicial, police, legal, and military actors, as well as UN agencies and other international assistance providers.

“Dried dog meat tastes good to eat; but while it dries, what do you eat?” This Liberian proverb goes to the heart of post-conflict reconstruction of the justice process.

Governments, as well as those who provide legal services, may argue that the first task of the international community is to build courts and train judges, prosecutors, and defence lawyers to get the system back on its feet. However, these activities take time—often years—to bear fruit. In post-conflict States, immediate action is needed to provide a basic criminal justice framework within which people can feel safer and resolve their disputes, which can form the basis of longer-term reforms of courts, prosecution, and defence.

10.2 Programmatic options

This section presents a series of suggestions for programmatic options for reforming courts, prosecution, and defence both in the short and the longer term. Particular emphasis is placed on options that have proven to work in the past and those that are cost-effective.

10.2.1 Rebuilding infrastructure and supplying resources

The buildings that housed courts, prosecution services, and any legal aid services may all have been damaged or destroyed during conflict. If not, they may have fallen into disrepair. The advisor may consider supporting projects to rebuild courts and other public buildings. This may be done in the context of quick-impact projects (see chapters 4, 5, and 11). In addition to needing major infrastructural components, the justice system may require—for the sake of both its efficient operation and its professional dignity—very basic resources, such as pens, paper, and office supplies. Advisors should focus on providing basic, yet adequate, resources. Money should not be wasted on the purchase of high-tech devices that local criminal justice actors are unable to use (e.g., because the local electricity supply is highly unpredictable or nonexistent) or cannot maintain (e.g., because there are no local parts for computerized case-tracking systems). Where equipment is provided to justice actors, training in how to use it is vital.

10.2.2 Vetting human resources and developing capacity

In some post-conflict States, given the level of human rights abuse that might have occurred at the hands of the justice system, vetting must be undertaken to remove implicated individuals from the system. Vetting is often conducted as part of transitional justice initiatives after conflict, and it is beyond the scope of this chapter.⁸⁸ After vetting has been carried out, a widespread recruiting campaign must be launched to bring new professionals into the justice system. These individuals will need to be trained quickly yet effectively.

Where capacity is present but weak, capacity development initiatives will be required. Capacity development, and the process by which it is undertaken, is discussed in greater detail in chapter 6. Capacity development (including mentoring and coaching) can also support and expand existing mobile investigation, prosecution teams, courts, and paralegal aid services, as discussed in this chapter and in chapter 7.

⁸⁸ For a complete discussion on vetting, see Office of the High Commissioner for Human Rights, *Rule of Law Tools for Post-conflict States: Vetting: An Operational Framework*, <http://www.unhcr.org/refworld/category,POLICY,OHCHR,,,46cebcd62,0.html>.

10.2.3 Establishing mobile courts

Because the post-conflict justice system may be damaged or destroyed, innovative and flexible approaches, such as mobile courts, are needed to enable the authorities to address impunity and cover more ground nationally. These courts are usually well received by the local population, as they demonstrate a measure (however small) of accountability for those who have committed crimes locally as well as of strengthening access to justice for the population.

Mobile courts in the Democratic Republic of Congo, sub-Saharan Africa and Bangladesh

Mobile courts, also known as *chambre foraines* or *assizes*, may have largely fallen into disuse in more developed countries, but are not a new concept. In the Democratic Republic of Congo (DRC), they have been revived in the form of judicial panels that travel to remote areas and process substantial caseloads. A caseload of 120 cases in a two-week period is usual. They are not without their problems, however; because they lack the resources to investigate fully or provide an adequate legal defence.

Elsewhere in sub-Saharan Africa, especially in countries applying the English common law, the magistrate has powers to constitute a court (an *assize*) anywhere. The magistrate may travel to remote districts with a full complement of court staff (including an accounts assistant to be able to collect fines and bail bonds and provide receipts). Witnesses for all cases are summoned to be present. Cases are opened, heard, and judgment delivered before the *assize* is adjourned.

In Bangladesh, mobile courts operate in the capital, Dhaka, to conduct spot checks on safety standards in factories, hygiene standards in restaurants, and expiration dates on medicines sold in pharmacies.

In some of these countries, a “camp court” convenes in prisons (see feature box “Camp courts in India and Malawi” in chapter 11).

10.2.4 Screening the caseload

Where the courts are not functioning and the prisons are grossly overcrowded, there is usually little to gain by pursuing cases at the lower end of the criminal scale. This does not mean, however, that they should be dismissed. Instead, they can be dealt with in alternative ways. Some cases might be referred back to the customary law system (discussed in chapter 12); others might be dealt with through diversion away from the criminal justice system (see the following section, 10.2.5). The other cases not dealt with in alternative ways will be heard by the courts.

Advisors should work with justice agencies and consult with local advisors to develop a screening process that determines which cases are to be referred or diverted. A key step in setting up a screening process is reaching agreement among local and international actors on the criteria to be applied in deciding how to handle a case.

Paralegals screening the caseload of juveniles at the police station

Screening takes many forms and can be done by paralegals.

In Malawi, all juveniles under arrest are screened in a police station by a paralegal assigned to that station under an agreement between the paralegal organization and the police. The paralegals interview the youths according to a form agreed upon with police and social services. As a result, 77 per cent of juveniles have been “diverted” since 2004. The diversion here has been by way of police caution (and release to parents or guardians) or apology to the victim. In Malawi, paralegals also screen sentenced prisoners and link them up with community service officers when the prisoners satisfy the criteria for a community service order instead of a prison sentence.

In Malawi, Kenya, Uganda, Benin, Niger, and Bangladesh, paralegals screen detainees in prison. They list those who have overstayed or been held unnecessarily and refer them to the courts for action.

10.2.5 *Diversion from the formal justice system*

Diversion programmes vary from country to country. They may include formal police caution, reparation, restitution, conciliation, community service, or individual, family, or group therapy. These programmes are based on a restorative approach to justice. They hold the offender responsible for the harm done, and they take into account the interests of the victim, the offender, and society. The goal of these programmes is to respond in the most appropriate way to the damage done.

Specific criteria need to be developed to assess whether or not a case is suitable for diversion. Criteria might include the nature of the offence, whether the accused has admitted guilt and showed remorse, the age of the accused, whether the accused possesses any special skills that could benefit the community, and whether the victim has agreed to some form of mediation or conciliation. Any diversion procedures must comply with international human rights standards.

Recourse to a diversion programme can be decided before or after the disposal of the case. Before the matter comes to court, the police or the prosecutor will decide on the diversion programme. After the matter has been adjudicated, the judge or magistrate will make a diversion order as an alternative to a prison term. In most cases, it is the police or prosecutor who exercises discretionary power and deals with a case through a diversion programme. In some cases, diversion may be administered through the informal or customary justice system or by an NGO (see the feature box, “Diversion of Minor Cases through Mediation”)

The purpose of establishing objective criteria to assess eligibility for diversionary programmes is to make decisions regarding diversion efficiently. The more quickly minor cases can be diverted to alternative programmes, the more quickly serious cases can be brought to court. Further, establishing objective criteria helps ensure that decisions about diversion are individualized, proportionate, consistent, fair, and predictable.

Diversion of minor cases through mediation

The Danish Institute for Human Rights started a Village Mediation Programme in three districts in Malawi in 2008. The programme trained a corps of teachers, who in turn taught 350 literate and semi-literate village mediators fluent in the local language to assist their immediate communities with day-to-day disputes and build their capacity to divert minor cases out of the formal system. Paralegals link village mediators with the courts, police, and prison services to facilitate mutual referrals. Cases that are not resolved through mediation can still be taken to informal arbitration with chiefs or adjudication in the magistrate's court. This programme is being replicated in Sierra Leone (through Timap for Justice), in response to recommendations by the government and the Truth and Reconciliation Commission to deliver primary justice to its post-conflict communities by enabling them to handle their own disputes.

10.2.6 *Speeding up the process*

Lengthy pre-trial detention periods are usual in many developing countries. They are exacerbated in countries recovering from conflict, where the courts may not be functioning at all or are likely to be functioning at a much slower pace than usual. Successful methods of dealing with pre-trial detainees and prison overcrowding have been successfully implemented in some post-conflict countries, particularly through so-called case flow management committees or detention review committees (see the accompanying feature boxes).

Case Flow Management Committees in Liberia and elsewhere

The Case Flow Management Committee (CFMC) was established in Liberia early in 2004 by the Ministry of Justice, before the re-establishment of the prosecutorial attorney offices. The CFMC was developed as a policy response to the overcrowding of prisons—particularly in Monrovia—with pre-trial detainees charged with the commission of minor offences overstaying in custody. The committee reviews the individual files and status of the detainees and makes a monthly recommendation to the solicitor general to drop charges in appropriate cases.

In other countries, prisons have partnered with private legal aid providers from civil society to visit prison and interview the remand population. These civil society organizations not only draw up lists of prisoners (as per the example from Liberia) to refer to the local courts but also identify those who might be able to access bail and link up with their relatives outside to provide a bond or surety to ensure their future attendance at court.

Case management committees in Uganda and Bangladesh

In 1998, the court system in Uganda had an extremely large backlog of criminal and civil cases. In one court, during a nine-month period only one case was decided. This led to the appointment of a case management committee, with representatives drawn from all the justice agencies. The committee meetings were soon being held on a monthly basis, as it immediately became apparent that poor communication was largely to blame for the lengthy court delays. By tracking the progress of cases through the system from the very beginning, the committee was able to identify the major bottlenecks between the police, courts, and prisons. The committee initiated the practice of transferring cases from police to court immediately and having the available magistrate take evidence from witnesses in order to ensure fast disposal of simple cases. Another achievement was the development of a “joint simplified procedure” to discontinue prosecution of certain cases in which the accused had not been formally arrested. A large number of “deadwood” cases clogging up the administrative system of the judiciary in the pilot district of Masaka were disposed of in this manner.

The Uganda initiative has been replicated in East Africa (where its mechanisms are known variously as “court user committees” and “access to justice committees”). It is being piloted in Bangladesh (as “case coordination committees”) to improve interagency communication, cooperation, and coordination, and to tackle the problem of false or malicious prosecutions, which are estimated to make up 30 to 50 per cent of the caseload.

10.2.7 Establishing paralegal aid schemes to provide legal assistance

The rights of the accused, including the right to access to legal advice and assistance, need to be protected. Legal advice and assistance may be provided by trained non-lawyers, such as paralegals. Paralegal aid plans are discussed in chapter 7.

10.2.8 Institutional reform

The reform or improvement of the institutions of justice—in this case, the courts, prosecution service, and defence service—is a valuable programmatic option, one that may take time to bear fruit but which can have a significant long-term impact. Institutional reform of the police service is addressed in chapter 9; the information presented there is equally applicable to the reform of the courts, prosecution service and defence service.

10.2.9 Accountability and oversight of the justice system

Formal oversight mechanisms (such as a judicial services commission, national office of the ombudsperson, or a human rights commission) will likely not be in place immediately after conflict. They will take time to establish, but advisors should make them a priority over the long term, because they provide accountability of the courts, prosecution service, and the defence service. Longer-term efforts should likely also focus on the adoption of codes of ethics for judges, prosecutors, court staff and defence counsel.

Civil society oversight is as important as oversight from official government agencies. The establishment of local committees made up of justice agencies and local community representatives who meet regularly is a useful mechanism for managing the judicial caseload and reviewing the justice system in the locality. Examples of such initiatives are presented in section 7.4 of chapter 7.

10.2.10 Providing public information on justice

Improving lines of communication among the various criminal justice agencies is a good start when attempting to provide public information on justice. However, more needs to be done to inform the public at large and to engage them in the justice process. Rule of law advisors do not need to be media experts, but they do need to recruit the help of such experts in developing a media strategy tailored to the national or local context.

Radio Okapi: making the law accessible to the people

In the Democratic Republic of Congo, the UN radio station, Radio Okapi, helps to make the law accessible to ordinary people by broadcasting a series of debates that focus on the bill of rights chapter in the constitution and that feature leading local judicial, police, or other authorities. Radio Okapi also broadcasts programmes that discuss topics such as inheritance, marriage and divorce.

The radio station has developed theatre pieces on aspects of the justice system (these are very popular with listeners) and a series of programmes linking international human rights law to customary law in order to demonstrate the universality of human rights standards. The station also sends theatre troupes into the countryside to educate people on justice matters.

II. Detention and prisons reform

II.1 Introduction

Prison systems in post-conflict situations are generally characterized by “dilapidated facilities, non-existent or weak security, inadequate and dated legislation, poor conditions including inadequate basic services such as food, water, sanitation and health care, that result in violations of prisoners’ basic human rights, inadequate numbers of staff, outdated policy frameworks and a lack of coherence between the elements of the criminal justice system.”⁸⁹

In short, the prison system will likely have collapsed or be very weak. The role of an advisor faced with such a situation is, in the short term, to provide “a combination of strategic advisory support and backstopping of the system,”⁹⁰ rather than attempt to rebuild it. The focus in this chapter is on the kind of “strategic advisory support” that an advisor may bring to bear on the situation. This chapter also explains how advisors might harness and coordinate the resources available within the country to support the national authorities in ensuring that conditions of imprisonment are safe, secure and humane.

II.2 Assessing the situation

A number of assessment tools can be used to assess the prison system in a post-conflict State, including the *Criminal Justice Assessment Toolkit* produced by United Nations Office on Drugs and Crime (UNODC), which is discussed in chapter 4.⁹¹

A wide range of actors, both national and international, that have direct experience with the system should be canvassed during the assessment. Advisors must meet with prison authorities, national prison staff, and the line ministry (e.g., the ministry of the interior or the ministry of justice). Advisors should contact and seek cooperation with other organizations in the country that may have had recent access to detention centres and prisons. The International Committee of the Red Cross (ICRC) will almost certainly have been present

⁸⁹ United Nations Department of Peacekeeping Operations (UNDPKO), *Prison Support Guidance Manual* (2006), 1, <http://www.unrol.org/files/FinalPrisonGuidanceManual20April2006.pdf>.

⁹⁰ *Ibid.*, 15.

⁹¹ The International Centre for Prison Studies has produced *Guidance Notes on Prison Reform*, No. 2, *Getting Started: Doing a Planning Needs Assessment* (2004), available at <http://www.kcl.ac.uk/depsta/law/research/icps/downloads/gn2-pre-project-assessment.pdf>.

before, during, and after the conflict. Although ICRC delegates are bound by strict confidentiality rules, they may be able to provide a useful briefing on the general situation and the priorities that they are addressing. Others advisors will want to meet with include NGOs, and members of civil society, UN military observers, the UN Office of the High Commissioner for Human Rights, other UN agencies, bilateral donors, domestic faith-based groups, NGOs (including medical and humanitarian organizations), and members of civil society.

It is always useful to ask the same questions of different people, because knowledge and understanding can vary greatly. Advisors in this early stage often have a limited frame of reference and few tools with which to determine who is credible. The initial assessment should include the following topics.

11.2.1 Legal framework and applicable law

It is essential to identify the applicable domestic legislation at the outset. Advisors will need to identify the legal framework within which they are to operate and regional and international human rights instruments bearing on the treatment of prisoners. The assessment of the legal framework is discussed in chapter 8.

11.2.2 Prison practices and procedures

Advisors must develop a comprehensive knowledge of how the prisons are operating and, where prisons have collapsed and are to be re-established, find out how these were operating before the collapse. An advisor who does not understand this aspect will have great difficulty understanding his or her national counterparts' frameworks and will likely struggle to develop a fruitful relationship with the national staff and also find it difficult to develop effective strategies for encouraging compliance with applicable international standards and ensuring acceptance of advisory support.

Policies and procedures manuals may not be available. However, the observation of and discussion with prison staff and detainees may elicit the necessary information.

11.2.3 Prison facilities

This part of the assessment should identify the location of all prisons in the country, including military camps used as prisons, and indicate the presence (suspected or verified) of secret prisons, "ghost houses," or "irregular" places used as detention facilities (e.g., those operated by warlords or other armed groups). The assessment should describe which organization is responsible for each institution and whether a judicial process is in place by which persons are committed to prison, or whether they can be sent there at the discretion of a police or military officer, traditional authority, or politically powerful person. An assessment of prison conditions will also be necessary, which can be determined by prison visits, where feasible. Chapter 4 of the UNODC *Criminal Justice Assessment Toolkit*, discussed above, contains guidance on how to assess prison conditions.

11.2.4 Current prison capacity

Advisors should determine whether a mechanism is already in place to calculate how many people the country's prisons can accommodate. If possible, advisors should break this down further: male, female, juvenile, different security levels, multiple cell and single cell capacities, and special category prisoners including high-risk prisoners. Advisors should also find out whether there are institutions with increased security and institutions for mentally ill prisoners.

11.2.5 Status of prison facilities, supporting infrastructure and equipment

The physical office structures of prisons are usually in poor condition, and office equipment and supplies, communications equipment and prison vehicles (needed to transport prisoners to the courts or other prisons) limited or unavailable. An advisor's initial assessments may provide a general description of the facilities, but a detailed technical assessment should be undertaken as soon as possible. Ideally, advisors will be accompanied by a building engineer to enable realistic project plans to be developed for any short-term structural work that may be needed.

11.2.6 Size and profile of existing prison population

The accurate registration of prisoners is essential to ensure that prisoners do not get lost in the system and/or lose contact with their families. In order to determine the size and profile of the existing prison population, advisors should familiarize themselves with the prisoner register system in use and determine its accuracy. Advisors should seek out any statistical data on the number of persons detained in the State. In many post-conflict states, a prison register may not exist however. If none exists, the advisor can encourage and support the creation of a prisoner registration and data collection system in the short-term. The ICRC may also have information on the size of the prison population; indeed, the ICRC may be an invaluable source where no national statistics or no national system of registration exists.

An assessment of the prisoner profile should also include a review of the numbers and categories of vulnerable groups in prisons (e.g., women, children, mentally ill prisoners and older prisoners) and their locations.

11.2.7 Organizational structure

In post-conflict situations, the headquarters organization structure is often very weak. The prison department may be part of the ministry of interior, rather than the ministry of justice. The prison service needs to operate effectively as an organization based on sound principles of organizational management. The development of a coherent organizational structure, reporting lines and procedures may need to be developed, along with the capacity to manage a budget.

11.2.8 Number and profile of current and available staff

Advisors should attempt to ascertain how many staff are currently employed by the prison service and what their level of qualification is.

11.2.9 Training needs of current prison staff

Part of the process of building confidence between advisors and existing national staff consists of taking an interest in them and responding to their needs. Assessing the staff members' skills and experience at an early stage is a good way to start developing confidence. Although some staff may have many years of experience and a good practical experience of prison management, most are unlikely to have received adequate training—if any—especially on the implementation of international standards and special training corresponding to their roles. This process will identify appropriate training for staff. Later, a more detailed training needs analysis can be undertaken, and the results can inform the development of an in-depth, structured curriculum for prison staff. The issue of staff capacity development is discussed in greater detail in chapter 6.

11.2.10 Involvement of other international actors

A number of international agencies and NGOs are likely to be present on the ground. Those agencies and NGOs working on prison reform should be approached to ascertain what assistance they are currently providing or are intending to provide to prisoners, prisons and prison staff. Coordination and cooperation with these international actors will help to ensure that programmatic initiatives do not conflict or overlap. Advisors may consider contacting international NGOs and institutions that do not have a presence on the ground but can offer advice and support.⁹²

11.3 Establishing relationships with national authorities

Prisons are security institutions of the State. From the outset, advisors must work with the line ministry responsible and those charged with the administration of the prisons service. Establishing good relationships is essential if an advisor is to be effective. Advisors should request the appointment of a defined group to act as a focal point within the national prisons structure. This group, with which advisors should work closely, should consist of representatives from management (whether from headquarters or a prison); administration and support (whether from human resources, finance and administration, logistics and procurement or staff development and training); and operations.

The importance of engaging actively and effectively with national personnel in the prisons and government offices cannot be overstated as it is an important factor in ensuring national ownership. Establishing these relationships takes time, careful listening, and a

⁹² Penal Reform International (<http://www.penalreform.org>) and the International Centre for Prison Studies at King's College, London (<http://www.kcl.ac.uk>) are two such organizations.

willingness to learn about the cultural and organizational frameworks (both formal and informal) in place in the post-conflict State.

11.4 Short-term programmatic options

This section presents some programmatic options that advisors could support in the immediate post-conflict situation. It is important to act in the short term and to gain so-called quick wins (i.e., early successes). Short-term options do not need to be costly. Concrete results are possible in a short time and with relatively few resources. This can serve to nurture confidence, trust, and hope and plant the seeds for longer-term prison reform efforts. Many of these short-term initiatives may be classified as quick-impact projects (discussed in chapters 4 and 5). Several of the short-term measures set out here (e.g., training, mentoring, recruitment, vetting, study tours) may also be carried on in the longer term.

11.4.1 *Rehabilitating prison facilities*

In many instances, prisons and staff housing will need to be entirely rebuilt. In other instances, however, they can be rehabilitated. Prison rehabilitation may be funded by international donors. Advisors should point out that although there are no architectural blueprints for “model prisons,” any new or rehabilitated prison buildings must conform with applicable international human rights standards, which stipulate, among other things, the need for adequate ventilation and natural light, the numbers of toilets and shower unit for a given prison population, and the existence of an area for preparing and cooking food.⁹³ Advisors should also ensure that former “dark cells” and other punishment units within the prison are either adjusted to conform to international standards or removed entirely in the reconstruction.

11.4.2 *Providing for the basic needs of prisoners*

Improving sanitary facilities and ensuring prisoners’ access to water and adequate food should be the first priorities, in order to prevent disease, especially epidemics, which are prevalent in post-conflict situations. Where the government is unable to provide basic services (e.g., food, water, clothing, sanitation), international agencies present on the ground in each district may be able to render assistance. Practical guidance on improving access to water—and on a variety of other issues regarding improving prison conditions—can be found in the ICRC publication, *Water, Sanitation, Hygiene and Habitat in Prison* (2005).⁹⁴ Prisoners often depend on families for food and other basic necessities. Unless absolutely necessary because of security considerations, advisors should not discourage or bar families from providing this support until adequate alternative sources are established, which is likely to take time. It is unlikely, for instance, that any prison farm programme can

⁹³ *Making Standards Work* provides an authoritative commentary on the application of international human rights norms and standards to prisons and is available from Penal Reform International in a number of languages at <http://www.penalreform.org>.

⁹⁴ Online at <http://www.icrc.org/web/eng/siteeng0.nsf/html/p0823>.

be launched in the short term. However, planning for such a programme should start immediately, because prisons should aim to be as self-sufficient as possible.⁹⁵

An advisor should identify the system of health service delivery. Medical and other health services personnel may be employed directly by the prison system or through the ministry of health. The latter arrangement is recommended by the World Health Organization but if the former is in place it should be retained in the short term and steps taken to make it more effective. Proposing a new arrangement is likely to distract attention from ensuring that basic health services are provided; alternative models should be considered as part of the development of a longer-term strategic plan. Where health professionals are in short supply, advisors should approach international medical organizations in-country for advice and assistance in servicing prisoners' basic health needs (e.g., by training paramedics, conducting hygiene education and sanitation promotion courses for prison staff and prisoners, improving HIV/AIDS awareness).

Advisors should pay particular attention to those prisoners with special needs. The UNODC *Handbook on Prisoners with Special Needs*⁹⁶ can provide valuable guidance on the needs of prisoners with mental health issues, disabled prisoners, ethnic and racial minorities and indigenous prisoners, older prisoners, lesbian, gay and bisexual prisoners and prisoners under sentence of death. The UNODC *Handbook for Prison Managers and Policymakers on Women and Imprisonment*⁹⁷ addresses the needs of women prisoners specifically.

11.4.3 Vetting and recruitment

Where a prison system is still functioning after conflict, the staff-to-prisoner ratio is likely to be very low, and some of the personnel may not meet the requirements of a corrections officer and therefore subjected to vetting which may reduce the number even further. Vetting of prison service personnel is often conducted as part of transitional justice initiatives after conflict. It is not covered in this chapter. However, a complete discussion of vetting can be found in the Office of the High Commissioner for Human Rights' *Rule of Law Tools for Post-conflict States: Vetting—An Operational Framework*.⁹⁸

Additional staff will therefore need to be recruited. In some instances—as in Timor-Leste in 1999–2000—it may be possible to engage new recruits on temporary contracts. In other situations, the peace agreement may include provisions concerning the recruitment of prison personnel. Ideally, the individuals recruited will demonstrate “behaviour and values . . . consistent with the professional standards required of a Prison Service.”⁹⁹

⁹⁵ Recommendation 2 of the Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa (2002), http://www.achpr.org/english/declarations/declaration_ouagadougou_en.html, states, “Further recognition should be given to the reality that resources for imprisonment are severely limited and that therefore African prisons have to be as self-sufficient as possible. Governments should recognize, however, that they are ultimately responsible for ensuring that standards are maintained so that prisoners can live in dignity and health.” The declaration was adopted in November 2003 by the African Commission on Human and People's Rights.

⁹⁶ Available at: <http://www.unodc.org/documents/justice-and-prison-reform/Prisoners-with-special-needs.pdf>

⁹⁷ Available at: <http://www.unodc.org/documents/justice-and-prison-reform/women-and-imprisonment.pdf>

⁹⁸ Office of the High Commissioner for Human Rights, *Rule of Law Tools for Post-conflict States: Vetting—An Operational Framework*, <http://www.unhcr.org/refworld/category,POLICY,OHCHR,,,46cebed62,0.html>.

⁹⁹ UNDPKO, *Prison Support Guidance Manual* (2006), 31–32, <http://www.ru.unrol.org/files/FinalPrisonGuidanceManual20April2006.pdf>.

In some cases, it is challenging to find candidates who meet the minimum recruitment requirements. Therefore, it may be necessary to develop a pre-recruitment programme which once completed, will qualify candidates.

11.4.4 Training and mentoring

International prison or corrections advisors can provide structured initial induction and on-the-job training (or mentoring). The mentoring should be in support of a continuous training programme that is based on the initial (and any subsequent) training needs assessment. One of the best ways of providing training is by means of mobile training teams that visit different regions and the prisons located there. Mobile units are cost-effective, involving dispatching a small team of trainers to different locations rather than transporting large numbers of prison officers to a central location, where they will need to be accommodated and fed. Mobile units are also flexible. Standard short training modules should be developed and adopted by trainers so that they can mix classroom study of theory with its practical application (mentored by advisors) in each prison.

Training is necessary for all levels of prison staff, but priority should be given to the training of mid- and senior-level managers, because these are the officers who will determine the policies and procedures that will be implemented throughout a prison system and who will lead reform efforts.

11.4.5 Enhancing coordination between the prisons and other justice agencies

Supporting enhanced communication, coordination, and joint problem-solving between the prisons, the courts, the prosecution service, civil society and other stakeholders early on is valuable. It can not only lay the groundwork and build the necessary relationships to sustain reform in the longer term, but also provide a forum for creative problem-solving in the short term. Local stakeholders are often best placed to devise the most effective solutions to local problems concerning prisons. Chapter 7 discusses cross-sector coordination in more detail.

11.4.6 Assistance to vulnerable groups

Projects focusing on vulnerable groups in the criminal justice system should be prioritized in the short term, given that their needs are greater in post-conflict situations. Staff should undergo anti-discrimination training and be made more aware of the specific rights and needs of vulnerable groups such as women, children, prisoners with mental illnesses, older prisoners and disabled prisoners. Reference should be made to relevant international standards pertaining to vulnerable groups, many of which are set out in chapter 5. Standards such as the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* and the *Standard Minimum Rules for the Administration of Juvenile Justice* should be looked at with regard to children in prison. Other useful tools on

improving the conditions of vulnerable groups in prisons are the UNODC's *Handbook on Prisoners with Special Needs* and *Handbook for Prison Managers and Policymakers on Women and Imprisonment*.¹⁰⁰

11.4.7 Pre-trial diversion

Slowing the rate of entry into prisons through both pre-trial diversion options (i.e., increased use of bail and alternatives to imprisonment for convicted persons) may be useful. Although the introduction of alternatives to prison may seem ambitious in the early days after conflict, it deserves serious consideration. Detaining people charged with minor offences alongside people charged with serious acts of violence is neither in the interests of the person detained nor in compliance with international standards. The UNODC handbook entitled *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment* is a useful resource on pre-trial diversion.¹⁰¹ Pre-trial diversion may be particularly appropriate for children as international human rights law states that “detention should be a measure of last resort”.¹⁰²

11.4.8 External study tours

Study tours bring prison officials from a post-conflict country to another country to meet with local prison officials and to observe the operation of another prison system. Study tours can be a highly effective way of introducing prison officers and government officials to good practices developed elsewhere but potentially applicable to the post-conflict country. Study tours need to be carefully planned, highly focused, short, and—crucially—involve the right people (i.e., a mix of influential decision makers and those who implement policy).

11.5 Longer-term programmatic options

This section presents some examples of effective long-term programmatic initiatives in the area of prison reform. Ideally, these longer-term initiatives will build upon the short-term measures just discussed. These longer-term initiatives should ideally be grounded in a national ownership strategy, as discussed in chapter 4. The options are largely based on local partnerships and on the establishment of close communication between criminal justice agencies and the local population.

¹⁰⁰ United Nations Office on Drugs and Crime, *Handbook on Prisoners with Special Needs* (New York: United Nations, 2009), <http://www.unodc.org/documents/justice-and-prison-reform/Prisoners-with-special-needs.pdf>; United Nations Office on Drugs and Crime, *Handbook for Prison Managers and Policymakers on Women and Imprisonment*, (New York: United Nations, 2008), <http://www.unodc.org/documents/justice-and-prison-reform/women-and-imprisonment.pdf>.

¹⁰¹ United Nations Office on Drugs and Crime, *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment* (New York: United Nations, 2007), http://www.unodc.org/pdf/criminal_justice/07-80478_ebook.pdf.

¹⁰² United Nations Convention on the Rights of the Child, article 37(b).

11.5.1 *Institutional reform*

International instruments recommend that prison management be the responsibility of the ministry of justice, or at least a ministry other than the ministry of interior. In some countries, however, the ministry of interior (or its equivalent) does manage prisons. In other countries, prisons are managed by two or three ministries—an arrangement that fragments planning, budgeting, and the operation of the service as a whole.

The formal organizational structures are likely to have broken down during the conflict. In the long-term, advisors should encourage the re-establishment of an organizational structure that provides for the range of services necessary for the basic functioning of the prison system. Significant planning, followed by a lengthy period of legislative, operational, funding, and staffing changes, is required to implement such large structural changes. The elements of institutional reform are addressed in chapter 9 as they apply to policing; the same principles apply to the reform of prisons.

11.5.2 *Providing inmates with access to legal advice*

The court system unlike to have the capacity to hear many cases, and those cases it does hear will often be subject to lengthy delays. Prisoners may well become increasingly restive as they remain in custody with no clarity about the progress of their cases; in some cases, prisoners have rioted over the lack of such progress. Legal aid services are likely to be minimal, and most pre-trial detainees will be unrepresented. Paralegal aid programmes (discussed in chapter 7) can provide inmates with legal advice.

11.5.3 *Providing inmates with “access to courts”*

In a number of countries, in order to enhance the inmates’ “access to courts,” the notion of “camp courts”—meaning courts that from time to time relocate to a prison to hear cases—has been pioneered to screen the remand population and accelerate the handling of at least some cases.

Camp courts in India and Malawi

In Bihar, India, judicial officials periodically visit prisons to review cases and dispense rulings on the spot. These “camp courts” handle only matters involving minor offenders. Camp courts are seen as a way to reduce overcrowding and speed up the delivery of justice.

In Malawi, encouraged by paralegals, magistrates have applied this practice. They visit prison to screen the pre-trial caseload, weed out those who are there unlawfully or unnecessarily, and fix dates for trial. The exercise has reduced the caseload and helped to restore prisoners’ confidence in the justice system. Camp courts serve to defuse tension by demonstrating to prisoners that they have not been forgotten.

11.5.4 Establishing a register and filing system

Advisors can help national counterparts to establish and maintain accurate prison registers and establish individual file systems, including a “return to court” register. Advisors can assist prison management in compiling lists of pre-trial detainees due in court for either hearing or review of pre-trial detention and in submitting these lists to the courts on a weekly basis. Additionally, advisors can work with local prison management to review current bed allocation arrangements and propose arrangements that more closely reflect international human rights standards (e.g., standards on the separation of pre-trial prisoners from convicted prisoners and the separation of juveniles from adults). The UNODC *Handbook on Prisoner File Management* is a useful tool in establishing a register and filing system.¹⁰³

11.5.5 Updating the prisoner assessment and classification system

Advisors may work with prison administrations to review the current prisoner assessment and classification system. Where no clear system exists, advisors may collaborate with prison administrations to develop a system that, at least, identifies and separates high-risk from low-risk prisoners.

11.5.6 Legal reform of prison legislation and rules

Administrative decrees and patchwork amendments to the governing legislation may be in place for a transition period. However, after this relatively short transition period, the prison service and its staff will need a clear and practical legal framework within which to operate. (Law reform is discussed in greater detail in chapter 8.) In tackling reform of prison legislation, advisors may find the Model Detention Act in the *Model Codes for Post-Conflict Criminal Justice* (outlined in chapter 8) a useful tool. Another useful resource, developed by Penal Reform International, is *A Compendium of Comparative Prison Legislation*. This work is designed to assist legislators, government officials, prison administrators and all those interested in penal reform with positive examples of national laws around the world framed within international and regional standards.¹⁰⁴

11.5.7 Supporting prison self-sufficiency and growing food for inmates

Food is almost always the largest operating budget item for a prison. Although prison farms may be a project for the future, horticultural activities on available land can start at once. Local people know what to plant, and international assistance is best provided through sharing contemporary management techniques that enable prisons to grow food more efficiently.

¹⁰³ United Nations Office on Drugs and Crime, *Handbook on Prisoner File Management* (United Nations, New York, 2008), http://www.unodc.org/documents/justice-and-prison-reform/Prison_management_handbook.pdf.

¹⁰⁴ See Penal Reform International, *Compendium of Comparative Prison Legislation* (London: Penal Reform International, 2008), <http://www.penalreform.org/compendium-of-comparative-prison-legislation.html>.

Prison farms in Malawi

Penal Reform International worked closely with the Malawi Prisons Service to rehabilitate and expand the prison farms from 1997 to 2004. The model that evolved relied on maximizing the use of manpower so that as many prisoners as possible could be employed and minimizing the use of machinery; training and good management; and an independent financial mechanism (the treasury may not have the money to disburse when the planting season arrives). The programme was visited by prison representatives from East Africa, the Great Lakes (Rwanda), and West Africa. Films about prison farms in Africa, as well as other materials, can be obtained at www.penalreform.org.

In addition to prison farms, other programmes can be developed to ensure that the prison becomes self-sufficient, including soap making and tailoring, which can supply prisoners with soap and clothing.

11.5.8 Addressing prison overcrowding

Countries all over the world—rich and poor alike—have congested prisons. A range of solutions to the problem may be applied, including alternative dispute resolution mechanisms at the local level in appropriate cases (see chapter 12); simple diversion schemes used at the point of arrest or during court proceedings (see chapter 10); and sanctions that are alternatives to imprisonment. It should be noted that many of the problems that lead to prison overcrowding arise because of challenges elsewhere in the criminal justice system (and not just from prisons). Therefore, it is important that all the criminal justice components collaborate and are involved in finding solutions to address prison overcrowding.

11.5.9 Accountability and oversight

Although a government may have its own audit teams, the potential for independent inspection mechanisms should also exist. In many countries, a judge is assigned to chair a prison's inspectorate. In others, a body of prison visitors is allowed access to conduct periodic inspections. Advisors need to discuss with prison authorities the benefits of such mechanisms as a potentially powerful advocacy tool for prison reform and the improvement of prison conditions across the board. Regular inspection of prisons is a requirement of the United Nations' Standard Minimum Rules for the Treatment of Prisoners (Rule 55). Prison inspections are essential to prevent abuse and reduce corruption, both of which are likely to be widespread in post-conflict countries.

12. Working with customary and non-State systems of justice

12.1 Introduction

Many of the criminal justice reform strategies discussed in previous chapters are largely focused on building and strengthening the formal justice institutions of the State. In many societies, however, these formal institutions are—and in some cases, have always been—very limited in their reach. Instead, the vast majority of the local population rely on customary or non-State justice systems to resolve all matters of dispute, including crime. It has been estimated that such systems are the primary means of access to justice for 80 per cent of the world's population.

A couple of points are worth mentioning at the outset of this chapter about working with these systems. First, an advisor must take into account the full topography of the justice landscape. Too often, strategies are focused solely on the formal institutions, reflecting a lack of awareness of the customary or non-State justice systems, a reluctance to engage with unfamiliar systems that may contravene international human rights norms, or an assumption that they should simply go out of existence and be replaced by the State system. This approach is problematic for a number of reasons. At best, it may lead to reform efforts that risk being irrelevant to most of the population; at worst, it may exacerbate tensions between central authorities and more local bases of power.

Second, in order to take customary and non-State justice systems into account effectively, they must be assessed contextually and empirically. These systems need to be studied as part of the political and socio-cultural environments in which they operate so as to understand their internal logic, the perceptions of the people they serve, and the potential consequences of different reform strategies. Moreover, they should be assessed not through a comparison with an idealized formal system, but through an examination of the actual practice and experience of the population with both the formal system and the customary or non-State justice systems.

The overall goal should be twofold: to increase access to justice, and to do so in a manner that is realistic, considered legitimate, and that meets the justice demands of the population.

12.2 Customary justice systems

Customary justice systems are as varied as the cultures, tribes, and communities that produce them. They vary not only from country to country but also from community to

community. Southern Sudan alone is estimated to have over 60 different systems of customary law. Nevertheless, many of these systems share general characteristics and principles—a fact that becomes very evident when one compares them with formal Western-based criminal justice systems.

Customary law does not operate as an isolated concept that rises above culture, identity and social relations. To the contrary, customary law reflects and is deeply embedded in the particular belief system and social structure of the community. The most important implication of this is that customary law should not be seen as an informal and problematic substitute for a formal system that simply needs to be brought up to international standards, but as an alternative paradigm based on a different internal logic. This in turn has implications for the manner in which crime is defined and resolved.

12.3 General features of customary justice systems

While this section describes general features of customary justice systems as they relate to crime, it cannot speak to all of the varieties, exceptions, and particularities of each system, and cannot substitute for contextual assessments as described above.

12.3.1 The nature of crime

Customary systems do not necessarily distinguish between criminal and civil wrongs. Such systems come into play when a wrong of any sort is committed that disrupts the social order in the community. Thus, for instance, in communities that value social relations more highly than worldly objects, adultery may be considered an offence worse than theft.

Often, a wrong committed against an individual victim, such as cattle theft or bodily harm, is considered a wrong against the victim's immediate family, larger kinship group, or even the whole community, giving this larger group an important stake in the outcome. Moreover, guilt may be associated not only with the perpetrator but also with his or her larger social group. In some communities, the victimized group has an obligation to avenge the wrong. In Afghanistan among the Pashtun, for example, customary mechanisms were developed in order to provide an acceptable alternative to this obligation of revenge.

Some communities recognize a socio-spiritual dimension to wrongdoing, which may create a category of “crime” not recognized by western systems. For example, in Liberia and Timor-Leste, when something bad happens—perhaps drought or an outbreak of illness—it is assumed that someone has used sorcery or witchcraft to cause the harm. Such beliefs tend to be deeply ingrained, and therefore not addressing this “crime” can create deep insecurity within the community.

A case of sorcery

An Australian CIVPOL (UN civilian police) officer was asked by village elders in Timor-Leste to play the role of an independent mediator in the resolution of sorcery accusations. In response to the death of an infant, the child's father (A) accused another man (B) of "sucking the soul" of the child, and of attempting to kill A using magic. B, a well-known magician and the owner of a special tree root that enabled him to make his magic stronger, rejected the allegation that he had cast a spell on the child, but admitted that he was sharpening his machete in preparation for killing A in response to the accusation. Other villagers claimed that while B was innocent of killing the child, B was now casting spells against A in response to the accusation. It was said that B had recently clubbed and burnt a dog to enhance his magic, and sent another dog to bite A, who was now feeling ill as a consequence. In the negotiated settlement to the dispute, the magic tree roots were burnt by the CIVPOL officer (assuming the role of an independent outsider) at the request of all villagers (including B), and this was followed by a reconciliation of both parties to the dispute, after which the matter was considered settled.

Source: Written correspondence between the author of this chapter, Deborah Isser, and the Australian CIVPOL officer, November 2002.

12.3.2 *The dispute resolution process*

Generally, crimes, like any wrong, are managed as a dispute between two parties: the perpetrator and the victim (and their respective larger social groups). There is a tendency to prefer voluntary mediation and an agreed-upon settlement, but some communities will adjudicate matters with varying degrees of coercive power.

In some communities, the mediators or arbitrators are chosen by the individual parties on an ad hoc basis; in others, they may be the chiefs or other official traditional authorities; in still others, they may be specially trained "jurists." A common requirement is that the adjudicator be well-respected and have extensive knowledge of the community history, social norms, and laws.

The process is generally flexible and, compared with the formal justice system, proximate, low cost, speedy, oral, in the local language, and done without legal representation. Generally, it is geared at discovering the truth and finding an appropriate settlement.

Methods for discovering the truth can include investigations, questioning of the parties and witnesses, and the taking of oaths. Some cases involve consultation with spiritual authorities or the use of trial-by-ordeal methods, which can include the administering of poison to the accused, as in Liberia.

Methods of dispute resolution

The Pashtun of Afghanistan traditionally resolve their disputes by convening a *jirga*, an ad hoc assembly of mediators selected by the disputants. The process is essentially a mediation, and the resolution requires the consent of both parties. While there are no official enforcement mechanisms, social pressure can act as a significant guarantee of enforcement.

In Mozambique, disputes are brought to traditional authorities, who may consult with elders or ritual authorities. A mediated settlement is the preferred outcome, although the traditional authorities may also pronounce a decision.

In Southern Sudan, a system of chiefs courts, created initially under British colonial rule, is recognized by the State. These courts are presided over by chiefs, who are sometimes elected and sometimes inherit the position. The preference in court is for the parties to agree to a settlement, but chiefs will adjudicate if that is not possible. They sometimes call in police, or have their own enforcers to enforce judgements.

Trial by ordeal in Liberia

In certain parts of Liberia, the use of trial by ordeal is a fairly common method for determining guilt or innocence. The practice varies considerably. In some instances, suspects are forced to ingest a poison derived from tree bark, known as “sassywood”; an innocent person is expected to survive unscathed, while the guilty will fall ill. Other methods include making suspects take an oath or eat a clump of dirt—acts that may seem benign but that are believed to inflict physical harm on a person who lies while doing them.

The solicitor general of Liberia has been actively campaigning to end the use of trial by ordeal. While many support this as necessary to end an abhorrent practice that violates human rights, a significant portion of the population considers the banning of trial by ordeal a serious problem. According to one man in Nimba county: “The abolition of the Sassywood from our traditional people is harming us greatly because people take it as an opportunity to damage others’ lives. Because precedence is not being set by our traditional people, so the criminal rate increases greatly. So in short, the witches are very happy because there is no justice on them.”

Source: Interview conducted by United States Institute of Peace research team in Nimba County, Liberia, in June 2008.

12.3.3 Forms of resolution

Because of the inseparability of customary law and the social order, customary justice systems tend to be restorative, rather than punitive, in nature. The aim of resolving crime is generally to correct the disruption of the social order and allow the community to continue living in peace. This can involve several elements. Many systems emphasize admission and apology on the part of the perpetrator.

Compensation of the victim is necessary to undo the harm and put the parties back in appropriate social relations. Some communities have prescribed values for repairing various types of harm, which may change depending on the kinship relationship of the parties. Often, it is the perpetrator's extended social group that is responsible for payment of the compensation to the victim's extended social group. In some communities, the perpetrator may also be required to perform community service.

A clash of paradigms

Given the different conceptions of what constitutes a just result, formal penal sanctions applied to people who are accustomed to customary norms may have unintended consequences, as demonstrated in these examples from Timor-Leste:

"A young man in Oecussi was brought before a meeting of traditional leaders for impregnating a young woman and refusing to marry her. When asked to pay one traditional necklace of US\$100 in value, the man refused, saying he would prefer to go to jail. Other accounts confirm the view that jail is seen by many as 'an easy way out,' whereby perpetrators can eat, sleep and avoid paying compensation. The general perception seems that a detainee becomes 'fat,' which normally is a privilege of the rich. Moreover, if the individual perpetrator is taken to prison, the families—also wound up in the social tensions—remain with the unsolved problem. For the community such a case can have serious consequences. The possibility that increasing numbers of young men may be sent to prison has clear dangers, particularly where they are incarcerated before they have reconciled with their victims, and therefore may not be in a position to freely return home upon the completion of their sentences."

Source: Tanja Chopra and Christian Ranheim, "Local-Level Justice in a Post-Conflict Scenario: Lessons from East Timor," in *The Role of Customary Justice in Post-Conflict Societies*, ed. Deborah H. Isser (Washington, D.C.: United States Institute of Peace, forthcoming).

Some form of reconciliation is often involved to seal the deal and prevent long-standing feuds. The precise form of reconciliation is incredibly varied. It may involve a ceremony to invoke ancestral spirits, as in Timor-Leste and Mozambique, a symbolic act such as the parties eating the "kola nut" together, as in Liberia, or a coercive measure such as the families forcing a marriage between the perpetrator and victim.

The importance of reconciliation in Timor-Leste

"One of the most important stages following the agreement on compensation for a crime and the payment or execution of the punishment, is reconciliation. Community members who have been entangled in a conflict, now have to reconcile to emphasize that the conflict is over and that both sides are now entering a peaceful relationship again. There cannot be a winner and a loser left behind in the same village. This is crucial for the survival of the community. If there is no reconciliation, tension can persist and threaten the community at a later stage. A reconciliation ceremony is therefore held. It involves the ritual authorities and hence ensures ancestral participation in the resolution. This supernatural involvement prevents

community members from exercising revenge at a later point, because once reconciliation has been conducted under the eyes of the ancestors, breach of the agreement can lead to ancestral sanctions.”

Source: Tanja Chopra, Christian Ranheim, and Rod Nixon, “Local-Level Justice in a Post-Conflict Scenario: Lessons from East Timor,” in *The Role of Customary Justice in Post-Conflict Societies*, ed. Deborah H. Isser (Washington, DC: United States Institute of Peace, forthcoming).

Reconciliation in Liberia

In a case of accidental killing in Liberia, the victim’s family brought the case to the circuit court. The uncle of the deceased, an elder, called upon the two families to resolve the matter out of court. The victim’s family agreed, but wanted their court expenses to be paid back. The perpetrator’s family did not have the funds. As recounted by the elder, the matter was resolved as follows: “So I called my people and explained to them the response from the perpetrator’s family, that they are unable to pay back our expenses. It was finally decided . . . let them provide one cattle to make a sacrifice for the spirit of the deceased to depart in peace. So they brought the cattle and we made the sacrifice. We accepted their appeal and ate together. We also knock glasses together which proves true reconciliation.”

Source: Interview conducted by United States Institute of Peace research team in Nimba County, Liberia, in June 2008.

Some customary systems also incorporate various forms of punitive sanction, including shaming the perpetrator or corporal punishment. In the most extreme cases, where redemption is not seen as a possibility, the perpetrator, and sometimes his or her family, may be ostracized or banished from the community altogether. The use of prison or detention is generally not a feature of customary systems, but is used in practice in a limited number of communities.

12.4 Limitations of customary justice systems

Customary justice systems also share a common set of limitations regarding their legitimacy to manage crime and their ability to do so. While these systems should not be ignored or dismissed, they should also not be idealized.

The first limitation that bears mention stems from the very nature of customary justice systems. As reflections of the values and social order of the community, customary justice systems are designed to preserve the same. Their reach is thus generally limited to the constituents of the community that subscribe to those norms. Customary justice systems are often powerless against crime that has an extra-community dimension, for example, organized crime, drug trafficking, and even ordinary crime committed by individuals or groups that do not consider themselves bound by communal norms. This is a particular problem for countries emerging from conflict, as mass population movement, social

dislocation, and the availability of arms may significantly erode the effectiveness of customary justice systems.

A second, related limitation is that customary justice systems are generally designed to preserve and perpetuate social norms and traditional power structures—usually patriarchal ones that discriminate against women and other vulnerable groups. This, and other features, including collective responsibility, the criminalization of “witchcraft,” use of methods such as trial by ordeal and corporal punishment, and the practice of exchanging girls as compensation represent violations of international standards and raise obvious humanitarian concerns.

A third limitation is that customary justice systems are never pure expressions of community values and traditions, being subject to all sorts of external influences. In many former colonial societies that experienced some form of indirect rule, traditional leaders may have been exploited and/or elevated above internal communal accountability mechanisms. In conflict-ridden societies, customary justice systems may have been taken over by local militias. These and other dynamics may result in severe distortions of the traditional paradigm.

12.5 Relationship with the formal criminal justice system

Customary justice systems do not operate in complete isolation: there is invariably a history of intersection of some form or other with the formal justice system. Understanding these historical relations, in addition to the current manner in which the systems relate, is critical to devising effective criminal justice strategies. In some countries, the State has a history of deliberate trying to suppress customary justice. In others—such as Afghanistan and Timor-Leste—the two systems have for centuries co-existed in a careful balance between State power and local autonomy. In Sudan and Liberia, the customary justice system is formally recognized and integrated into the formal system.

Yet, in all of these cases there are common dilemmas related to the future of relations between formal and customary justice systems. One of the most difficult to resolve is how to determine the appropriate degree of integration of the two systems. The spectrum of possibilities ranges from full recognition of legal pluralism, where the systems essentially function in parallel, to a uniform system of justice that prohibits handling crime outside of the formal justice system. In between are various models of integration, including a limited jurisdiction for customary justice systems—usually limited to petty crime; recognition of customary resolutions as a legitimate form of out-of-court settlement; or incorporation of customary courts as the lowest tier of the formal judiciary.

A related dilemma is how to reconcile the very different paradigms and values underlying the customary and formal systems. A variety of models try to do this. Some incorporate into the penal code customary principles of compensation in lieu of jail time; others use customary reconciliation mechanisms in addition to State-imposed punishment. The trick is to try to find a way of respecting the State prerogative in criminal justice while resolving the dispute effectively in the eyes of the community.

These choices should be made with due regard for realistic conditions on the ground. In Liberia, for example, State law prohibits customary authorities from handling serious crime. Chiefs refrain from resolving criminal cases for fear of being prosecuted themselves, yet the formal justice system is far from capable of managing crime. The result is a rise in criminality that goes unchecked, and increased resort to self-help or mob justice.

The form of integration also has a strong political message: the degree of recognition and space given to customary justice reflects a vision of society and national identity. It further has potentially significant implications for relative power dynamics and for the extent to which local populations consider the State to be legitimate. It should thus be developed gradually and subject to an inclusive, consultative process.

12.6 Programmatic options

Those trying to design programmatic options for customary justice systems are faced with a very difficult task. Such systems are highly localized and contextual by nature, and thus demand customized approaches. Furthermore, the international community as a whole has relatively little experience of working with them, which makes it hard for advisors to draw lessons about what programmes have proved effective in the past. With these caveats in mind, this section focuses on two core aspects of criminal justice reform: the immediate imperative of improving access to justice, and the longer-term effort of justice-sector reform.

In both cases, the first step must be to dedicate resources to assessing the customary justice systems. As emphasized throughout this chapter, such an assessment must be contextual and empirical, and should seek to understand the following aspects:

- The internal logic of the customary system, which includes understanding the socio-cultural context in which it operates, and internal accountability mechanisms
- The manner in which it resolves criminal cases and the types of resolutions it reaches
- The types of cases it is capable of solving, and those beyond its reach
- The degree of support and legitimacy it enjoys among the people it serves, relative to that enjoyed by the formal system
- The nature of practices that violate formal laws and international norms
- The relationship between the customary and formal systems from a historical and political perspective

12.6.1 Immediate access to justice

Where the formal system has limited reach, advisors should consider ways to engage with customary justice systems to improve the experience of the population in criminal justice. Programmatic options might include strengthening accountability, strengthening links to the formal system, and mitigating harmful practices.

Strengthening accountability. Strengthening the accountability of customary justice systems to the communities they serve might involve the following types of activities:

- Restoring internal accountability mechanisms, such as methods for selecting customary justice authorities and the possibility of appeal to higher authorities, where such mechanisms have been distorted
- Training customary justice authorities in mediation techniques and familiarizing them with formal law and international standards
- Empowering parties to criminal disputes to insist on just results by making them aware of their rights, both under customary and formal law, or training community members to help advocate for women and vulnerable people
- Encouraging the recording of cases and their resolution so as to promote consistency of decisions and provide a basis for appeal

Improving linkages to the formal system. While resolving the relationship between the customary and the formal criminal justice systems is a question for the longer term, it may be possible to improve matters on a local level in the immediate term. Programmatic options might include:

- Working with customary authorities and State actors on a local level to set out appropriate criteria for determining when criminal matters might be left to customary authorities so as to avoid overlapping jurisdiction and double jeopardy
- Working with customary authorities, State actors, and civil society to incorporate restorative principles of compensation and reconciliation in State-prosecuted criminal cases

Timor-Leste: determining jurisdiction over criminal matters

During the UN administration of Timor-Leste, a CIVPOL officer in Baucau, in consultation with local village chiefs, developed the following criteria for determining whether an offence could be handled by the traditional justice system:

- The offence is of a minor nature, such as a simple assault with no permanent injuries to the victim or a “minor” theft without violence
- The victim requests traditional justice as a method of resolving the incident
- No coercion, threat, or violence is used by any person to encourage the victim to suggest or accept traditional justice
- The suspect admits committing the offence
- The suspect has little or no previous criminal history for the same or similar offence
- The victim and suspect consent to making a written agreement providing details of the resolution to the incident
- Police believe that traditional justice is the appropriate resolution for this incident

The prosecutor accepted this system and required that traditional justice resolutions be documented and filed in order to prevent further investigation or prosecution where matters had already been settled locally.

Source: Tanja Chopra, Christian Ranheim, and Rod Nixon, "Local-Level Justice in a Post-Conflict Scenario: Lessons from East Timor," in *The Role of Customary Justice in Post-Conflict Societies*, ed. Deborah H. Isser (Washington, DC: United States Institute of Peace, forthcoming).

Mitigating harmful practices. One of the more challenging issues is how to bring customary justice systems in line with international human rights norms and standards. Top-down prohibitions tend to be ineffective at best and counterproductive at worst. While developing progressive legislation is a positive step, it is important not to overestimate the ability of law to change deep-seated beliefs and cultural practices. Programmatic options should be aimed at protecting the vulnerable and promoting change from within, such as by:

- Working with communities to encourage the development of culturally acceptable alternatives to harmful practices; and
- Developing meaningful alternatives to customary justice for those who are victims of harmful practices and violations of international standards by these systems, for example, by providing legal aid and additional resources to enable them to access the formal system. This is discussed more fully in chapters 7 and 10.

Somalia: dialogue on harmful practices

The Danish Refugee Council conducted a series of dialogues with elders and community leaders from five different clans in the Somaliland region of Somalia aimed at modifying aspects of the local customary law, known as *xeer*, that were contradictory to basic concepts of fairness, as enshrined in both sharia and international human rights standards. Participants issued a declaration modifying local *xeer* with regard to revenge killing and forced marriage of a widow to her dead husband's brother.

Source: Andre le Sage, "Stateless Justice in Somalia: Formal and Informal Rule of Law Initiatives" (prepared for the Centre for Humanitarian Dialogue, the United States Institute of Peace, and the Fletcher School, October 2004).

12.6.2 Longer-term justice reform

Over the longer term, advisors should aim to promote a constructive process of engagement between the formal and customary justice systems to enable well-informed and widely acceptable decisions to be made regarding their integration. Often, the two systems are pitted against each other. From the perspective of many actors in the formal system, the customary system is anachronistic and primitive and should simply be phased out. From the perspective of many constituents of the customary system, the formal system is an unwanted intrusion on their values—an intrusion that is especially resented where

there is a history of tension between the central State and the periphery. In order to avoid eroding the legitimacy of the formal system in the eyes of much of the population, programmatic options should seek to establish a constructive relationship between the two systems and an inclusive process for determining the role of the customary system in the future. Steps towards this goal might include:

- Promoting dialogue between customary authorities, the local population, and formal-system actors to promote mutual understanding and respect, to identify problems in the relationship between the formal and customary system, and to design potential solutions;
- Ensuring that the policymaking process is informed not only by legal ideals but also by the realities on the ground and potential consequences of various policy options; and
- Drawing on comparative examples from other countries that have struggled with the integration of the formal and customary systems to help design possible models of integration.

Dialogue between the State and non-State justice systems

Following empirical research on the traditional dispute resolution system in Afghanistan, the United States Institute of Peace (USIP) organized a series of regional dialogues between formal and informal justice actors, followed by a national conference in Kabul bringing together traditional leaders with leading justice officials. In the wake of the conference, USIP and the UN mission in Afghanistan worked with the Ministry of Justice on a policy of recognition and engagement with the traditional justice system.

13. Promoting a culture of lawfulness

13.1 Introduction

Long-term impact and change in the criminal justice sphere can be achieved only when a culture emerges that respects, demands, and supports the rule of law. The development and maintenance of a “culture of lawfulness” or a “culture of rule of law” is a long-term, never-ending process that must be nurtured and constantly evaluated as circumstances change. No nation can secure and sustain a culture of lawfulness without constant vigilance.

Advisors should be aware from the outset that this is not a process that can easily happen. On the contrary, it demands the commitment of both State institutions and non-State local actors. In a way, a culture of lawfulness presupposes a new societal and political arrangement that organizes itself under clear governance guidelines and that rejects violence, exclusion, crime, and impunity.¹⁰⁵

13.2 Understanding the culture of lawfulness

Post-conflict States are commonly defined by the absence of a culture of lawfulness. Formal laws may not exist; where they do, they may not be based on international human rights standards; and even if they are based nominally on such standards, human rights may not be respected in practice. Justice in the broadest sense may be absent, and in the worst cases a culture of impunity and violence may exist. In its most visible form, impunity holds sway in a society when high-profile, serious offenders, who were or are involved in well-known criminal activities, circulate freely within the community, hold government positions, or play significant roles within the justice system.

“A ‘culture of lawfulness’ exists,” notes Roy Godson “when the dominant or mainstream culture, ethos, or mindset within a society supports the application of laws to societal activities and interactions, and believes that those laws should be applied without regard to an individual’s family, ethnicity, race, gender, and political or other status within the society. The presence of a culture of lawfulness does not mean that every individual in that society believes in the feasibility or even the desirability of the rule of law. Rather, [it means] that the average person believes that legal norms are a fundamental part of justice

¹⁰⁵ For more information on promoting a culture of lawfulness, see the work of the National Strategy Information Center at <http://www.strategycenter.org/>.

or can be used to attain justice, and that the systems employing those norms can enhance the quality of life of individuals and of society as a whole.”¹⁰⁶

13.3 Fostering a culture of lawfulness

Criminal justice reform programmes have traditionally relied on institutional strengthening and legal reform to respond to the demands brought by post-conflict environments and societies. Such reforms are indeed necessary, but by themselves they are inadequate to bring about a functioning criminal justice system. They constitute only one part of the equation. Another, complementary part needs to be factored into the equation in order for a culture of lawfulness to emerge and flourish. Champions of the process of developing a culture of lawfulness use the metaphor of the *two wheels of the cart* to illustrate this, noting that “one is the wheel of law enforcement, the second the wheel of education and culture. Both wheels always have to turn together and at the same speed if we want the cart to move forward rather than keep on turning about its own axis.”¹⁰⁷

In order to cultivate a culture of lawfulness, a broad spectrum of society needs to be involved. A culture of lawfulness presupposes that even when “[g]overnment may have a lead role in providing a lawful environment for the citizenry, civic, religious, educational, media, business, labor, cultural and social organizations at all levels of society have important roles to play.”¹⁰⁸ These different sectors of society must not only be mobilized but also work synergistically if cultural change is to occur on the scale required to usher in a culture of lawfulness. Four sectors, or “pillars,” have critical roles to play: educational institutions; centres of moral authority; mass media and popular culture; and education of criminal justice actors.¹⁰⁹

The four pillars that can effectively promote a culture of lawfulness in the following ways are:

- Educational institutions—ranging from primary and secondary-level schools to law schools, political science departments, professional organizations, and justice-sector training academies—can teach and deliver positive messages about justice and the rule of law to both the next generation and those responsible for making the legal system work in this generation.
- Centres of moral authority, whether public figures or organizations associated with a religion or located within civil society and the education system, publicly insist on the need for justice and the rule of law. When they speak out against criminal behaviour such as organized crime, they can significantly diminish the extent to which society tolerates such behaviour. The value in engaging centres of moral authority as change agents derives from the level of recognition and respect they enjoy within the wider society.

¹⁰⁶ Roy Godson, “A Guide to Developing a Culture of Lawfulness” (paper presented at the Symposium on the Role of Civil Society in Countering Organized Crime, Palermo, Italy, 2000), 51, <http://www.sicilianrenaissance.info/en/publicazioni/001214.pdf>.

¹⁰⁷ Lelouca Orlando (presentation at the Symposium on the Role of Civil Society in Countering Organized Crime, Palermo, Italy, 2000), 24, <http://www.sicilianrenaissance.info/en/publicazioni/001214.pdf>.

¹⁰⁸ Godson, “Guide to Developing a Culture of Lawfulness,” 52.

¹⁰⁹ Ibid.

- The mass media, when independent and trustworthy, can monitor government institutions and the private sector, unveil crime and corruption, and promote public deliberation and civil discussion among citizens and different sectors of society. Popular culture plays a fundamental role in shaping the public discourse on the justice system. When used constructively, it can also contribute to generating law-abiding citizens and institutions.
- A professional cadre of criminal justice actors and a culture within justice organizations that is supportive of lawful behaviour and respectful of citizens' rights are essential to inculcate a culture of lawfulness in a post-conflict society. Education of criminal justice actors can play a fundamental role in enhancing their effectiveness by developing such a culture.

Individually or collectively, these pillars have traditionally acted as agents of change when their societies have confronted crises. The opportunities for synergy among these pillars can be significant in post-conflict settings. For instance, the educational and the moral centres may be able to leverage their leadership through collaboration with the mass media, which typically exercises significant social influence in a post-conflict environment. Synergy, however, is by no means guaranteed—nor, indeed, is the participation of any of the pillars in what can be a dangerous undertaking.

The risks involved in speaking out for justice in the post-conflict environment are rarely trivial. Advisors should be aware of those risks. This analysis should guide advisors as they develop a strategy for involving the four pillars in the effort to reform the criminal justice sector. Advisors should also seek to empower traditionally disadvantaged groups so that they, too, can help create a post-conflict society that respects the rule of law—and to which they feel they belong.



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