

Chapter Three

Reforming the Legal Framework

The aims of this chapter are to

- Discuss what is meant by the term “legal framework” in a postconflict state
- Consider the relevance of the legal framework to the investigation and prosecution of serious crimes
- Discuss, in general, what sorts of modifications to the legal framework may be required for the effective investigation and prosecution of serious crimes
- Outline a number of procedural measures that are particularly valuable in tackling serious crimes, in addition to discussing the legal, practical, institutional, and resource implications for a postconflict state wishing to implement such measures

The Legal Framework in a Postconflict State

The Importance of Understanding the Legal Framework

The legal framework forms the backbone of a criminal justice system, setting out what defines criminal behavior; prescribing the procedures for investigating, prosecuting, and trying criminal offenses; setting out the powers of the police, prosecutors, and judges and the limits on state authority; and prescribing the fair trial and due process rights of the suspect or the accused. To understand the legal framework in a postconflict state is to understand how well or ill equipped the state is to tackle serious crimes. Are certain serious crimes defined as crimes under the domestic law? Does domestic legislation enable the effective investigation, prosecution, and adjudication of serious crimes? Does the domestic law contain adequate fair trial and due process guarantees for the suspect or the accused so that serious crimes can be fairly investigated or prosecuted? Does the domestic law contain adequate protections for the safety

Peace Agreements and International Standards

In many instances, the reformation of a country's criminal laws and rules of procedure and evidence is not only a practical requirement but a legal obligation. When a peace agreement is reached—either between countries or between different factions within a postconflict society—human rights provisions often form a central part of the text, and the agreement itself is typically characterized by a constitutionalism designed to define, protect, and enforce individual rights. For instance, the Bonn Agreement of 2001 charged the interim government of Afghanistan with rebuilding, with the assistance of the United Nations, a judicial system “in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions.” Similarly, Plan Colombia of 1999 committed the country to reducing impunity “through improved prosecution, more effective investigations and

speedier trials,” and the Arusha Peace and Reconciliation Agreement for Burundi required that parties to the agreement reform their code of criminal procedure. The Agreement on Human Rights concluded between the government of El Salvador and the Frente Farabundo Marti para la Liberacion Nacional required that certain fair trial and due process rights be implemented into domestic law, which was accomplished by the drafting of a constitution and a revised criminal procedure code. The 1995 Dayton peace agreement that ended the war in Bosnia and Herzegovina contained provisions that required the direct application of the European Convention on Human Rights and Fundamental Freedoms (ECHR). Consequently, reform of the legal framework, including the criminal code and criminal procedure code, was required to bring it into compliance with the ECHR.

and privacy of the witnesses and victims of serious crimes to encourage and facilitate collection of evidence and testimony in court?

In addition to determining the adequacy of the legal framework for the investigation and prosecution of serious crimes, assessing both the framework itself and a state's international treaty obligations

will highlight what law *should*, as a matter of international law, be in force in a state. For example, if a state has signed and ratified the United Nations Convention against Transnational Organized Crime (UNTOC), has it legislated for the substantive criminal offenses, procedural provisions, extradition, and mutual legal assistance provisions required under the convention? If it has signed and ratified an

Laws Addressing Trafficking in Persons Needed in Liberia

In the immediate aftermath of the conflict that began in 1989 and led to the establishment in September 2003 of the United Nations Mission in Liberia (UNMIL), trafficking in persons was a problem of grave concern in Liberia and continues to be so. The criminal code of 1976 was not sufficient to address trafficking. Currently, reform efforts are under way. According to UN conventions relating to trafficking in persons, domestic legislation should include money laundering laws, witness protection provisions, and a clear definition of trafficking in persons, among other elements.

international convention such as the International Covenant on Civil and Political Rights (ICCPR), has it given domestic legal effect to the fair trial and due process rights contained in the covenant?

Of course, as important as it is to ascertain the legal framework in a postconflict state, it is also important to assess whether the laws are actually being applied in practice. Laws may be on the books, but they have little effect if they are not being implemented. Lack of implementation may stem from a lack of qualified personnel to apply the laws (e.g., insufficient numbers of trained police officers), inadequate resources (e.g., no budget for gasoline for police cars), or even a lack of will on the part of the police or prosecution (or their political leaders) to investigate or prosecute the crime (e.g., corruption or threats to police or prosecutors). Determining the extent to which laws are being applied will form an integral part of the legal framework assessment, as outlined in chapter 2.

Drafting New Laws Is Not Enough: The Case of Kosovo

To fill gaps in Kosovo's legal system, a series of regulations were drafted in 2001 to create witness protection measures and permit electronic surveillance, use of informants, and undercover operations. However, although these laws were drafted in 2001 by a team of seasoned experts, by the time they emerged from the UN system of review and promulgation, the laws were no longer comprehensive in scope or clearly written. Furthermore, some practical difficulties undermined their effectiveness. For instance, the electronic surveillance provisions proved unusable for a year because the Kosovo police lacked the necessary equipment. Similarly, police could not make full use of the undercover provisions because of a lack of funds and of unmarked vehicles, and the absence of effective guidelines for proper and effective use of informants.

How Deficiencies in the Legal Framework Affect the Investigation and Prosecution of Serious Crimes

An adequate legal framework is a necessary prerequisite to the investigation and prosecution of serious crimes in a postconflict state. Without laws that criminalize certain activities, they can be perpetrated with impunity. The police and the prosecution are powerless to investigate and prosecute conduct that is not classified as criminal conduct.

In Kosovo, where kidnapping was prevalent before, during, and after the cessation of hostilities, kidnapping did not exist as a criminal offense in the Kosovo Criminal Code. Similarly, in Angola, although organized crime, corruption, and money laundering were widespread, no one could be prosecuted for these activities because they were not regarded by domestic law as criminal offenses.

Criminalizing these activities, however, is usually not sufficient in itself to tackle them effectively. Criminal networks use increasingly sophisticated means that make it difficult to investigate their activities, and thus the criminalization of the activities must be accompanied by the

introduction of specialized investigative tools such as covert measures of surveillance and witness protection measures and programs. Such tools are discussed at length later in this chapter.

Identifying the Legal Framework

As noted in chapter 2, ascertaining the existing legal framework should be a key element of any assessment intended to guide the development of a strategy to combat serious crimes in a postconflict state. The term “legal framework” refers to the laws that are applicable in a state. These

Kosovo’s Laws Changed to Combat Serious Crimes

In Kosovo, the criminal laws of the province itself, of the Serbian state, and of the Yugoslav nation did not adequately target a number of serious crimes. Fortunately, under the terms of Security Council Resolution 1244 and Regulation 1999/1, the special representative of the secretary-general (SRSG) in Kosovo was able to amend the applicable law to fill procedural and substantive gaps. Using this power, the SRSG changed the legal framework to achieve three broad objectives: to meet international and European human rights standards and norms and fulfill international conventions against crime; to develop modern procedural tools such as witness protection measures, immunity, and covert and technical surveillance; and to develop modern substantive criminal code provisions on firearms possession and use, human trafficking, terrorism, organized crime, and armed border crossing. The changes made in this third area, which were particularly valuable in tackling serious crimes, included the following:

- Penalties for possession of firearms were substantially increased, and new offenses were created for such activities as brandishing and firing weapons and firearms assault.
- Human trafficking was made a crime (previously, it was criminalized only inso-

far as “mediation of prostitution”—i.e., pimping—was a crime), with penalties for trafficking being higher in cases where the convicted person was a member of an organized group

- Terrorism provisions were extended to make it illegal to finance and support any terrorist or terrorist organization even if one does not join the terrorist group or act as an accomplice. (These measures, it may be noted, are required under the Convention against the Financing of Terrorism.)
- Penalties were increased for being the organizer or leader of a group or a gang “that has set as its objective the commission of crimes,” and the terms “organizer” and “leader” of such a group were defined. Furthermore, threatening witnesses to say nothing to police and prosecutors was made a crime. This latter measure, when used in combination with newly devised procedures and programs for the protection of witnesses, led to the conviction and incarceration of a number of people.

After more than two years of use by police, prosecutors, and courts, these and other regulations were refined further before being incorporated into Kosovo’s new Provisional Criminal Code, which was decreed in July 2003 and took effect in April 2004.

include domestic laws that are in force and international or regional treaties that are binding on the state and that have been domestically implemented. In the case of a postconflict state subject to a United Nations Security Council resolution, the resolution not only provides the mandate for the peace operation but also forms part of the legal framework. Furthermore, if a peace agreement has been concluded prior to the cessation of a conflict, it is also part of the legal framework in force in the state.

The focus in this book is on those instruments that relate directly or indirectly to the enforcement of criminal justice in a state. Therefore, this chapter will *not* examine

- Noncriminal aspects of the legal framework, such as property law, civil law, contract law, family law, or administrative law
- Binding international treaties that do not have implications for domestic criminal law
- Agreements that may be applicable in a postconflict state, such as those concluded between the state and intervening military forces or international or regional organizations (e.g., status of force agreements [SOFAs] and memoranda of understanding)

Domestic Laws

In determining what domestic laws apply in a postconflict state, it is important to note that some postconflict societies have multiple potential bodies of applicable law. A political decision may be needed to determine what body will be applicable in the postconflict period. In Afghanistan, for example, the laws in effect in 1964 were deemed applicable under the postconflict agreement, despite many of them having been replaced, supplemented, or amended over almost forty years by a series of communist and Taliban laws and then by presidential decrees.

Domestic laws relevant to the enforcement of criminal justice include the following:

- The constitution. The constitution often contains applicable rights of a suspect or an accused and other provisions relevant to criminal justice.
- The criminal code in force in the state. The criminal code contains, for example, general legal principles, such as criminal liability, defenses, penalties, and principles governing sanctions, including punishment and alternative measures, as well as the substantive criminal offenses applicable in the state.
- In states that have enacted a criminal code and a criminal procedure code, any legislation in addition to these bodies of law and with penal implications, such as special laws on drugs, money laundering, terrorism, weapons and ammunition, customs, taxes, and health and safety, as well as any juvenile justice codes, traffic codes, or minor-offenses/misdemeanor codes that

include offenses and powers related to public order. (Some special laws contain a mix of substantive criminal law provisions and procedural provisions.) Very often, such supplementary laws are found in an Official Gazette.

- Presidential or royal decrees in states that issue them
- In states that have not codified all criminal laws and follow the common law tradition of stare decisis (meaning that law is made by judges and the judgments of higher courts are binding on lower courts), jurisprudence and case law that is binding on the courts, as well as any criminal legislation enacted by the legislature that supersedes judge-made common law (legislation on property crimes, murder, etc.)
- In states that apply customary or traditional law in criminal matters, decisions made by nonstate adjudicating bodies, such as village elders
- The criminal procedure code, which contains procedures relevant to the investigation, prosecution, trial, and appeal of criminal offenses and may also contain provisions on extradition, mutual legal assistance, and the recognition of foreign orders and judgments; and related procedure codes that have criminal justice implications, including minor-offense procedure codes, traffic court procedure codes, juvenile justice procedure codes, mental health procedure codes (addressing mental competency), and civil commitment procedure codes (addressing mental competency)
- In states that have not enacted a criminal procedure code, any legislation relevant to criminal procedure, including laws on courts, prosecutors' offices, and police or binding court, prosecutor's office, or police rules that deal with criminal procedure
- If not contained in the criminal procedure code, laws on execution of penal sanctions, including laws on conditional release, parole, revision of judgments, and enforcement and execution of judgments
- Laws on the organization and structure of the court system and prosecutor's office, regulations and standard operating procedures (SOPs) for courts and prosecutors' offices
- Laws on the appointment, discipline, and dismissal of judges and prosecutors and any codes of ethics
- Laws, regulations, and bylaws on organization, appointment, payment, and tariffs relating to criminal defense lawyers and the organization of legal aid or public defender systems, and any codes of ethics
- Police laws and regulations. Some states have a formal police act supplemented by implementing or clarifying regulations. The police act and accompanying regulations set out additional police powers that are not contained in the criminal procedure code and are more related to public order (control of public gatherings, use of weapons, etc.). Some police acts contain provisions on the organization and structure of the police force.

- In states that have not enacted a police act, SOPs for police. SOPs often cover a broad array of administrative matters, such as pay, vacations, and uniforms, and organizational matters, such as the composition of the regular police force and its special units, if any. In addition, SOPs contain relevant criminal procedures. In states that adhere to the common law tradition of judge-made law, SOPs contain criminal procedures that have been distilled from relevant case law. Other police powers relating to criminal procedure or public order powers may be found in case law or in separate pieces of legislation.
- Laws on prisons and any accompanying regulations or standard operating procedures
- Laws governing intelligence services and secret police
- Laws governing domestic military forces as they relate to issues such as public order, detention, or investigations related to civilian criminal matters

International and Regional Treaties

Once the applicable domestic laws have been considered, the next step in ascertaining the legal framework is to look at what international and regional treaties are binding upon the postconflict state. A treaty is an international agreement, in written form and governed by international law, concluded between states (or, in rare cases, between a state and an international organization). A state may conclude a treaty with another state (a bilateral treaty) or with a number of other states (a multilateral treaty). Multilateral treaties may be concluded at an international level (e.g., within the context of the United Nations) or at a regional level (e.g., within the African Union, the League of Arab Nations, the Council of Europe, the Organization of American States, or the European Union). Often, treaties are called agreements, covenants, instruments, charters, or conventions, but in essence they are all the same thing.

For a treaty to become binding on a state and therefore part of its legal framework, the treaty must be officially signed and ratified. Usually a treaty is signed at the end of a negotiation process. Ratification occurs later and signifies the international act whereupon a state establishes its consent to be bound by the treaty. The act is completed by lodging an instrument of ratification with the depository designated in the particular treaty—for example, the secretary-general of the United Nations in the case of UNTOC. In the ratification process, some treaties allow for reservations, meaning the state can exempt itself from certain provisions. Reservations must be formally lodged with the depository, along with the instrument of ratification, and once accepted mean that the particular provision of the treaty that was the subject of reservation is not binding and therefore does not form part of the legal framework of the state.

When a state has formally ratified a treaty, it becomes part of the legal framework and is binding upon the state. The state is then obliged to give the treaty domestic effect—that is, to convert it from an international instrument into binding domestic law. In some states (monist states), ratification means that the treaty is automatically part of domestic law and has immediate domestic effect (although more often than not, domestic legislation is promulgated to provide the details on how the treaty will apply). In other states (dualist states), a legislative act will be required to give the treaty domestic effect. A postconflict state, or any state for that matter, might have formally ratified a convention but not given it domestic effect. Despite this situation, the convention should be considered part of the state's legal framework, as the treaty is still deemed binding on the state under international law, even if it is not yet effective within the domestic context.

A number of different international and regional treaties are relevant to the enforcement of criminal justice in a postconflict state and may form part of its legal framework if they have been signed and ratified. Human rights treaties relating to the rights of suspects or the accused in the criminal process may be binding. These include international and regional treaties that deal generally with fair trial and due process rights, with specific rights (e.g., freedom from torture), or with the rights of a specific group (children or women). (A full list of these treaties is contained in the accompanying sidebar, “International and Regional Human Rights Instruments.”)

In addition, international and regional treaties concerning various types of criminal activity are relevant to the legal framework in a state. These treaties include states' obligations to criminalize certain conduct and to implement provisions relating to criminal procedure, extradition, and mutual legal assistance, for example. They include international treaties on drug trafficking and production, terrorist acts, organized crime, trafficking in persons, smuggling of migrants, trafficking in firearms, corruption, money laundering, and cybercrime. (These treaties are listed in the sidebars “International Instruments on Crime and Criminal Investigation” and “Regional Instruments on Crime and Criminal Investigation.”)

Extradition treaties or agreements that have been concluded with other states are likely to be particularly relevant to the investigation and prosecution of serious crimes in a postconflict state. States generally opt to enter into bilateral as opposed to multilateral extradition agreements, and therefore many individual agreements may be binding on a state. However, a state may also be party to a multilateral extradition treaty (e.g., the European Convention on Extradition and its additional protocols, the Inter-American Convention on Extradition, or the Economic Community of West African States Convention on Extradition). By the

International and Regional Human Rights Instruments

International treaties that deal generally with fair trial and due process rights

- UN International Convention on Civil and Political Rights and its two additional protocols

Regional treaties that deal generally with fair trial and due process rights

- African Charter on Human and Peoples' Rights
- American Convention on Human Rights
- American Declaration on the Rights and Duties of Man
- Arab Charter of Human Rights
- European Charter of Fundamental Rights
- European Convention for the Protection of Human Rights and Fundamental Freedoms and its eleven additional protocols

International treaties that deal with specific rights

- UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- UN International Convention on the Elimination of All Forms of Racial Discrimination

Regional treaties that deal with specific rights

- Inter-American Convention on Forced Disappearance of Persons
- Inter-American Convention to Prevent and Punish Torture

International treaties that address the rights of specific groups of persons

- UN Convention on the Elimination of All Forms of Discrimination against Women
- UN Convention on the Rights of the Child

Regional treaties that address the rights of specific groups of persons

- African Charter on the Rights and Welfare of the Child
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

same token, a state may have entered into a bilateral agreement to provide reciprocal mutual legal assistance in the investigation of criminal offenses or into a multilateral treaty, (e.g., the European Convention on Mutual Legal Assistance in Criminal Matters and its additional protocols, the Inter-American Convention on Mutual Legal Assistance and Optional Protocol Thereto, the Convention on Mutual Legal Assistance in Criminal Matters between Member States of the European Union, or the Arab League Convention on Mutual Legal Assistance in Criminal Matters). A postconflict state may also have signed and ratified the constitution of the International Criminal Police Organization (Interpol), which thus becomes part of the state's domestic legal framework.

International Instruments on Crime and Criminal Investigation

Corruption

- UN Convention against Corruption

Drug trafficking and production

- UN Single Convention on Narcotic Drugs
- UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
- UN Convention on Psychotropic Drugs

Extradition

- Economic Community of West African States Convention on Extradition
- European Convention on Extradition and its additional protocols
- Inter-American Convention on Extradition

Mutual Legal Assistance Treaties

- Arab League Convention on Mutual Legal Assistance in Criminal Matters
- Convention on Mutual Legal Assistance in Criminal Matters between Member States of the European Union
- European Convention on Mutual Legal Assistance in Criminal Matters and its additional protocols
- Inter-American Convention on Mutual Legal Assistance and Optional Protocol Thereto

Organized crime

- UN Convention against Transnational Organized Crime

Smuggling of migrants

- Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the UN Convention against Transnational Organized Crime

Terrorist acts

- UN Convention on the Marking of Plastic Explosives for the Purpose of Detection
- UN Convention on Offences and Certain Other Acts Committed on Board Aircraft
- UN Convention on the Physical Protection of Nuclear Material
- UN Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons
- UN Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation
- UN Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation
- UN Convention for the Suppression of Unlawful Seizure of Aircraft
- UN International Convention against the Taking of Hostages
- UN International Convention for the Suppression of the Financing of Terrorism

- UN International Convention for the Suppression of Terrorist Bombings
- UN Convention for the Suppression of Unlawful Seizure of Aircraft
- UN Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf
- UN Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation

Trafficking in firearms

- UN Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the UN Convention against Transnational Organized Crime

Trafficking in persons

- UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention against Transnational Organized Crime

Regional Instruments on Crime and Criminal Investigation

Corruption

- Council of Europe Criminal Law Convention on Corruption
- Inter-American Convention on Corruption
- OECD Convention on Corruption of Public Officials

Cybercrime

- Council of Europe Convention on Cybercrime

Money laundering

- Council of Europe Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds of Crime

Terrorism

- Arab Convention for the Suppression of Terrorism
- Inter-American Convention against Terrorism
- OAU Convention on the Prevention and Combating of Terrorism

Trafficking in firearms

- Inter-American Convention on Trafficking in Firearms

Trafficking in persons

- SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution
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Nonbinding Human Rights Principles and Instruments

- UN Basic Principles on the Independence of the Judiciary
- UN Basic Principles on the Role of Lawyers
- UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officers
- UN Body of Principles for the Protection of Persons under Any Form of Detention or Imprisonment
- UN Code of Conduct for Law Enforcement Officials
- UN Declaration on the Elimination of Violence against Women
- UN Declaration on the Protection of All Persons from Enforced Disappearance
- UN Declaration on the Rights of the Child
- UN Guidelines on the Role of Prosecutors
- UN Rules for the Protection of Juveniles Deprived of Their Liberty
- UN Standard Minimum Rules for the Administration of Juvenile Justice
- UN Standard Minimum Rules for Non-Custodial Measures
- UN Standard Minimum Rules for the Treatment of Prisoners

The treaties and conventions dealt with above are all binding in nature. Such instruments are often termed “hard law.” It is worth noting, however, the existence of relevant “soft law” sources from the United Nations and regional organizations. While not legally binding, states have adopted these laws in forums such as the UN General Assembly or the UN Crime Congress. Therefore the laws are *politically* binding, and states aspire to comply with them. Soft law sources are often called principles, guidelines, standards, declarations, or rules. A significant number of UN soft law instruments, such as the Body of Principles for the Protection of Persons under Any Form of Detention or Imprisonment and the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, are relevant to the enforcement of criminal justice. A full list of these principles and guidelines is contained in the sidebar above.

United Nations Security Council Resolutions

Any relevant United Nations Security Council resolutions need to be taken into account in assessing the legal framework in a postconflict state. Some postconflict states are subject to Security Council resolutions that establish a peace operation in the particular state. In many cases, a Security Council resolution will have no bearing on other aspects of the legal framework in a state, such as the criminal code or the criminal procedure code. However, on two occasions, in Kosovo and East Timor, Security Council resolutions have had a bearing on the domestic legal framework and future reforms. In the cases of Kosovo and East Timor, the relevant resolutions also required that certain human rights

treaties, such as the ICCPR, would have direct effect in both territories.

Peace Agreements

The provisions of a peace agreement, if one has been concluded, should be consulted in order to ascertain whether the provisions have any bearing on legal framework issues. For example, a peace agreement may provide that all domestic legislation be amended to include international human rights standards. Peace agreements may also oblige criminal justice actors to directly apply international human rights treaties in domestic courts. For example, through the Dayton peace agreement in Bosnia and Herzegovina, the ECHR was deemed to have domestic legal impact and is binding upon the courts.

Designation of Applicable Laws in Kosovo and East Timor

In Kosovo, using the powers granted him by Security Council Resolution 1244, the SRSG in Kosovo promulgated four regulations addressing the establishment of Kosovo's legal framework. One regulation set forth that the applicable law would be based primarily upon the law that existed as of March 22, 1989, as modified later by listed international human rights conventions that were to be applied by all government agents, including police, prosecutors, and courts, and as modified later by UNMIK regulations decreed by the SRSG. The SRSG also decreed numerous regulations related to the criminal code and criminal procedure code, thus altering the legal framework that existed in Kosovo prior to the establishment of UNMIK.

Security Council Resolution 1272 on East Timor (1999) vested executive powers in the United Nations Transitional Administration in East Timor (UNTAET). The SRSG in East Timor promulgated UNTAET Regulation 1999/1 on the Authority of the Transitional Administration in East Timor, which designated the applicable law as being the Indonesian law that had applied prior to the peace operation, subject to its compliance with "internationally recognized human rights standards" and subject to subsequent UNTAET regulations. UNTAET later passed a regulation reorganizing the courts in East Timor and another regulation establishing a provisional criminal procedure code.

The Types of Modifications That May Need to be Made to the Legal Framework

Any number of modifications may need to be made to the legal framework in a postconflict state to ensure it is adequate to address serious crimes issues. Which modifications are required will depend, first, on the state in question and the adequacy of the legal framework in place and, second, on the particular serious crimes problems that are prevalent in the state. Modifications or reforms may need to be made to address the following:

- The criminal code or other criminal legislation
- The criminal procedure code or other procedural laws
- Police procedure
- Criminal justice institutions

Model Codes for Postconflict Criminal Justice

The United States Institute of Peace and the Irish Centre for Human Rights, in collaboration with the Office of the UN High Commissioner for Human Rights and the UN Office of Drugs and Crime, have drafted a package of model codes that provide a framework within which peace operations, international missions, and national governments may quickly respond to justice needs. The Model Codes for Postconflict Criminal Justice include a “Model Criminal Code,” “Model Criminal Procedure Code,” “Model Detention Act,” and “Model Police Act” and guidelines for using the model codes. Drawing upon the lessons learned from past and present peace operations around the globe, the model codes

- Serve as a reference tool kit for national and international authorities in postconflict environments
- Serve as a cross-cultural legal tool that draws from a variety of the world’s different legal systems, including common, civil, and Islamic law
- Fill gaps in legislation, or amend existing legislation, to meet international human rights and criminal law standards and to ensure that the law is capable of restoring law and order in postconflict environments
- Provide a criminal law framework that can be adapted for postconflict situations where there are substantial obstacles to identifying appropriate or acceptable applicable laws

Modifications of the Criminal Code or Other Criminal Legislation

Modifications of the criminal code or other criminal legislation (if no criminal code exists) may be required to ensure that conduct that falls under the rubric of serious crimes is criminalized as such. This conduct could include organized crime, corruption, money laundering, obstruction of justice (e.g., threats, intimidation, or bribes to witnesses, police, or justice officials), false testimony to courts, revealing identities of witnesses ordered anonymous by the courts, trafficking in persons or goods, smuggling in migrants, weapons-related offenses, hate speech, drug offenses, cybercrime, and terrorist offenses, including being a member of or financing a terrorist organization, to name but a few. Many offenses, such as organized crime, trafficking in persons, and money laundering are absent from legislation in many states, both postconflict states and those that are more stable. When legislating for offenses such as organized crime and trafficking in persons, modifications of the criminal code or other criminal legislation may also be required to ensure that participation in these criminal activities, such as liability for conspiracy or joint criminal enterprise, is covered. While this book focuses in depth on several modifications to the legal framework, it does not address modification of the criminal code in any depth. In defining these offenses for inclusion in the criminal code or other criminal legislation, and in drafting domestic legislation, it would be useful to look to international and regional conventions, which often contain definitions of these offenses (see the sidebars

on international and regional instruments on crime and criminal investigation on page 49). Other relevant sources regarding substantive offenses might be foreign criminal codes or criminal legislation. Additionally, the “Model Criminal Procedure Code” (drafted as part of the *Model Codes for Postconflict Criminal Justice*—see the sidebar on page 52) contains a catalog of newer offenses and offenses that are particularly prevalent in a postconflict setting. It is important to note that modifications to the criminal code or other criminal legislation must be consistent with the provisions and general principles underlying the code or legislation.

Modifications of the Criminal Procedure Code or Other Procedural Laws

It may be necessary to modify the procedural laws in force in a state in at least two ways. First, procedural law as a whole may have to be modified to ensure that it complies with international human rights standards. A legal framework that complies with these standards is vital to the fair investigation of serious crimes. For example, the legal framework should contain mechanisms to ensure judges are independent and impartial in their application of the law. Given the far-reaching powers that many of the measures discussed below give to actors in the criminal justice system, a strong and independent judiciary must oversee their application. (Modifications to ensure that the legal framework as a whole complies with human rights standards are *not* discussed below as they are outside the scope of this handbook.)

Second, given that increasingly sophisticated criminal methods require increasingly sophisticated legal methods to counter them, the procedural laws in a postconflict state may need to be modified to incorporate tools to effectively investigate and prosecute serious crimes. (This type of modification is discussed below.)

Modifications of Police Procedures

Any modification of police procedures (e.g., implementing or clarifying procedures or standard operating

Fair Trial and Due Process: Vital, Not Expendable

In some peace operations, there has been a tendency to sacrifice fair trial and due process guarantees in the name of successfully prosecuting serious crimes or to see these guarantees as superfluous to the ultimate aim of curbing such crimes. Far from being superfluous, fair trial and due process guarantees are fundamental aspects of justice and the rule of law and cannot be sidelined by a state seeking to uphold these values, particularly a postconflict state, where much effort is often expended to promote previously unobserved values.

Furthermore, many modifications to the legal framework discussed below give wide powers to actors in the justice system. In a postconflict setting, where the police force may be composed of newly trained and inexperienced officers, for example, placing extensive powers in their hands without guaranteeing the necessary rights and protection of suspects and the accused may prove dangerous.

The Problem of Inadequate Resources

A country's lack of financial resources can often pose formidable challenges to adopting the procedural tools helpful for combating serious crimes. This problem is particularly acute in postconflict societies, where competition for limited resources is intense. For example, in Kosovo, although laws permitting wiretapping were put on the books, attempts at covert surveillance have been complicated by the prohibitive cost of equipment. The cost of just the basic equipment required to monitor the province's mobile phone network has been estimated at between \$500,000 and \$1 million. Furthermore, this amount does not include the

typically substantial sums needed to cover the costs of implementing wiretapping provisions—a multifaceted task involving monitoring, transcription, translation (if needed), and reporting. Similarly, although changes were made to Kosovo's code of criminal procedure to permit anonymous witness testimony to be given by way of closed-circuit television and voice-altering devices, not until a few years later were the funds available to purchase the necessary equipment and pay technicians to operate the equipment. The cost of continued maintenance and operations will likely also pose a strain on limited resources.

procedures) should be done simultaneously with modification of criminal procedure laws. Modifications of the police procedures are needed because new criminal procedure laws often create new police powers. These powers tell police what they can do, whereas the police procedures provide the details on how to implement the powers. The new police procedures should guard against police misconduct by providing appropriate operational guidance to police officers when conducting undercover or plainclothes operations, covert monitoring of suspects from public places, and other covert investigative activities.

Institutional Modifications

Institutional modifications may be required to enable the criminal justice system to tackle serious crimes effectively. Such modifications might include the creation of specialized police units or task forces and special tribunals or chambers. Institutional modifications, which are discussed in greater detail in chapter 4, will necessarily call for a reassessment of the roles, relationships, distribution of powers, and responsibilities within and between different institutions.

Modifications to the Legal Framework

This section offers a primer on some of the most common modifications made to the legal framework to curb serious crimes, and focuses in particular on those modifications that have been implemented in postconflict environments. Although reference is made to institutional and operational modifications, this section deals mainly with procedural

modifications. In doing so, it discusses a variety of issues involved in the complex and resource-intensive process of implementing modifications—issues such as training, human resources, and material resources. It should be noted that no attempt is made to provide an exhaustive list of possible modifications.

Before introducing any measure, it is important to consider its practicality and feasibility. For example, introducing sophisticated covert and surveillance measures may not be a viable option where basic resources such as police cars and radios are unavailable.

The following procedural measures are discussed below:

- [Covert and other measures of surveillance](#)
- [Measures to protect witnesses](#)
- [Immunity from prosecution or mitigation of penalties for cooperative witnesses](#)
- [Seizure and confiscation of the proceeds and instrumentalities of crime](#)
- [Effective extradition procedures](#)
- [Mutual legal assistance](#)

Covert and Other Measures of Surveillance

Criminals have become increasingly sophisticated in the methods they employ. As a consequence, the means used to investigate crime have also become more sophisticated. Advances in surveillance technology have been of great benefit to the investigation of organized crime, which often involves planning within a closed group of individuals. Recent international conventions such as UNTOC have urged states to incorporate special investigative techniques such as electronic surveillance and undercover operations within their domestic legal framework. It is important to note, however, that there may be understandable resistance to the adoption of such measures in those postconflict states where similar techniques were used by the secret police under the former regime.

The covert and other measures of surveillance discussed here must be distinguished from criminal intelligence gathering. While the means of gathering information may be identical in some cases, there are distinct differences in terms of the purpose of collecting the information, the legal provisions governing information gathering, and the actors involved in the collection. This discussion of surveillance measures focuses on the collection of information by the police or the prosecutor, under the supervision of a judicial body or a judge, for the purpose of eliciting information relevant for the investigation and prosecution of serious crimes. Evidence that is legally obtained through covert and other measures of surveillance may then be used as evidence in court, which is not always the case with

intelligence information. (Chapter 5 discusses the issue of intelligence in more detail.)

In their domestic laws, postconflict states may consider addressing a variety of methods for gathering information. Listed below are some of these methods. (A detailed list and discussion of these methods can be found in the “Model Criminal Procedure Code.”)

- Intercepting, monitoring, and recording telecommunications
- Intercepting, monitoring, and recording computer network communications
- Surveillance in private premises, including covert monitoring and recording and transcribing conversations
- Covert search of letters, packages, containers, and parcels
- Controlled delivery (i.e., covert monitoring and control over the delivery process) of letters, packages, containers, and parcels
- Covert targeted monitoring, recording, and transcribing of conversations and observation, monitoring, and recording of persons, their movements or other activities in public or open spaces
- Covert monitoring of financial transactions
- Disclosure of financial data, including obtaining information on deposits, accounts, or transactions from a bank or another financial institution
- The use of tracking and positioning devices
- The deployment of undercover agents
- A simulated purchase of items, such as drugs
- A simulation of a corruption offense

When using covert and other surveillance measures, a delicate balance must be struck between the right to privacy of the individual and the right of the state to investigate serious criminal activity. Privacy is a right recognized in all major human rights treaties, but it is a “limited right,” meaning that in certain instances the right may have to be balanced against other factors, such as national security, public safety, and the prevention of disorder or crime, all of which are set out in the relevant treaties. Covert surveillance measures of course impinge to varying degrees upon the individual’s right to privacy. Given the nature of the intrusion, the instances in which covert and other measures or surveillance can be undertaken and the parameters of such measures must be strictly limited and defined.

The clearest guidance on the legal regulation and the precise parameters of covert and other measures of surveillance comes from the European Court of Human Rights, where this matter has been litigated on numerous occasions. The principles of checks and balances that have been elaborated in international forums such as the European Court

should be integrated into any legislation on surveillance. Among the elements that should be included are provisions to ensure accountability over the authorization and use of surveillance measures and the review and supervision of such measures by the courts. Given the extensive powers endowed upon actors in the criminal justice system by legislation to permit covert and other measures of surveillance, and particularly in light of the fact that the individual's right of privacy may have been unduly impinged upon by former regimes, it is important that a strong and independent judiciary reviews and supervises their use. Legislation should also include provisions to minimize the interception of irrelevant conversations; to regulate the use, handling, preservation, and destruction of material and personal data obtained through covert or other measures of surveillance; and to notify targets of surveillance in the case of nonprosecution, with exceptions made only to preserve the confidentiality of ongoing covert operations.

Additional guidance can be found in the "Model Criminal Procedure Code," which includes an elaborate framework for the regulation of surveillance that takes into account international standards, relevant jurisprudence, and international best practice in this area. The accompanying commentary explains the content of the provisions in great detail. Another useful reference is the *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocol Thereto* (hereafter referred to as *Legislative Guide for UNTOC*). The legislative guide gives ample examples of and references to useful domestic legislation on surveillance.

In addition to legislative amendments, police and prosecutors will need standard operating procedures or regulations to serve as guidance on the use of surveillance measures. Protocols and procedures for inter-agency cooperation may also be required to ensure effective cooperation between prosecutors and the police.

The greatest impediment to the implementation of covert and other measures of surveillance will certainly be lack of resources. The equipment required to implement such measures is extremely expensive and includes not only recording equipment but also media to store recorded conversations and equipment to duplicate conversations. Funds to cover the costs of transcription (and possibly also of translation) will also be needed. Those tasked with implementing these measures will require extensive training.

Measures to Protect Witnesses

Witnesses in serious crimes cases may include victims, innocent bystanders, and individuals who have been involved in criminal activity but are cooperating with police. In many postconflict states, the prosecution of serious criminal activity has been severely hampered by the reluctance of

witnesses and even victims to testify at trial because of intimidation and threats to their lives and the lives of their families by the perpetrators of crime or their associates. These are by no means always idle threats; potential witnesses have disappeared or been murdered prior to testifying at trial, while other witnesses have suffered retaliation after testifying. This pattern is especially familiar in the cases of prosecutions for organized criminal activities or politically or ethnically motivated crimes. Hence the need for witness protection measures. Article 24(1) of UNTOC, it may be noted, makes the implementation of some witness protection measures mandatory, where appropriate and within the means of the state.

In addition to victims and witnesses, a person who has committed a criminal offense but has cooperated with the state against a criminal associate or organization, and has received immunity from prosecution or a mitigation of sentence, may need protection. If a person who has cooperated with the state is in prison, the prison may need to implement witness protection measures to ensure his or her safety during and after trial.

Chapter 4 discusses various forms of physical protection of witnesses. The discussion here is limited to witness protection measures under the criminal procedure laws of a state and adoption of witness protection and relocation laws.

Witness Protection Measures under Criminal Procedure Laws

Procedural witness protection measures aim to protect the identity of a witness from the public. These measures may include creating a form of temporary anonymity in which the name of and other identifying information about a witness are not revealed to the accused and his or her lawyers until shortly before the trial begins. In some instances, witnesses are provided full anonymity, with their identity being known only to the judge and the prosecution in a trial. The public and the accused and his or her lawyers are not told the name of the witness or any other identifying information. (Not all states provide for witness anonymity in domestic legislation due to its controversial nature, as discussed below.)

Witness protection measures that may be employed to ensure a witness's anonymity include

- Nondisclosure of the witness's identity to the public and/or expunging from the public record of the court any information that could identify the witness
- Nondisclosure to the accused and his or her lawyers of any records that identify the witness until a reasonable period prior to the trial
- Efforts to conceal the features or physical description of the witness giving testimony during the trial. These efforts could include testimony behind an opaque shield or through devices that alter and disguise facial features or the voice; contemporaneous examination in another place, communicated

to the courtroom by means of closed-circuit television; and videotaped examination of the victim or witness prior to the hearing.

- Assignment of a pseudonym to a witness, with his or her full name revealed to the defense within a reasonable period prior to trial
- Closing court sessions to the public
- Temporarily removing the accused from the courtroom during witness testimony

In cases where witness anonymity, as opposed to other witness protection measures, is granted, a number of the above-mentioned means (e.g., expunging the name of the witness from all court records; concealing the identity of the witness during testimony) might be used together to ensure that the identity of the witness is never revealed to the public or the defense.

The introduction of procedural witness protection and witness anonymity measures requires amendments to a state's criminal procedure law. Amendments are required to determine who is eligible for protective measures, how the prosecution or defense should apply for protective measures, and whether and under what conditions a hearing should be conducted by a judge to decide upon an application. Given that witness anonymity procedures impinge upon the right of the accused to confront and examine a witness against him or her, many states have chosen not to draft such provisions as a matter of policy. Other states are prohibited from taking such steps by their constitutional case law. However, many states have implemented such measures. As detailed in chapter 4, witness anonymity was implemented in Kosovo in cases where witness relocation programs could not ensure the safety of witnesses before and during trials for serious crimes.

In those countries that have chosen to implement such measures, a delicate balance must be struck between the fair trial rights of the accused and the rights of victims. The case law of two forums—the European Court of Human Rights and the International Criminal Tribunal for the former Yugoslavia—provides extensive guidelines on the circumstances in which an order for anonymity may be granted,

Witnesses at Risk in Serbia and Iraq

In early 2004, Kujo Krijestorac, a key eyewitness to the assassination of Serbian prime minister Zoran Djindjic, was killed before he could testify at the trial of Zvezdan Jovanovic, Djindjic's alleged killer. Krijestorac had received a number of death threats before being shot repeatedly by gunmen near his home in a Belgrade suburb. When asked about possible motives for the killing, Rajko Danilovic, a lawyer for Djindjic's family, noted, "Perhaps the killers wanted to threaten the other witnesses."

Responding to fears for the safety of witnesses at the trial of Saddam Hussein, officials close to the Iraqi Special Tribunal announced in October 2005 that witnesses could give evidence from behind a screen or curtain.

including the provision that anonymity should be granted only as an exceptional measure. The “Model Criminal Procedure Code” contains extensive provisions on witness protection measures and witness anonymity. The provisions ensure compliance with international standards and best practice. The commentaries that accompany the provisions offer an analysis of these international standards and explain how the provisions can be incorporated into domestic laws. The *Legislative Guide for UNTOC* discusses witness protection measures in detail and also provides examples of domestic legislation.

In addition to the amendments discussed above, practical and administrative arrangements and procedures would have to be set in place for matters such as the secure storage of sealed documents. Furthermore, when implementing witness protection measures, many states have also introduced supplementary laws—for example, to criminalize the obstruction of justice or the revelation of the identity of a protected witness. The former offense is contained in Article 23 of UNTOC, which requires states that have signed and ratified the convention to criminalize “the use of physical force, threats or intimidation . . . to induce false testimony or to interfere in the giving of testimony or the production of evidence” at any time before or during formal criminal proceedings.

The financial implications of witness protection measures and witness anonymity have to be considered prior to their implementation. While some measures, such as the redaction of statements or the removal of the accused from the courtroom during witness testimony, have little to no resource implications, other measures, such as remote testimony or voice-altering devices, are expensive. Furthermore, police, judges, prosecutors, and lawyers will need training on the substantive, procedural, and operational aspects of witness protection and witness anonymity.

Witness Protection and Relocation Laws

In addition to the witness protection measures discussed above, physical protection of a witness is sometimes required during the investigation and trial. Additionally, threats to the witness may continue beyond the trial (for instance, the defendant’s family may seek to retaliate against the witness). In such situations, a witness and his or her family may be placed in a witness protection and relocation program and moved to a different area or (especially if the region or country is small) a different country. The witness and his or her family may simply be granted a visa to live in another state or may be given new identities, new homes, new jobs, and assistance and money with which to build a new life. Cross-border relocation is facilitated by bilateral or multilateral agreements with other states, although experience has shown that states are sometimes unwilling to accept witnesses with criminal records. Witness protection and relocation programs require operational and administrative guidance to ensure that witnesses are protected. In some states, witness protection and relocation

programs are regulated by police laws and procedures as opposed to criminal procedure laws. Changes to the legal framework may be necessary to establish a witness protection and relocation program. The *Legislative Guide for UNTOC* gives examples of these changes, including

- Creating legislative or delegated legislative powers to protect the identity of witnesses, facilitate the creation of new identities, and facilitate the issuance of new identification and other documents in a secure and confidential manner. A state may also need to make arrangements with other states to permit cross-border relocation.
- Adopting legislation or procedures to determine who qualifies as a witness for the purposes of the program, procedures to assess potential risks and threats to witnesses, safeguards to prevent the misuse of discretionary powers and funds, and requirements regarding physical and information security.

Immunity from Prosecution or Mitigation of Sentences for Cooperative Witnesses

Immunity from prosecution is a formal legal process in which a person who is suspected of committing a criminal offense is exempted from prosecution in exchange for his or her testimony against the accused in a trial. Mitigation of sentence is a formal legal process whereby a person receives a lower sentence based upon his or her level of cooperation in an investigation and prosecution. The person is often referred to as a cooperative witness. Immunity from prosecution and mitigation of sentences have become useful tools in the fight against serious crimes. In organized crime cases, it is often difficult to find evidence against those at the higher echelons, which makes it extremely helpful to have testimonial evidence, particularly from someone close to the accused or to a former associate of the accused. Evidence the cooperating witness provides about a criminal associate or organization might be immensely difficult to obtain without some incentive. For this reason, UNTOC (Articles 26[2] and [3]) urges states to consider introducing either immunity from prosecution or mitigation of sentences for persons who provide substantial cooperation in the investigation or prosecution of organized crime cases.

To avail itself of this tool, the state must usually implement new legislation or amend existing legislation. Some states have limited the scope of cooperative witness provisions to cover only those persons who have committed lesser crimes or are less-culpable actors (e.g., people who are not leaders of organized crime gangs). Additionally, legislation may provide that cooperative witness provisions are applicable only in crimes of a serious nature. The tools provide either for *full immunity* (also called *transactional immunity*) from prosecution, *partial immunity* (also

called *use immunity*) from prosecution, or mitigation of sentence. A number of states have implemented legislation that provides for full immunity. Such legislation involves a hearing on cooperative witness status and a judicial determination of legal criteria, such as the full and voluntary cooperation of the person, the likelihood of the evidence leading to successful prosecution, and the truthfulness and completeness of the evidence presented by the potential cooperative witness. If the criteria are fulfilled, the applicant is declared to be a cooperative witness, and a cooperative witness order is granted whereby prosecution of the person for the named criminal offense (or offenses) is barred. Of course, the person may be subsequently prosecuted for other offenses not enumerated in the cooperative witness order. The granting of cooperative witness status is voluntary. The court may revoke it at any time if the witness breaches the conditions of the order. To prevent the abuse of cooperative witness measures, many states have introduced provisions in the relevant legislation to the effect that a person may not be found guilty based solely or to a “decisive extent” on the evidence of a cooperative witness. Instead of, or in addition to, introducing a system of full or transactional immunity, some nations have implemented a system of partial immunity. This system provides that the testimony given by the person seeking immunity will not be used in a prosecution against him or her, except in a subsequent prosecution for perjury or giving false statements. That said, other evidence may be used to mount a prosecution against the person.

Another alternative to a judicial determination of cooperative witness status is the drafting of nonprosecution agreements and cooperation agreements that may be part of plea bargaining. Nonprosecution agreements are entered into by the prosecutor and the person seeking immunity and involve the granting of full immunity. Cooperation agreements, which are more commonly used than are nonprosecution agreements, are used both nationally and internationally (by the International Criminal Tribunal for the Former Yugoslavia, for example). Cooperation agreements focus on the mitigation of one’s sentence as opposed to either full or partial immunity from prosecution. The prosecutor enters an agreement with the potential witness that provides for his or her testimony in exchange for the prosecutor filing a motion with the court suggesting that the sentence of the accused person be reduced. This motion cannot be legally binding so as to not interfere with judicial independence in the determination of an appropriate penalty. But it may prove persuasive to the judge in determining a sentence. States with a mandatory minimum sentence for criminal offenses would need to amend the legal framework to give judges the discretion to issue penalties that are below the mandatory minimum sentence provided for by law.

Cooperative witness provisions have proved popular in many states. However, some states have not introduced such provisions because they

violate other legal provisions, such as mandatory prosecution (which gives the prosecutor no discretion to abstain from prosecuting a suspect where there is sufficient evidence) or the principle of equality before the law. Other states have not introduced legislation due to fears about the potential for abuse that such measures could bring, doubts about the reliability of statements of perpetrators of crimes, and public and victim outrage that someone who has committed a crime may be exempted from prosecution or receive a lesser sentence. When considering drafting cooperative witness provisions, it is important to consider the public's perspective about these measures and the context in which such provisions would apply, particularly in a postconflict environment where similar legal measures may have been abused under a prior regime and thus may have negative connotations and associations for the population. A state that decides to introduce cooperative witness provisions or plea-bargaining provisions will find that the "Model Criminal Procedure Code" and the *Legislative Guide for UNTOC* are useful references.

Seizure and Confiscation of the Proceeds and Instrumentalities of Crime

According to Article 2(f) of UNTOC, seizure, or freezing, of the proceeds, assets, and equipment or other instrumentalities of crime is a legal measure under which a person is temporarily prohibited from transferring, converting, disposing of, or moving his or her property by order of the court. Very often when assets are seized, the police take temporary assumption of custody or control of property based on an order of the court. Seizure, as opposed to confiscation or forfeiture, is a temporary measure and occurs during the investigation and trial of an offense. According to Article 2(g), confiscation involves the permanent deprivation of property by order of the court or another competent authority and almost always occurs only after the trial of the accused has concluded and he or she has been found guilty.

In recent years, there has been a growing recognition both domestically—as evidenced by the growing number of states implementing legislation on seizure, freezing, and confiscation of assets—and internationally—in various international treaties—of the importance of a state asserting its legal power to seize and confiscate assets in the fight against serious crimes. This growing recognition is particularly pronounced in relation to crimes such as organized crime, money laundering, drug trafficking, and the financing of terrorism. Seizing and confiscating the proceeds of crime and the instrumentalities of crime are vital to ensuring that serious crimes perpetrators are prevented from profiting from crime and enjoying their illegal gains. Taking away the "capital" of a criminal gang will also hinder the commission of future criminal activities by preventing the reinvestment of funds in criminal activity.

Confiscation: The Case of Bosnia and Herzegovina

In postconflict states where corruption is rampant, it is important for a state to have the legal authority to seize and then confiscate illegally acquired property and other assets. Such authority is a powerful tool in combating and deterring corruption; by the same token, however, the absence of such authority can hamstring efforts to fight corruption. In Bosnia, for example, an asset forfeiture law proposal remained stalled in parliament as of 2005 after its introduction in late 2003. While the scale of the corruption problem in Bosnia is not seriously disputed, the ruling nationalist parties have been unwilling to support a law aimed at cutting down corruption, tax evasion, and money laundering within the country. Even with the establishment of a special legal department for combating organized and economic crime, convicted persons have typically retained ownership of their illegally acquired assets and will continue to do so until Bosnia's courts are empowered by law to requisition assets acquired through criminal activities.

A postconflict state's legal framework will need to be amended to provide the legal basis for an asset seizure and confiscation regime. It is worth noting that even when the legal framework provides for such a process, the tasks of tracing, seizing, and confiscating assets are extraordinarily complicated and challenging. Even developed and well-resourced states grapple with this challenge. Domestic legislation should be augmented to provide for the power to seize and confiscate assets both before and after trial. In so doing, a state must also consider to what crimes seizure and confiscation

should apply and what exactly can be seized or confiscated. Many states limit the power to seize and confiscate to the most serious crimes, such as drug trafficking, terrorism, and organized crime, as provided for under international or regional treaties. The *Explanatory Report to the Council of Europe Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds of Crime*, however, urges that states go further and include all crimes that “generate huge profits” (para. 66), including extortion, kidnapping, economic fraud, insider trading, violent crimes, sexual exploitation of children, and environmental offenses, to name but a few. As for what exactly can be withheld or taken from the perpetrator of a crime, there appears to be an international consensus that the seizure and confiscation of the following is permissible and necessary:

- The proceeds of crime
- Property acquired with the proceeds of crime
- Property acquired from legitimate sources that has been mingled with property acquired with the proceeds of crime, up to the value of the proceeds of the crime
- Property, equipment, and instrumentalities used in or destined for use in a crime for which seizure and confiscation is permissible (e.g., vehicles and warehouses used to transfer and store controlled substances)

To seize and confiscate the proceeds, property, equipment, or instrumentalities of crime, a state will also have to implement various procedural provisions and powers to (1) trace and identify such items, (2) temporarily seize them in advance of potential future confiscation, and (3) confiscate them after conviction and dispose of them appropriately.

Tracing and Identifying Proceeds, Property, Equipment, or Instrumentalities

To trace and identify proceeds, property, equipment, or instrumentalities, police and prosecutors will need legal provisions that enable them to access information on bank accounts and business records and to require banks and businesses to produce these records. To do so in a state that does not possess an adequate banking regulatory framework may require sweeping and complementary reforms to domestic banking laws and regulations. To trace and identify the proceeds and instrumentalities of crime, police and prosecutors may also need powers to access information on assets, income, commercial records, property, stocks, and so forth. Furthermore, covert monitoring of financial transactions may aid in the tracing and identification process.

Seizing Proceeds, Property, Equipment, or Instrumentalities

A state will need to establish a procedural mechanism to seize proceeds, property, equipment, or instrumentalities. There is no single standardized and internationally accepted mechanism. In some states, temporary seizure of assets is a civil matter, and there is a low standard of proof (“on the balance of probabilities”) required before assets can be seized or confiscated. In other states, asset seizure is a matter for the criminal law, and a higher standard of proof (“beyond a reasonable doubt,” “convincing truth,” or “objective truth”) is required. Some states, depending upon constitutional restraints, “shift the burden of proof” onto the suspect or accused—that is, to retain his or her assets, a suspect has to prove their lawful origin, as opposed to the prosecutor having to prove that the assets were obtained by unlawful means. This practice is not generally accepted, however, and in fact is somewhat controversial. Opponents argue that shifting the burden of proof impinges upon the presumption of innocence of the suspect or accused. That being said, treaties such as UNTOC and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime present such an option, subject to the limitations of the domestic law of states parties. Legislation establishing the procedure for temporary seizure of assets needs to include details such as the duration for which assets can be held, appeal mechanisms, and rights of good-faith purchasers and innocent third parties who have no knowledge of the crime and may have a right to the seized property.

Confiscating Proceeds, Property, Equipment, or Instrumentalities of Crime

A state will need to establish a procedural framework for the confiscation of proceeds, property, equipment, or instrumentalities of crime. As with the temporary seizure of assets, this could be done through a separate civil process or as part of the criminal procedure and final disposition in a criminal case. The same considerations that apply to the seizure of assets, such as whether a civil or criminal procedure should be established, apply to the confiscation of assets.

A state will need rules and administrative procedures to govern the handling of seized or confiscated property. To prevent abuses and to maintain transparency in the process, the state will further need to designate an authority to handle and secure temporarily seized and confiscated property. If a person has been found guilty and the court orders permanent confiscation, the state must determine the issue of disposal of the property. In some states, confiscated property goes to a victims' fund. Where a victim has lost property as a result of a crime, legislation may ensure that the property is returned to the victim or that he or she is adequately compensated. This measure is provided for as an optional provision in UNTOC (Article 14[2]). In situations in which there is no victim or compensation of a victim is not possible, it may be appropriate for the state to take confiscated assets or property for its own use. Where a crime has a transborder element and two or more states have been involved in its investigation, the states may consider sharing the confiscated property or using it to cover the costs of any mutual legal assistance that has been provided.

A state may wish to amend its legal framework to provide for seizure and confiscation not only of in-state proceeds and instrumentalities of a crime but also of those in other states. International cooperation is necessary here, as serious crimes perpetrators often hide the proceeds and instrumentalities of crime in other states, hoping to evade seizure and confiscation laws in their home states. UNTOC and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances require states that have signed and ratified both treaties to cooperate to the greatest extent possible in this regard. This form of international cooperation may be legislated for under bilateral or multilateral mutual legal assistance treaties or domestic legislation. The provision of assistance in tracing, seizing, and enforcing confiscation orders issued by another state will follow the same procedures as other mutual legal assistance measures.

Amendments to the legal framework are not the only measures required for the effective seizure and confiscation of the proceeds and instrumentalities of crime. The investigation of the proceeds of crime is a complex endeavor, and those involved in the investigation, as well as in the process of asset seizure and confiscation, require extensive training.

The Importance of Having a Legal Basis for Seizure and Confiscation

While a state's power to seize and confiscate assets can be an invaluable tool in combating serious crimes, the importance of establishing a legal basis for such seizures should not be underestimated. Indeed, in allowing illegal seizures through the misuse of or the failure to apply the correct procedures, or by failing to establish a sound legal basis that would authorize public confiscation, states risk encouraging the very criminal behavior they are trying to stop. For example, in Kosovo, some UNMIK international police officers seized cars that had been recorded as stolen in the databases of their home countries and confiscated them without properly

investigating and instituting cases of stolen property, or at least without formalizing proof of contraband by working with the prosecutor and court to receive international legal assistance from the victims' states. In the absence of any provisions allowing permanent confiscation without prosecution and conviction through a final verdict, and without standard procedures that established a legal basis for seizing the cars or regulating their confiscation (e.g., regulating where they should be stored and safeguarded), the police officers kept the cars for police use. The UNMIK international police later issued instructions to prevent such illegal takings.

States may need to form specialized and multidisciplinary units or task forces to work on the financial side of criminal investigations. Units may include not only prosecutors and officers with police powers of varying types, including border, customs, tax, financial or economic, and judicial police, but also specialists in forensic accounting. Furthermore, given that police and prosecutors often have to work hand-in-hand in financial investigation, procedures or protocols for interagency cooperation would be valuable. Agreements or memoranda of understanding among these agencies may be required to formalize such cooperation.

When introducing asset seizure and confiscation in a postconflict state, it is important to bear in mind any history of the government or police arbitrarily appropriating property without a legal basis or justification. To assuage any fears of arbitrariness, the state needs to inform the population about any new laws and the precise rationale for and limits on these powers. This process may require conducting public awareness and outreach campaigns. It is imperative to set in place adequate checks and balances to the broad powers of police, prosecutors, and the courts.

Effective Extradition Procedures

Extradition is a formal process conducted through treaties that define the process and conditions under which a person in one state can be sent to another state either to face trial or to serve a sentence. Given that serious criminal activity, such as trafficking in persons, weapons, and drugs and smuggling of goods to avoid taxation, often has a transborder element, and given the ease of travel, particularly in postconflict states

The Value of Extradition Treaties: The Case of West Africa

A March 2005 report issued by the UN secretary-general advised the UN missions in Côte d'Ivoire, Liberia, and Sierra Leone to ensure that adequate extradition treaties are in place and to strengthen judicial and prosecutorial cooperation between the three countries. If acted upon, this advice will go a long way toward tackling a host of important cross-border issues, including trafficking in persons, drugs, and small arms; the smuggling of natural resources; and the use of children in armed conflicts.

with porous borders, it is important to have effective extradition mechanisms in place in a postconflict state. A person accused or convicted of a serious crime might have fled the state and be residing abroad. A person living in another state might have committed a serious crime in a postconflict state without ever actually having set foot in the postconflict

state—for example, by aiding and abetting in the trafficking of persons. Depending on the legal framework, the postconflict state may still have jurisdiction to prosecute and may wish to do so. For example, the legal framework of a state may assert extraterritorial jurisdiction over a criminal offense (see the sidebar on page 69). Without formalized extradition procedures in place between both states, however, prosecution will not be possible. Nor will it be possible to bring an accused or convicted person who has fled the jurisdiction back to face prosecution or punishment.

To provide for the extradition of persons to and from a postconflict state, it may be necessary to conclude extradition treaties and to make some amendments to the domestic legal framework. Another option may be to use the provisions of international conventions as a substitute extradition treaty. States that have signed and ratified UNTOC can use its extradition provisions as a substitute where no extradition agreement exists with a requesting state, but only in relation to other states that have signed and ratified UNTOC and only in cases involving extradition for the criminal offense of participation in an organized criminal group listed in UNTOC. Likewise, states that have signed and ratified the United Nations Convention against Corruption (UNCAC) can use the extradition provisions of UNCAC where no extradition agreement exists with a requesting state, but only in relation to other states parties to UNCAC and only for cases involving extradition for corruption and corruption-related offenses listed in the convention.

Extradition treaties and implementing legislation are lengthy and highly complex instruments, and practice varies among countries. Some countries have a constitutional prohibition on extraditing their own citizens. Other states permit this practice. There is also a debate about what constitutes an extraditable offense. Many states have replaced a list of extraditable offenses with the “principle of dual criminality,” meaning that extradition is permissible where the offense in

Extraterritorial Jurisdiction to Combat Serious Crimes

Many international conventions on serious crimes require that states assert “extraterritorial jurisdiction” over these crimes.

Examples include

- organized crime (UNTOC)
- drug trafficking (Single Convention on Narcotic Drugs, United Nations Convention on Psychotropic Drugs, United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances)
- corruption (United Nations Convention against Corruption)
- terrorist offenses (Convention on Offences and Certain Other Acts Committed on Board Aircraft, Convention for the Suppression of Unlawful Seizure of Aircraft, Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Con-

vention on the Prevention and Punishment of Crimes against Internationally Protected Persons, International Convention against the Taking of Hostages, Convention on the Physical Protection of Nuclear Material, Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Convention on the Marking of Plastic Explosives for the Purpose of Detection, International Convention for the Suppression of Terrorist Bombings, International Convention for the Suppression of the Financing of Terrorism)

question is criminalized in both the state requesting extradition and the receiving state.

In drafting extradition treaties, it would be helpful to refer to the United Nations Model Treaty on Extradition, which provides a framework for extradition. It would also be necessary to look to international conventions that a state has signed and ratified, as many of these conventions contain basic minimum standards and obligations on states vis-à-vis extradition. The *Legislative Guide for UNTOC* and the *Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols* contain detailed descriptions of international extradition requirements, valuable resources, and samples of domestic legislation. Depending on the state in question, implementing extradition treaties may also involve legislative amendments, such as amendments to a criminal procedure code. A useful resource in this regard is the “Model Criminal Procedure Code” in which an extensive framework for extradition based on international obligations and best-practice standards on extradition has been drafted.

The Role of Mutual Legal Assistance in the Investigation of Serious Crimes

Mutual legal assistance refers to the provision of legal assistance by one state to another state in the investigation, prosecution, or punishment of crimes. As with extradition, mutual legal assistance is usually governed

by bilateral or multilateral mutual legal assistance treaties that govern the scope, limits, and procedures for such assistance. These treaties supplement cooperation that already exists under other mechanisms, such as Interpol.

Mutual legal assistance treaties are distinct from joint investigations, another useful international cooperative mechanism (mentioned in UNTOC and UNCAC) that is also relevant to the investigation of serious crimes. A joint investigation is undertaken by agreement of states on a case-by-case basis. In such arrangements, amendments to the legal framework may not be necessary.

Mutual legal assistance treaties are not necessary for every type of information sharing and assistance. Bilateral cooperation and sharing of information can occur directly between law enforcement actors in different states on an informal basis. Indeed, such informal arrangements can prove very useful and should be encouraged.

Mutual legal assistance measures include the following:

- Taking of evidence or statements from persons who may be witnesses or victims
- Effecting service of judicial documents
- Effecting searches and seizures of evidence, including bank, telephone, and Internet records
- Effecting seizure and confiscation of proceeds and assets
- Examining objects and sites
- Providing information, evidentiary items, and expert evaluations
- Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate, or business records
- Identifying or tracing proceeds of crime, property, instrumentalities, or other items for evidentiary purposes
- Granting requests for covert and other measures of surveillance to be implemented
- Facilitating the voluntary appearance of persons in the requesting state
- Providing copies of government records, documents, or information, including passports and visas

Given the transborder nature of some serious crimes, mutual legal assistance measures can be an invaluable tool. Many international conventions contain extensive provisions and requirements for states providing mutual legal assistance to other states. To give and receive such aid, it is necessary to conclude mutual legal assistance treaties and often to make some changes to the domestic legal framework. Another option may be to use the provisions of international conventions as a substitute;

states that have signed and ratified UNTOC can use its mutual legal provisions as the applicable law, but only in relation to other states parties to UNTOC. Likewise, states that have signed and ratified UNCAC can use its mutual legal provisions as the applicable law on mutual legal assistance, but only in relation to other states parties to UNCAC.

Like extradition treaties and legislation, mutual legal assistance treaties and implementing legislation are lengthy and intricate. The process of drafting such documents is thus typically time-consuming and complex. Fortunately, a number of useful resources exist for states that wish to draft a mutual legal assistance treaty or to implement domestic legislation on mutual legal assistance. These resources include the following:

- The Legislative Guide for UNTOC and the Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols contain detailed descriptions of international mutual legal assistance requirements and samples of domestic legislation.
- The “Model Criminal Procedure Code” contains an extensive framework for mutual legal assistance, based on international obligations and best-practice standards, that could apply in addition to or in place of a mutual legal assistance treaty.
- The UNDCP Model Mutual Legal Assistance in Criminal Matters Bill is a model mutual legal assistance act drafted by the UN Office on Drugs and Crime.
- The Mutual Legal Assistance Treaty Creator, developed by the UN Office on Drugs and Crime, is a program designed to assist in the drafting of mutual legal assistance treaties. 