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MODEL CODES FOR POST CONFLICT CRIMINAL JUSTICE: OVERVIEW

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"It is by reintroducing the rule of law and confidence in its impartial application that we can hope to resuscitate societies shattered by conflict."¹

INTRODUCTION

Establishing the rule of law in conflict and post conflict environments is currently a central focus of both the United Nations and regional organizations. As part of the multitude of issues that come under the umbrella term "rule of law" is that of the "applicable law."

The term "applicable law" refers to the legal framework that applies in a given territory. As noted in the Report of the Secretary-General on "Justice and the Rule of Law: The United Nations Role" in August 2003, and in the 2000 report entitled "Report of the Panel on UN Peace Operations" (more widely known as the "Brahimi Report"), numerous difficulties arise when addressing the issue of the applicable law in the context of a conflict or post conflict environment. In some cases, the pre-existing law does not comply with minimum international human rights and criminal law standards or it may contain discriminatory provisions. It may also be opposed by the local population on account of its association with the former regime. In other cases, the law may be outdated and ill-equipped to deal with current law and order problems. In almost all instances, some form of law reform is necessary in the very early stages of a peace operation to ensure that there is an adequate legal basis to prosecute crimes that are occurring, particularly "newer" crimes that are not contained in the pre-existing legislation. Just as important, the legal framework in place should not violate the fundamental human rights of the local population.

In the past, initial law reform has proved to be a lengthy and time consuming process, conducted while many crimes go unpunished in the territory because of a lack of a legal basis for the police to act. This process has also required starting over in each peace operation, effectively "re-inventing the wheel" each time.

¹ Address of the United Nations Secretary-General, Kofi Annan, to the General Assembly (21 September 2004) (available at www.un.org/apps/sgstate.asp?nid=1088).

THE CODES PROJECT

The United States Institute of Peace and the Irish Centre for Human Rights, in cooperation with the United Nations Office of the High Commissioner for Human Rights and the United Nations Office on Drugs and Crime, are coordinating a project, inspired by the Brahimi Report that seeks to provide tools to assist in the abovementioned process of legal reform.

The tools that have been developed are a set of codes that focus on criminal law legislation as a means to enable the more effective delivery of criminal justice. The codes – a criminal code, procedure code and detention/prison code – have been developed through a community of experts from around the world. The “Transitional Criminal Code” (TCC) contains general provisions on substantive law, as commonly found in national penal codes, such as criminal liability, grounds for defense, jurisdiction and penalties. It also contains a list of offences in the “Special Part”. The definitions contained in the TCC are those crimes most commonly found in a conflict and post conflict environment, and that are frequently missing from the national legislation. The “Transitional Code of Criminal Procedure” (TCCP) consists of provisions on all aspects of criminal procedure, from investigation to appeal. It also contains provisions on issues such as juvenile justice, extradition and international cooperation, witness protection and redress for victims. The “Transitional Detention Act” deals solely with detention, both pre-trial detention and detention upon conviction. It contains a mix of both general principles and also standard operating procedures applicable to the relevant detention authority.

The goal was to create a package of draft codes that draw upon the lessons learned in past peace operations and that are tailored to the exigencies of a conflict or post conflict environment. The target audience of the codes is national and international personnel (whether acting as part of an assistance or an executive mission) engaged in the law reform process in such environments.

These codes were developed through the blending of different legal systems to create a coherent legal framework. The codes are also drafted with the exigencies of its environment of application. Consequently, it takes into account factors that are often present, such as a lack of resources and personnel. Rather than drawing from one legal system, the codes developed represent a cross-cultural model inspired by a variety of the world’s legal systems (common, civil, and Islamic law). Sources cited for provisions throughout the codes reflect this rich blending of various legal traditions.

The package of codes contains two important elements in addition to the legal provisions of the codes. First, the legal text is accompanied by a set of extensive commentaries. These commentaries are a vital component of the transitional codes package. They explain the choices of wording and approaches adopted by the expert panel, elaborate upon the content of the legal provisions, articulate why the provisions are of particular consequence in a conflict or post conflict environment, and provide practical information from past and current peace operations on the experience in previously applying similar provisions.

Second, in addition to the codes and commentaries, an accompanying document, entitled “Guidelines for Application,” has been drafted, which is an equally indispensable tool. In the

first instance, it discusses the project in an in-depth manner and seeks to provide an understanding of how the codes could be used in a practical sense. Looking at the issue of the applicable law more broadly, it also sets forth a methodology for assessing and approaching the criminal law framework in a conflict or post conflict environment. Finally, the “Guidelines for Application” provides a succinct summary of the structure and provisions of the model codes.

POTENTIAL USES OF THE CODES

As mentioned above, the codes provide a valuable tool that policy-makers, lawmakers, practitioners and those engaged in the law reform process in conflict and post conflict states - both national and international personnel- can look to for inspiration where the criminal law in place is deficient or unsuitable for some reason, and consequently in need of reform.

- Where the pre-existing law contains “gaps,” such as is commonly found in conflict and post conflict environments, the codes could be used to fill them. An example would be the situation in which certain crimes do not exist on the statute books but are being perpetrated at large. This would be more common with “newer” crimes or crimes that are prevalent particularly during or after a conflict, such as trafficking in persons, people smuggling, organized crime, money laundering, or incitement to crime on account of hatred.
- In addition to criminalizing such acts, procedures will also need to be put in place to adequately investigate and prosecute them. In the case of organized crime, for example, experience has shown that measures to protect victims, witnesses and their families are an essential component of criminal procedure legislation. Covert or other technical means of investigation are also often required to give the police the necessary tools to investigate organized crime.
- The criminal legislation in many conflict and post conflict environments clearly violates international human rights standards and criminal law standards. For example, in Kosovo, early on in the mission, it was clear that a lack of provision in the law for the review of detention, commonly referred to as *amparo* or *habeas corpus*, was in violation of international standards. In East Timor, according to *UNTAET Regulation 1999/1 on the Authority of the Transitional Administration in East Timor*, a number of provisions of the penal code were deemed to be no longer applicable as they violated international standards on human rights. In order to bring the law in line with these standards, it would be necessary to delete objectionable provisions and replace them with standards that comply with human rights norms. At the same time, however, the new standards must be workable and practicable in the particular environment in which the laws will apply.

This is no easy task. In the first instance, it would be necessary to ascertain what the international standards are. This would then require a process of “translation” of these general norms from the abstract into concrete legislative provisions that can actually be applied in circumstances of great instability, widespread criminality and minimal capacity of the justice sector. The model codes are a valuable asset, as this process has

already been thoroughly undertaken in the course of their drafting. As part of the drafting of the codes, a study was carried out to determine the baseline standards of human rights and criminal law. Thereupon, substantive provisions were created that made these standards real by translating them into readily-applicable legal provisions. The result is not the “gold standard” for protection of human rights in a peaceful, well-functioning society, but rather provisions that are workable and practicable in a conflict or post conflict environment while still being fully compliant with international norms. Commentary to the substantive provisions of the codes will give comprehensive guidance on how baseline standards can be increased as conditions permit. The commentaries also contain discussion on the core substance and parameters of the particular human rights norm and point to relevant standards and case law to assist the user in furthering understanding of the meaning of the provision.

- In some conflict or post conflict environments, the law in force might have been that of a former dictatorial or oppressive regime and therefore might be politically objectionable to the local authorities in power or the population at large. A decision could be made by the legislative authorities to create a “transitional law” pending more extensive revision of the criminal legislation. Where such a decision is made, the codes could be a valuable source of inspiration in creating transitional legislation. Given the fact that there is no “one size fits all” model, it is unlikely that the codes would be used in their entirety, but the provisions used could be adapted to the particular context in which they were to apply.
- In cases where a special chamber or division or a tribunal is being set up either as part of the domestic system or as a stand-alone body to handle, for example, international crimes (genocide, crimes against humanity and war crimes) or serious crimes (organized crime, terrorism, economic crime) the codes may be used as a source of inspiration. For example, in Bosnia an economic and organized crime division was established within and as part of the existing criminal justice system, as well as a war crimes division. In Sierra Leone, a special court was set up to deal with past crimes that occurred in the course of the conflict.

It is also likely that additional uses for such a set of codes will unfold over time. During the consultation and vetting process, for example, input received from legal experts suggested that the utility of the codes should not be limited to conflict or post conflict environments. Many were of the view that the codes could be useful in weak states, unstable states or states which may not have conflict *per se*, but experience the same justice system resource issues as those of post conflict states.

THE DRAFTING, CONSULTATION AND PRESENTATION PROCESS

The codes were initially drafted over a period of 18 months by a multi-disciplinary team of experts from various legal systems with experience in different post conflict settings. Following this phase of the project, the process sponsors began an exhaustive consultative process that has involved over 250 experts to date, including international and national judges, prosecutors,

defense lawyers, police, corrections officials, human rights advocates, military lawyers and international, comparative and criminal law scholars. Among the elements of this consultation have been the following:

- USIP and ICHR, with the support of the UN's Office of the High Commissioner for Human Rights, convened a three-day conference in Geneva, Switzerland in June 2003 to review the draft codes. The 80 participants included a wide range of rule of law experts, hailing from 24 countries, and representing legal systems in the Middle East, Europe, North America, Africa, and Asia.
- Organized into working groups, these 80 specialists continued to work on and revise the codes over a four-month period after the Geneva meeting. During this period, over 40 additional experts were consulted and invited to provide comments on the draft codes.
- A number of meetings were convened in Galway, Ireland, in February 2004. The first meeting reconvened the original panel of experts to consider the recommendations made in relation to two of the three model codes - the Transitional Criminal Code and the Transitional Code of Criminal Procedure - during the post-June 2003 consultation period. The second meeting focused on the third of the model codes, the Transitional Detention Act. At this meeting, experts on corrections and detention standards and prison management conducted a line-by-line review of the Act, as well as expanded the commentary to aid its application in the field.
- A roundtable discussion centering on the possible application and use of the model codes in an Asian context was co-hosted by the Asia Pacific Centre for Military Law and the Institute of Comparative and International Law at the University of Melbourne, Australia in March 2004.
- In June 2004, a meeting took place at the UN Office of the High Commissioner for Human Rights. At this meeting, legal experts from the European Commission met with members of the codes drafting team to provide substantive input on the provisions of the model codes.
- Field research was conducted in Timor Leste and Kosovo. Individual consultations on the codes were conducted with both international and national judges, prosecutors, defense counsel, academics, human rights advocates and individuals engaged in law reform.
- A series of meetings that sought to assess the potential utility of the codes in a regional context and to test their compatibility with a variety of different legal systems commenced with an Africa roundtable discussion in Abuja, Nigeria in June 2004. The meeting brought together scholars and practitioners from militaries, police forces, the corrections sector, national judiciaries and legislatures, and the human rights community, hailing from Botswana, Liberia, the Democratic Republic of the Congo, Sierra Leone, Uganda, Nigeria, Zambia, Zimbabwe, Tanzania, Ghana and Sudan. The Africa roundtable members reconvened in London in September 2004 in partnership with the United Nations Association of the USA.

- In July 2004, a second roundtable meeting was held in partnership with the International Institute of High Studies in Criminal Sciences (ISISC) in Siracusa, Italy, this time focusing on Islamic countries. At this meeting, experts from Morocco, Egypt, the United Arab Emirates, Syria, Libya and Sudan reviewed the substance of the model codes from a Shari'ah law perspective.
- The final roundtable meeting was held in September 2004 in Bangkok, Thailand in cooperation with the Judge Advocate General's Department of the Thai Military and the United Nations Association of the USA. A team of justice, police and military experts from various Asian countries, including Thailand, Sri Lanka, Nepal, Hong Kong, China, Bangladesh, Fiji, the Philippines, and Malaysia examined the potential utility of the codes and their compatibility with Asian legal systems.
- The "Guidelines for Application" of the codes was presented to a group of 80 rule of law specialists at the United Nations Office of the High Commissioner for Human Rights "Rule of Law Tools Workshop" for comment and input in September 2004.
- Consultation was also sought on the "Guidelines for Application" along with the Transitional Detention Act, at the International Corrections and Prisons Association Annual General Meeting in Beijing, China, in October 2004.
- In January 2005, the International Peace Academy, in collaboration with USIP and ICHR, organized a one-day roundtable on the model codes in New York, which brought together a number of UN Member State Permanent Representatives, legal advisors and military attaches, as well as UN officials and members of the non-governmental and academic communities.
- In addition to these consultations, presentations on the model codes have been made at a number of different meetings and conferences for reactions and input, including the United Nations Commission on Crime Prevention and Criminal Justice in Vienna, Austria (May 2004); and the European Commission's Workshop on Criminal Justice in the Framework of Training Activities in Civil Crisis Management in Madrid, Spain (May 2004); and the "Challenges to Peace Operations: Into the 21st Century" Conference, held in Abuja, Nigeria in June 2004. In July 2004, the model codes were presented for input to 60 Iraqi judges, lawyers and academics as part of "Raising the Bar: Legal Education Reform in Iraq" in Siracusa, Italy. At the same venue, the codes were also presented to members of the Afghan judiciary as part of the Interim Training of Afghan Judiciary being conducted by ISISC in cooperation with the International Development Law Organization.

NEXT STEPS ON THE CODES PROJECT

Individual consultations on the model codes, with a variety of experts from different disciplines and regions of the world, are still ongoing. New elements and suggested amendments to the codes are currently being incorporated, and commentaries to the codes are being augmented based on the substantial input received over the course of the consultation process. Finalization and publication of the transitional codes package is scheduled for 2005. Following this, efforts will be made to monitor and advise on the use of the codes, as well as gather input for future potential revisions and refinements.

In addition to the three codes to be published in 2005, work is underway on the development of a Police Act – the “Transitional Law Enforcement Powers Act” – and a set of Standard Operating Procedures/Implementing Regulations for police operating in a conflict or post conflict environment. The need for the creation of both documents came about as a result of a meeting held in Galway, Ireland, in February, 2004 that gathered 22 experts on post conflict policing, including civilian police officers and officials from several current and former UN missions.

The Transitional Law Enforcement Powers Act (TLEPA), similar to the type of Police Act found in many civil law systems, focuses on the maintenance of public order, as opposed to criminal investigation. Thus, it contains provisions on issues such as public gatherings, road blocks, arrest and detention otherwise than in connection with a criminal offence, and use of force and firearms, to name but a few. The Standard Operating Procedures/Implementing regulations will set forth detailed procedures for police to follow when taking actions relating to criminal investigation (and will therefore have a close relationship to the Transitional Code of Criminal Procedure), and also when taking actions relating the maintenance of public order, pursuant to the TLEPA. The TLEPA is currently being drafted and vetted by international policing experts. A vetting meeting is scheduled for July 2005. Preliminary work has commenced on the creation of the Standard Operating Procedures, with widespread vetting due to commence in the middle of 2005.

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