

OPEN SOCIETY JUSTICE INITIATIVE

International Crimes, Local Justice

A Handbook for Rule-of-Law
Policymakers, Donors, and Implementers



OPEN SOCIETY
FOUNDATIONS

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The Open Society Justice Initiative bears sole responsibility for any errors or misrepresentations.

Acronyms

ASP	Assembly of States Parties (to the Rome Statute)
CICIG	International Commission against Impunity in Guatemala (Comisión Internacional contra la Impunidad en Guatemala)
DDR	disarmament, demobilization, and reintegration
DPG	Development Partners Group
DRC	Democratic Republic of Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ICC	International Criminal Court
ICD	International Crimes Division (of the High Court in Uganda)
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
JCE	Joint Criminal Enterprise
JLOS	Justice, Law, and Order Sector (Uganda)
LRA	Lord's Resistance Army (Uganda)
SASP	Secretariat of the Assembly of States Parties
SCSL	Special Court for Sierra Leone
TRC	truth and reconciliation commission
UNODC	United Nations Office on Drugs and Crime

Executive Summary

Surviving victims of the gravest crimes—war crimes, crimes against humanity, and genocide—have little chance of seeing the architects of their suffering brought to justice. This is true even today, nearly a decade after the International Criminal Court (ICC) became operational. Some crimes fall outside of the ICC’s jurisdiction because they have been committed in states that are not party to the Rome Statute that created the court, by individuals who are also from non-states parties.¹ Similarly, crimes committed before July 2002, when the Rome Statute took effect, are outside the ICC’s jurisdiction. Even where the ICC does have geographical and temporal jurisdiction, the alleged crimes must meet a gravity threshold. But even then the court’s three trial panels and two courtrooms can only accommodate a handful of cases at a time. The only reasonable hope of securing justice for a larger number of victims of international crimes is to ensure that national jurisdictions are willing and able to take on the task. Increasingly, the international community has committed to assisting states in doing so. As the international community takes up the many challenges that this entails, there is a need for guidance in how policymakers, donors, and implementers can best support states that are seeking to provide local justice for international crimes.

This handbook is part of an ongoing effort to provide just such guidance. It is intended as a practical aid to the entire rule-of-law development community. It covers large policy questions of interest to policymakers in legislative and executive roles as well as more technical issues encountered by rule-of-law programmers and implementers in headquarters and the field. The handbook has the ambition of serving as a reference

work for officials in donor governments, international organizations, multilateral development banks, contracting agencies and non-governmental organizations—anyone who has a hand in supporting national accountability for international crimes.

The handbook addresses the main needs of states that require assistance in developing the will and capacity to conduct criminal proceedings involving international crimes and ensuring those proceedings meet international standards for due process of law. For each category of need, the handbook examines areas of overlap between international justice assistance and traditional rule-of-law development, highlights issues that may be more prevalent or unique to proceedings involving international crimes, and provides examples of the international community's past successes in addressing the need. Finally, it offers a set of guidelines to assist rule-of-law donors in designing programs for each area, and lists relevant resource organizations and publications.² The content is applicable not only within the framework of the Rome Statute, but also to situations where alleged crimes do not fall under potential ICC jurisdiction.

The handbook first looks at how donors can assist countries in establishing effective outreach, an area that is often overlooked but is indispensable to successful proceedings involving international crimes. It then examines a number of other areas of technical assistance and capacity building: from establishing a sound legal framework, to investigations, prosecutions, judges, defense counsel, witness and victim protection and support, victim participation, court management, archival management, management of prisons and detention facilities, reparations, policy coordination, provision of international personnel, journalism, and NGO advocacy and court-monitoring capacity. Finally, it discusses needs for physical infrastructure and equipment.

The principal differences between providing support for proceedings involving international crimes and doing so for other types of criminal proceedings are rooted in the nature of the crimes. The differences extend beyond the legal basis. International crimes tend to have a large number of victims, which can complicate and prolong the investigations and trial process. Victims of international crimes—frequently including children, victims of torture, and victims of sexual and gender-based violence—often suffer greater trauma, and interacting with and supporting traumatized witnesses and victims requires specialized skills. In many instances the communities most affected by the atrocities are in remote locations and speak minority languages or dialects, and these factors can complicate logistics. In addition, the impact of international crimes often polarizes society. Justice in these situations, or where it threatens authorities who are perpetrators or aligned with perpetrators, can be much more controversial and difficult. This is particularly the case because modes of liability under international criminal law—including command responsibility, superior responsibility, and participation in a joint criminal enterprise—are more likely to expose senior officials to potential accountability. Witness protection and management are likely to be more significant

and complex than they would in most other types of criminal proceedings. Under such circumstances, political obstacles to genuine international criminal justice often prove more challenging than addressing capacity deficits.

For rule-of-law donors, it is important to note that there are many similarities between supporting proceedings involving international crimes and supporting domestic criminal justice systems. In many countries receiving assistance, building capacity for the conduct of genuine and fair international crime cases means beginning with addressing basic shortcomings in the justice system.³ Such fundamentals as the independence of the judiciary, the autonomy of the prosecution authority, guarantees of fair trial rights, and basic technical and professional skills form the basis for all credible judicial proceedings, and international criminal justice is no exception. Insofar as differences stem from international criminal law's potential for large, complex and sensitive cases, the challenges involved closely resemble some other types of rule-of-law development. Donors experienced in supporting justice for organized crime, corruption, or terrorism may recognize many common challenges as they turn to the implementation of international criminal law. By the same token, it should be acknowledged that development support for these other kinds of complex criminal proceedings can be considered directly relevant to proceedings for international crimes.

The types of assistance that states need in order to hold genuine domestic proceedings involving international crimes can vary greatly, and as emphasized throughout this report, proper needs assessments are vital.⁴ The justice mechanism may well be called upon to address numerous atrocities affecting various communities, committed across a large geographical space, where the justice system has imploded, there is limited human capital, the security situation is grave, misinformation about the proposed justice mechanism is rampant, potential witnesses are afraid to cooperate, and there is scant commitment to justice on the part of the government. But it could also be that the proceedings are being designed to deal with a handful of war crimes cases involving relatively few victims in a stable state where the justice system is largely functional, witnesses do not face significant threats, the population has a good understanding of the justice system, and the government is committed to the process. Assessments should consider not only the scale of such challenges, but also evaluate whether existing state institutions and assets might contribute to filling gaps. States may be tempted to seek ICC-inspired high-tech upgrades and complicated solutions where low-tech and simple solutions will suffice and be more sustainable. The proposed solutions should be appropriate to the state's capacity and ability to carry the programs forward after implementation. In many respects, the needs of domestic proceedings relating to international justice will overlap with other rule-of-law needs, so including international justice elements in rule-of-law assessments will provide greater efficiency.

Introduction

Origins

To the extent that the term “international criminal justice” has entered popular consciousness, it conjures grainy images of the Nuremberg and Tokyo trials following World War II, or alternately the sterile courtrooms of the International Criminal Court (ICC) and the ad hoc tribunals created by the United Nations in the 1990s: the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). International criminal law, even as it pursues the compelling goal of accountability for war crimes, crimes against humanity, and genocide, has (fairly or not) gained a reputation as inscrutable, alien, and remote. Increasingly, however, attention is turning to new forums for its practice: national justice systems, operating in diverse settings, close to or amidst affected communities. Under the right circumstances, these venues offer victims of atrocities the greatest chance at justice. And in asserting the rule of law for international crimes, states can help dissipate climates of impunity that incubate atrocity crimes in the first place.

National proceedings for war crimes, crimes against humanity, and genocide are not a new development. The Federal Republic of Germany and a number of other countries, including France, Israel, and the United States, launched scores of prosecutions against suspected Nazi perpetrators in the decades following World War II—with proceedings against some aging suspects continuing to the present day.⁵ Until quite

recently, however, national proceedings for international crimes committed in conflicts after World War II were only sporadic.

In the absence of viable domestic justice mechanisms, the atrocities in the former Yugoslavia and Rwanda in the 1990s spurred the creation of two international tribunals and revived planning for a permanent international criminal court.⁶ But concerns about national sovereignty would require that the ICC defer to properly functioning domestic courts. In turn, this would place new attention on the willingness and capability of domestic jurisdictions to handle proceedings for international crimes.

When state representatives gathered in Rome in 1998 to finalize negotiations on the proposed permanent International Criminal Court, their concern for national sovereignty was reflected in the final document, the Rome Statute. Its Preamble notes that the ICC should be “complementary to national jurisdictions,” with every state obligated “to exercise its criminal jurisdiction over those responsible for international crimes.”⁷ This “principle of complementarity” (a phrase that doesn’t appear in the statute itself), is elaborated in Article 17, which lays out various restrictions on the ICC’s jurisdiction. Principal among these is that the ICC lacks jurisdiction if “[t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.”⁸ Further, the ICC cannot step in if “[t]he case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.”⁹

The principle of complementarity is negative in the sense that it limits ICC jurisdiction, but it also places an affirmative obligation on states to ensure accountability for war crimes, crimes against humanity, and genocide. Efforts to assist states in fulfilling their obligations have often been referred to as “positive complementarity.”

After the Rome Statute entered into force in July 2002, its signatories focused on the activities of the fledgling ICC. To the extent that issues of state will and capacity to tackle crimes under the statute drew attention, it was largely to consider what the new court could do to help.¹⁰ Notably, attention focused on situations “under analysis” by the prosecutor where—as in Colombia—the threat of ICC action could provide an incentive for reluctant governments to proceed with national investigations and prosecutions.

Meanwhile, states continued to support proceedings dealing with international crimes being carried out at the local level, where the crimes in question pre-dated the Rome Statute.¹¹ From East Timor to Cambodia, Sierra Leone, Argentina, Chile, Peru, Bosnia and Herzegovina, Croatia, Serbia, and Kosovo, the international community offered support of various kinds for proceedings dealing with international crimes. While these initiatives sought to deliver justice in the countries where the crimes were committed, they have varied greatly in form, from the heavily internationalized Special Court for Sierra Leone financed entirely by the international community to the purely

domestic proceedings in Argentina and Serbia that have received very limited support. Most of these initiatives are ongoing, and some new processes have launched more recently, including the proceedings against Jean-Claude Duvalier in Haiti.

More recently, states and international organizations have turned greater attention to assisting local proceedings dealing with international crimes, even where these crimes fall under potential ICC jurisdiction. In the Democratic Republic of Congo (DRC) and Uganda, domestic justice mechanisms are already grappling with such cases in parallel with the ICC, and in Kenya the government is attempting to launch a domestic process that would complement, or possibly supplant, ICC activity related to that country's post-election violence of 2007–8.¹² These efforts and others have drawn increasing attention and support from the international community, largely in response to a dawning realization that the ICC cannot by itself assist states in developing the requisite will and capacity. Indeed, through the ICC's oversight and legislative body, the Assembly of States Parties, states have made it clear that the court should remain focused on its core mandate and devote only incidental resources toward providing such assistance.

At the same time, it is clear that the ICC will only ever be able to process a handful of cases at a time. It can serve as a court of last resort for the worst and most difficult cases, where local capacity and (usually the greater hurdle) political will to deal with them are absent. But without a proliferation of other credible forums, there will be insufficient justice for the victims of most international crimes, even where the ICC has launched investigations. Fulfilling the Rome Statute's aspiration that "the most serious crimes of concern to the international community as a whole must not go unpunished" requires broad efforts to enable local justice mechanisms to address war crimes, crimes against humanity, and genocide.

The Review Conference of the Rome Statute of the International Criminal Court held in May-June 2010 catalyzed a renewed dedication to realizing the "principle of complementarity." Leading up to the Review Conference, Denmark and South Africa were designated as focal points on complementarity. Following wide consultations, they put forward recommendations that emphasized mainstreaming Rome Statute concepts into traditional rule-of-law programming.¹³ At the Review Conference, states passed a resolution on complementarity calling for "the enhancement of international assistance" to boost justice for international crimes at the national level, but offered scant guidance on how this should be achieved.¹⁴ The European Union, the United States (as an observer), and several individual states parties—including Finland, France, Ireland, the Netherlands, South Korea, Spain, Uganda, and the United Kingdom—made pledges related to complementarity that in many cases were quite concrete, if still lacking an overall framework.¹⁵ This rekindled attention to assisting national proceedings has highlighted the scale and number of challenges that lie ahead.

Challenges

In many countries where international crimes have been committed, political obstacles are likely to present the greatest impediments to genuine investigations, prosecutions, and fair trials. In many cases, government forces or their allies have been involved in the relevant events, and members of their ranks frequently stand accused of having perpetrated acts constituting war crimes, crimes against humanity, or genocide. In such circumstances, the authorities are usually more interested in deflecting accountability and preserving power than in providing justice for the victims. Alternatively, in some settings, authorities in tenuous power-sharing arrangements or facing opposition forces whose members may be implicated in crimes may fear that accountability for atrocities could be destabilizing. And some governments with the former motivation seek to cloak their reluctance in the mantle of the latter, more understandable concern. Whatever their origins, political obstacles to genuine proceedings for international crimes are many and varied.

Countering Political Obstruction

The means for dealing with political obstruction to genuine domestic proceedings for international crimes vary, with bilateral and multilateral donors, policymakers, and implementers taking different approaches. Beyond efforts at diplomatic persuasion, the development community's options include:

Empowering reformers in government

Seek to identify key reform-minded or persuadable individuals in the executive office and parliament and ensure they have opportunities to become informed about international criminal justice and learn about comparable experiences elsewhere.

Boosting support to relevant civil society organizations and journalists, and investing in legal education

Place emphasis on increasing knowledge of international criminal justice among local civil society organizations, especially victims' organizations, and journalists. The international community can also boost civil society advocacy trainings and support for relevant media programming. Supporting initiatives to educate law students and local attorneys about international criminal law can be a worthwhile investment even in countries where short-term prospects for its application appear bleak.

Drawing attention to the demands of affected communities

Create forums for affected communities to address justice issues, and participate in community-organized events. The international community can seek to draw media attention to such events, and encourage the participation of government officials.

Publicly identifying political obstacles

In direct interactions with the local public or through the media, development officials can bluntly identify the sources and means of political obstruction to genuine proceedings for international crimes.

Supporting ICC or other supranational proceedings

In countries where the ICC has potential jurisdiction over alleged crimes, the international community can speak in support of possible action by the ICC prosecutor if reforms that would allow genuine domestic proceedings remain blocked. In egregious circumstances, the international community can consider UN Security Council referral of the situation to the ICC even for non-states parties to the Rome Statute, which may also help to spur domestic reform. The establishment and support for ad hoc supranational justice mechanisms is another option.

Making aid conditional on reform

Conditionality often means providing positive incentives such as pledging new support as reform benchmarks are met. Where obstruction is more acute, conditionality can mean shifting from general budget support to more closely scrutinized justice sector support or from sector support to project-specific support. If a government shows no will, there may be no point in conducting capacity assessments. In the most serious circumstances, conditionality can mean threatening to cut aid to the justice sector entirely, or even suspending the country's broader aid package.

As will be seen throughout this handbook, political reluctance can manifest itself through inaction. Governments may withhold support from efforts to domesticate international crimes into domestic criminal codes or refrain from backing constitutional amendments that may be important to facilitating domestic proceedings. In undemocratic states and those just making the transition to democracy, prosecution authorities are rarely operationally independent, and independent judiciaries are the exception. Thus even if investigations and prosecutions of international crimes are theoretically possible under domestic law, prosecution authorities and police may never initiate proceedings that they have been instructed to avoid, or that they know to be unwelcome. Or they may proceed with investigations and prosecutions of a one-sided nature:

targeting opponents and critics of the government who (often with legitimacy) have been accused of committing international crimes, while leaving current leaders and their associates beyond legal scrutiny for similar offenses. Even if prosecution authorities do press forward with discomfiting investigations and prosecutions, trial judges may have incentive to scuttle proceedings.

Authorities who seek to obstruct credible proceedings for international crimes may take a variety of active steps to thwart investigations and prosecutions. They may preserve or design legal hurdles to proceedings, including various types of amnesty, assertion of head-of-state immunity, or other *de facto* immunities built into criminal procedure codes.¹⁶ They may order prosecutors to pursue rivals, or attempt to instruct trial judges to rule in a particular way, or offer them incentives for doing so. If justice sector officials persist in pursuing genuine proceedings for international crimes against the authorities' wishes, governments may feel compelled to subvert the process in more overt ways, for example by starving the proceedings of funds, blocking or removing prosecutors and judges, or even deploying force to disrupt the justice process.

Because obvious interference threatens aid and trade relationships and invites international condemnation and even investigation by the ICC (where it has jurisdiction), authorities who wish to undermine the judicial process typically choose the least overt means required for the task. One tactic is to agree to establish genuine domestic proceedings for international crimes, but then attempt to ensure that the system is only capable of investigating and prosecuting the crimes of regime opponents, or only targets low-level suspects. By foot-dragging on technical reforms and starving the system of required resources, governments may try to ensure that relevant authorities remain incapable of launching proceedings at all. Some cases of such subterfuge are rather obvious, while in other cases it can be significantly more difficult and time consuming to discern intent. Complicating matters for development partners, the intentions of government officials may vary.

While capacity shortcomings that hinder proceedings for international crimes can be used as an excuse—a tool of political obstruction—in most locations they also represent genuine challenges in their own right. In conflict and post-conflict situations and in poor and weak countries, justice sectors often suffer from a shortage of human and financial resources, inadequate professional skill, disorganization, corruption, and political perversion. Technical challenges can arise at every point of the judicial chain, from the legal framework to investigations, prosecutions, defense, the judiciary, witness protection and support, victim participation (where practiced), court management, archival management, the management of detention facilities and prisons, and policy planning and coordination. Basic competence in these areas is important for any criminal justice system. But, as detailed throughout this handbook, proceedings for international crimes can (but, importantly, do not always) require additional knowledge and skill in each area. Furthermore, such proceedings raise challenges in areas often not

encountered in domestic justice systems, including outreach and reparations. They can also lend greater importance to capacity issues further removed from the formal judicial process, namely the capacity of journalists and civil society organizations.

As states seek to meet these challenges, the international justice community will be called upon to make extensive contributions, drawing on experience and expertise gained to date. But overwhelmingly, the task of developing the will and capacity to deal with international crimes falls not to the international justice community, but to the traditional rule-of-law development community. The latter's much greater network of international organizations, aid agencies, and other donor and implementing bodies offers extensive programs already in place around the world, as well as vast experience and expertise in fostering the rule of law. Any attempt by the international justice community to establish parallel efforts would cause confusion, create inefficiencies, and take longer to produce results. In short, fostering the conditions necessary to address international crimes is such a significant task that only the rule-of-law development community has the scope to undertake it.

As discussed above, the need for cooperation between the international justice and development communities gained new recognition in advance of the Rome Statute Review Conference of May-June 2010. At a follow-on high-level conference in October 2010, participants from both orbits acknowledged a need to cooperate in integrating international criminal justice into traditional rule-of-law programs.¹⁷ That recognition has resulted in concrete progress during 2011. Notably, the European Commission and the European External Action Service are developing a "complementarity toolkit" for use by officials in headquarters and field delegations; the toolkit is expected to be launched in early 2012. Similarly, the UN Development Programme (UNDP) and the UN Office on Drugs and Crime (UNODC) are jointly exploring ways of integrating justice for international crimes into UN rule-of-law programming.

Despite these encouraging beginnings, enormous work lies ahead. Most policymakers and rule-of-law development professionals have scant awareness of international justice issues. And even among those who have followed developments in the field, some may question the value of devoting significant resources to integrating international justice into their work, which is already replete with its own challenges and competing priorities.

Why International Criminal Justice?

Beyond concerns about shifting attention and resources to any new priority, some in the rule-of-law development community may feel that international criminal justice in particular brings with it a number of difficulties. Addressing international crimes can

introduce political challenges, touch on sensitive topics in torn societies, and require familiarity with a host of difficult issues.

Nevertheless, even if international justice can at times insert complicating factors into rule-of-law development work, the international community has embraced the importance of addressing international crimes. There are currently 118 states parties to the Rome Statute, including all 27 member states of the European Union, 33 member states of the African Union, and every country in South America. Additionally, some non-states parties—notably the United States—have supported measures designed to end impunity for international crimes outside and within the Rome Statute framework, notwithstanding lingering domestic skepticism about the ICC itself. In short, states that have committed to the policy goal of establishing accountability for war crimes, crimes against humanity, and genocide include most of the world’s largest bilateral aid donors, as well as a large proportion of aid recipients. It is worth examining why so many states have committed to the pursuit of justice for international crimes, despite the complexities.

Inherent Value

There is inherent moral value and resonance in international criminal justice. Many states embraced the need for justice for international crimes in response to the atrocities of the 20th century. As the Rome Statute’s Preamble notes, these atrocities “deeply shock the conscience of humanity.” For many policymakers in Europe and North America in particular, supporting international justice can be understood as a response to the Holocaust, and a substantiation of the moral oath “never again.” In Africa, Latin America, and Asia, atrocities committed under colonial administration, cold war proxy regimes, and apartheid have provided much of the inspiration for demanding legal accountability for the commission of similar atrocity crimes in the future.

Supporting Peace

If international criminal justice is to serve as an adequate moral reaction to the worst criminal outrages, it must be more than a symbolic proclamation that war crimes, crimes against humanity, and genocide are not acceptable. International criminal justice must make a substantial contribution to preventing the commission of such acts in the first place. Signatories to the Rome Statute draw the explicit link between justice and peace in the stated determination “to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”¹⁸ Further, in

“[r]ecognizing that such grave crimes threaten the peace, security and well-being of the world,” they imply that preventing them will contribute to peace, security, and well-being.¹⁹ Similar expectations are expressed in the founding documents of the ICTY and ICTR, and can be found in some peace agreements at the national level.²⁰

Whether international criminal justice dissuades would-be perpetrators from committing atrocity crimes in the first place is inherently difficult to measure. Numerous entangled factors can lead to or prevent the commission of atrocities, and it is impossible to isolate any single factor with certitude. Any fair evaluation of the question must be comparative: The world with international criminal justice must be compared to the world without it. And there are few test cases for the proposition that international criminal justice deters crime and contributes to peace and development.

In the two situations for which there was significant accountability for international crimes prior to the 1990s, both countries involved have been at peace ever since. In Germany, trials of Nazi perpetrators at Nuremberg, in domestic courts, and in courtrooms around the world, helped the country to face and categorically reject the nationalist foundations of its ugly past. Flaws in the post-World War II Tokyo Trials meant that they had less impact on Japan’s population, but they did sideline a significant number of senior individuals implicated in the commission of international crimes, and helped signal the futility of pursuing nationalist imperialism.

By contrast, if one looks at countries that have become the focus of international justice efforts in the post-Cold War world, many have a history of cyclical violence, including the former Yugoslavia, Rwanda, the DRC, Uganda, Central African Republic, Sudan, Kenya, and Colombia. In each of these countries, previous rounds of atrocity were not followed by efforts to hold perpetrators individually criminally accountable. The degree to which this omission may have contributed to later atrocities is difficult to isolate. In some cases, however, there are strong indications that grievances built on memories of past wrongs left unpunished and unrecognized played a key role in the eruption of new conflicts and atrocities. This was the case in the former Yugoslavia, where Serb nationalist propaganda found resonance and instilled fear in populations that recalled World War II atrocities against Serbs which met with official denial rather than accountability.²¹ Many accused Serbs at the ICTY, including Slobodan Milošević, Radovan Karadžić, and Vojislav Seselj, have prominently cited World War II atrocities against Serbs in casting their actions in the 1990s as necessary for communal defense. Similarly, in Kenya, impunity for violence arguably constituting international crimes in the 1992 and 1997 election cycles made it easier for leaders to foment larger-scale atrocities for political ends following the 2007 elections.²² In Rwanda, a lack of accountability for past crimes served to reassure perpetrators that they could get away with massacres on an even larger scale. The fact that no one was held accountable for anti-Tutsi atroci-

ties from 1990 to 1994—and that this lack of accountability caused no impediments for Rwanda’s relations with the international donor community—emboldened radical Hutu parties in preparing the genocide launched in April 1994.²³

It has only been twenty years since international criminal justice began to re-emerge in response to the atrocities of the former Yugoslavia and Rwanda, and it has only been eight years since the Rome Statute came into effect. It is difficult to gauge the effects of such a recent development, although there are some indications that it can serve as a deterrent.

In 2003 the government of Uganda referred the situation in the country’s north to the ICC after an amnesty in 2000 failed to end attacks on civilians by the rebel Lord’s Resistance Army (LRA). The ICC prosecutor opened an investigation in 2003, and in 2005 ICC judges approved arrest warrants for five senior LRA commanders. This arguably helped to bring the rebels to the negotiating table in 2006; by 2008 elements of the LRA leadership signed the Juba peace agreement and subsidiary protocols, including provisions for domestic trials of international crimes.²⁴ Although LRA leader Joseph Kony eventually balked at signing the peace agreement, LRA attacks on civilians in Northern Uganda have ceased altogether. Fears that ICC actions would destabilize the peace process have proved unfounded, and justice may well have played a significant role in deterring new atrocities and allaying the conflict, although definitive conclusions about cause and effect cannot be drawn. When Thomas Lubanga Dyilo was arrested in the DRC on an ICC arrest warrant for the forcible recruitment of child soldiers, researchers on the ground noticed a marked increase of interest in international criminal law among military and militia commanders in the country.²⁵ And one militia commander in the Central African Republic cited the Lubanga case in deciding to work with Human Rights Watch and UNICEF to demobilize child soldiers under his own command.²⁶

In Afghanistan, three years after the ICC prosecutor announced that the situation there was “under analysis,” a prominent northern commander with alleged ties to atrocities cited his fear of the ICC in forcing dozens of senior commanders to listen to a reading of a Human Rights Watch report detailing the allegations. He also reportedly moved heavy weaponry away from the city of Mazar-e-Sharif and agreed to the formation of a multi-ethnic police force there in order to prevent the abuse of minorities.²⁷ Similarly, as tensions mounted in Ivory Coast in late 2004, the UN Special Advisor on the Prevention of Genocide visited the country and warned that xenophobic hate speech from government radio could exacerbate violence and lead to a referral of the situation to the ICC. The following day, the UN mission noted, “National Radio and Television have been airing peace messages significantly different in tone and content to the ones we have been hearing of late.”²⁸

Legacy Issues

What is legacy?

Legacy is a concept associated with hybrid and ad hoc tribunals for international crimes, and also with the International Criminal Court. On one level, legacy refers to increased capacity within the justice system that is left behind once the tribunal's work is complete (or ICC activity in the country has ended). It also refers to the contribution that proceedings for international crimes can make to forging common historical memory, reconciliation, respect for the rule of law, and peace.

Legacy in national settings

With any court model, proceedings for international crimes at the national level will eventually end. To maximize lasting benefits, legacy should factor into planning from the outset.

Increased capacity

As detailed throughout this handbook, supporting proceedings for international crimes can contribute to lasting skill development and institution building in many areas: from establishing a legal framework, across every area of the judicial chain, and through support for journalism and civil society advocacy and court monitoring.

Shared history, reconciliation, rule of law, and peace

In order to maximize these more intangible legacy benefits for future generations, two areas of activity are of particular importance. Archives must be accessible to the public, and the dense information contained in them distilled and presented in a variety of easily understandable ways. Outreach activities should also extend beyond the span of the formal judicial proceedings in order to more widely share information from the archives, spur national discussion and acknowledgement of sometimes uncomfortable judicially-established facts, and solidify notions of accountability.

Further reading

UN Office of the High Commissioner for Human Rights: Maximizing the Legacy of Hybrid Courts, (Rule of Law Tools for Post-Conflict States), 2008, available at: <http://www.ohchr.org/Documents/Publications/HybridCourts.pdf>.

To be sure, these anecdotes offer only a preliminary indication that international criminal justice can have a deterrent effect, but they also point to the same simple logic

of deterrence that is taken for granted in most domestic contexts: the more that laws are enforced, the more would-be law-breakers become aware of the laws and, fearing accountability, decide against breaking them in the first place.

Beyond simple deterrence, there is mounting evidence that international criminal justice can support peace initiatives by sidelining those who would undermine the peace process. By 2003, former Liberian President Charles Taylor had been a signatory to eight peace agreements and nine cease-fire agreements, and had broken every one of them. Under increasing pressure from two rebel factions, he again sought peace negotiations as a tactic to regroup and re-arm. However, his indictment for war crimes and crimes against humanity at the Special Court for Sierra Leone made his role in any Liberian settlement untenable and led to unprecedented international pressure for him to leave the country. After twelve years of civil war, Liberia finally could begin to tackle difficult reforms and economic development. A similar dynamic can be seen in the Balkans. After the Dayton Peace Agreement ended the war in Bosnia and Herzegovina, numerous suspected war criminals remained at large and played a major role in blocking freedom of movement, minority returns and other developments supported by the international community.²⁹ Then in 1998, NATO peacekeepers began making arrests for the ICTY in earnest, and in 2005 a War Crimes Chamber was created within Bosnia's new State Court, which has subsequently tried numerous lower-ranking suspects, some of whom had remained in positions of authority. In Serbia, those sidelined by ICTY indictments related to crimes in Bosnia and Herzegovina, Croatia, and Kosovo included not only Slobodan Milošević, but also other former top officials who retained significant influence over the unreformed security sector. Furthermore, international pressure to enforce ICTY arrest warrants encouraged local officials to undertake difficult security sector reform, directly tackling a dangerous nexus of nationalism and organized crime within the institutions—actions without which some arrests would likely have been impossible.³⁰

Perhaps counterintuitively, international criminal justice can also facilitate the success of disarmament, demobilization, and reintegration (DDR) programs. Although short-term tensions between DDR programs and prosecutions for international crimes can arise, the latter not only can remove potential spoilers of the DDR process, but also help in the reintegration of ex-combatants.³¹ By differentiating among perpetrators, prosecutions can provide communities with some confidence that the worst perpetrators are not among those ex-combatants undergoing reintegration, and the assignment of individual criminal responsibility can help reduce the likelihood of collective blame. Furthermore, if victims and their communities see that suspected perpetrators are being prosecuted, they may be less resentful of benefit packages provided to reintegrated ex-combatants.

In many circumstances, acts that can be charged as international crimes are already illegal under domestic criminal codes. This begs the question of why extra effort should be devoted to developing the will and capability for states to pursue these as international crimes.³² One reason is that even where the acts are already illegal, international criminal law may offer greater deterrence than national law. Charging a number of individual perpetrators for rape or murder, for instance, may miss the circumstance that they were all linked through a hierarchy to specific commanders who failed to prevent or punish the actions. While this may not create legal liability under domestic law unless there were specific orders to commit the crimes, it does create that liability where international crimes and related principles such as command or superior responsibility are on the books. Where domestic codes are amended to integrate international crimes and these related modes of liability, those in positions of authority have a new legal incentive to act to prevent or punish crimes by their subordinates. Beyond creating this more expansive deterrence, there are other benefits to applying international criminal law. In many places, the terms “war crime,” “crime against humanity,” and “genocide” have arguably come to connote a greater level of infamy and illegitimacy. Categorizing an act as one or more of these international crimes may therefore offer victims a more profoundly felt public recognition of the suffering they have endured. This can soften the impulse for retribution. Such international crimes generally also better reflect the gravity of the atrocities and in some circumstances may provide for stronger punishment. Perhaps most importantly, the difficult extra elements that must be explored in trials for international crimes—the context and patterns of atrocities—offer precisely the type of information that can help societies arrive at common truths about the background and conduct of a conflict. Ultimately this can ease the post-conflict reconciliation that undergirds truly durable peace.³³

Traditional Justice Mechanisms

In some settings, the application of international criminal justice may help to spur initiatives for traditional justice mechanisms with parallel or overlapping mandates to deal with atrocity crimes. The *gacaca* process in Rwanda provides an example of this. Even where these mechanisms have been particularly controversial—for example the *mato oput* in Northern Uganda—the parallel practice of international criminal justice can provoke broadened discussion about issues of justice, including goals, beneficiaries, and fairness.³⁴

Strengthening the Rule of Law

In most settings where international crimes have been committed, the issue of justice for these crimes is inseparable from prospects for standard rule-of-law development. After all, how can a culture of the rule of law, accountability, and trust develop when the worst crimes, often orchestrated by ruling elites and implicating military or police officials, are left unaddressed? It is worth looking in greater detail at how the prioritization of international criminal justice has catalyzed broader rule-of-law reform in practice.

The high-profile nature of international crimes can galvanize significant domestic and international leverage for the removal of specific obstacles to genuine international justice that have also been hindering other rule-of-law development goals. In Rwanda, Bosnia and Herzegovina, Croatia, and Serbia, governments that wanted to achieve the transfer of cases from the ICTR and ICTY to domestic courts established specialized chambers for war crimes. As part of the effort, they also undertook numerous reforms required to meet the international tribunals' conditions for the transfer of cases. For example, Croatia focused on witness protection capacity, and Rwanda abolished the death penalty and bolstered the rights of the accused.³⁵

Within the Rome Statute system, the principle of complementarity has clearly extended this pattern. In states where the ICC has jurisdiction, the threat of its action can create powerful incentives for the adoption of far-reaching justice sector reforms that can best be guided or influenced by a donor community that is attuned to the issue. In Kenya, a new constitution was adopted amid demands for justice for atrocities related to the post-election violence of 2007–8, articulating a new formulation of the principle of legality.³⁶ Further, the government's desire to avoid ICC trials for six individuals has spurred officials to hasten the implementation of rule-of-law reforms under the new constitution. ICC proceedings have generated not only greater domestic and international pressure for the naming of conscientious individuals to key rule-of-law posts, but also a legal incentive if ICC judges are to be convinced that Kenyan investigations and prosecutions are genuine.³⁷ Draft implementing legislation for the Rome Statute under consideration by the DRC parliament in 2011 would not only establish a basis for the prosecution of international crimes in the country's civilian court system. The draft would also functionally abolish the death penalty for international crimes.³⁸ Further, it would amend the DRC penal code by adopting the Rome Statute's expansive definition of individual criminal responsibility as a mode of liability for all crimes under the code. If enacted, this would represent significant legal reform.³⁹

Beyond specific system-wide reforms spurred by a focus on international criminal justice, there is arguably an intangible benefit to focusing on law enforcement for the gravest of crimes. If these efforts are genuine and successful, then the public may well

gain confidence in the justice sector as a whole, which in turn can contribute to the deterrence of domestic crimes.

On a more technical level, new financial resources that come with the commitment to international justice can be brought to bear on areas of concern to the justice system as a whole. Sources of funding for general rule-of-law support and international justice overlap, but also derive in part from different policy imperatives and initiatives. The extent to which international justice and traditional rule-of-law development compete for the same funds will vary by situation and donor. With integration, redundancies can be avoided and synergies can be tapped. For example, backing for a witness protection and support system needed for international criminal law trials could also benefit initiatives on domestic abuse, sexual violence, corruption, drug trafficking, or organized crime. Criminal investigators who have undergone specialized training in international criminal justice may also receive advanced training in securing crime scenes, forensics, or taking witness statements—skills that will boost capacity of the criminal justice system across the board. As this report notes throughout, such areas of overlap are numerous.

A Factor in Economic Development

If, as argued above, international criminal justice can assist in breaking cycles of violence, laying the groundwork for sustainable peace, and strengthening the rule of law, then its relevance for economic development in conflict and post-conflict countries should not be underestimated. Indeed, the World Bank Development Report for 2011 drew a correlation between cyclical political and criminal violence and persistent poverty. It argued for a refocusing of development assistance on the prevention of political and criminal violence.⁴⁰ The report cited transitional justice, including judicial proceedings for international crimes, as an important tool in doing so.

Integrating International Justice into Traditional Rule-of-law Development Support

Integrating international justice into the work of the traditional rule-of-law development community offers advantages of expertise, efficiency, and coherence. But with the introduction of many new actors, it also places a higher premium on policy coordination within the international community itself. States and international organizations have made commendable commitments to fostering the development of new, credible

venues for international criminal justice at the state level. The extent to which these commitments pervade the policy-making and –implementing apparatus within donor entities and among them will in large measure determine their success.

As in other areas of development policy and implementation, effective support for strengthening the rule of law requires extensive communication and coordination among all relevant stakeholders. And integrating any new priority into the field requires not just political commitments from foreign ministries and other relevant actors, but the buy-in of all concerned. And yet in the Democratic Republic of Congo—a state where the rule-of-law development community is very active, and where the need for domestic justice for international crimes is tremendous—development officials interviewed in 2010 had no familiarity with relevant pledges that their own political representatives had made at the Rome Statute Review Conference three months earlier.⁴¹ In Cambodia, public information officials working on access-to-justice issues have not been able to answer questions about proceedings for international crimes at the Extraordinary Chambers in the Courts of Cambodia (ECCC), while ECCC outreach officials have no mandate to answer questions about other elements of Cambodia’s justice sector. In many locations, trainings for judges in criminal procedure don’t address international crimes, and separate trainings for the same participants must be organized to cover just this aspect. The list of such inefficiencies is long. Clearly, achieving integration will require much more work.

The challenges include not only internal communication and coordination between capitals and the field, but also among different sections of foreign ministries, and among foreign, development, and other relevant ministries and agencies. Communication and coordination mechanisms also must encompass a broader circle of stakeholders, including principally the government being assisted (discussed in the chapter on national policy coordination), as well as relevant international organizations, non-governmental organizations, and contractors. Coordination among governmental development partners and private foundations can present significant challenges. Where the international community supports domestic proceedings for international crimes as a priority, there should be an early effort to ensure support from senior international officials in the jurisdiction (i.e. influential ambassadors, and in many locations a Special Representative of the UN Secretary General). Efforts should also be undertaken to liaise with multilateral lenders and others active in the economic sector to ensure that resource needs are understood.

These challenges are common to the integration of any new priority into international development policy, but in this case may be compounded by the often-insular nature of the international justice community. As this handbook makes clear, there are many available resources that donors can tap for expertise on international justice. But the international community needs to do a better job of connecting those who know the needs with those who know the available resources.

Guidelines on Donor Policy Coordination

Assess

► **current policy coordination:**

- Is there a policy coordination mechanism in-country for all of the major donors to the justice sector?
- Does each bilateral or multilateral donor entity coordinate international criminal justice (or broader transitional justice) policy and messaging internally, including:
 - Between its field mission and capital?
 - Among all relevant offices of its foreign ministry, including country desks and regional bureaus, human rights departments, war crimes departments (where applicable), and its mission to the United Nations?
 - Between its foreign ministry and development ministry?
 - With any other ministries relevant to the given aid effort, including justice and defense?
- Does the in-country donor-coordination mechanism have expertise in the area of transitional justice—or access to such expertise—in order to sufficiently advise the host state and assess its transitional justice-related requests?

Plan

► **in-country coordination on international criminal justice issues:**

- Consider creating a working group on international criminal justice (or broader transitional justice) within an existing donor coordination mechanism for the justice sector.
- Consider first creating a donor coordination mechanism for the justice sector if one does not exist.
- Organize site visits by representatives of the donor coordination mechanism to observe transitional justice projects in the field.
- Conduct individual and collective donor reviews of existing and planned future programming to identify areas where capacity building for proceedings involving international crimes could be included through minor changes. For example, a planned training for judges could be extended to include an overview of international criminal law, or a planned audit of the criminal and criminal procedure codes could include looking at options for the inclusion of international criminal law.

- ▶ **internal coherence:**
 - Ensure that once policy decisions on international criminal justice are made, consistent guidance is communicated to all relevant ministries, agencies, and contractors.
 - Conduct a periodic review of whether these entities are in fact acting and speaking consistently in support of stated policy on international criminal justice.
- ▶ **external coordination:**
 - Ensure international donor coordination with civil society organizations, including victims' organizations, on issues of international criminal justice.
 - Where support is being conducted for states parties to the Rome Statute, determine how best to facilitate regular contact between the in-country donor coordination body on transitional justice and the Secretariat of the Assembly of States Parties (ASP) to the Rome Statute, and with the complementarity facilitators in the ASP's Hague Working Group.
 - Seek expert advice from the international justice community to plug gaps in donor knowledge.

Outreach

Why

- ▶ Allowing those affected by the events to see justice being done.
- ▶ Fostering national ownership of the international justice mechanism.
- ▶ Defusing fears based on misperceptions and rumors about mandates and activities.
- ▶ Managing public expectations, especially among victims.
- ▶ Encouraging the public, especially witnesses and victims, to participate in the process.
- ▶ Educating the public about legal concepts.
- ▶ Strengthening public expectations of accessibility to state institutions.
- ▶ Accustoming state institutions to transparency and an interactive relationship with the public.

What

- ▶ Circulating information about legal mandates, processes and activities.
- ▶ Learning of community views and expectations.

Who

- ▶ Prosecutors, defense counsel, judges, and administrators.
- ▶ Justice sector policymakers.
- ▶ Civil society organizations.

When

- ▶ Before launching proceedings for international crimes.
- ▶ During the proceedings.
- ▶ Legacy activity after the proceedings.

Outreach offers an opportunity for justice sector institutions to engage in two-way communication with communities affected by their work. The institutions can learn of affected communities' perceptions and expectations, while circulating information about their mandates and activities. Prior to the launch of proceedings for international crimes, outreach can give affected communities a voice in planning the proceedings, which can help in fostering national ownership and managing expectations. Before and during the proceedings, outreach can encourage the public, and especially witnesses and victims, to participate in the process while defusing fears among ex-combatants and others that are based on misperceptions and rumors. Once proceedings come to an end, outreach becomes a critical legacy activity; it can ensure that information from the trials remains accessible to the public, where it can contribute to a common historical narrative of events, a sense among victims that justice has been done, and ultimately reconciliation.

Methods. Outreach activities can take many forms, including interactive forums where the public can ask questions of court officials, the distribution of printed material, the airing of audio or video summaries of legal proceedings followed by questions and answers with outreach staff, radio call-in shows, theater skits, seminars, consultative meetings, and conferences. These and other methods have been used by various transitional justice institutions, and have become standard in international courts dealing with atrocity crimes. Judges' participation may most appropriately be limited to general presentations on the justice mechanism and its mandate.

Organizers and participants. In domestic settings, it may not be obvious which officials or offices should be responsible for organizing outreach. Possibilities include existing public relations offices within ministries of justice and court registries. The organizing office should be seen as impartial, meaning not aligned with the prosecution or defense. It should also not be too closely identified with the judges, so as not to be perceived as speaking for them. Domestic prosecution authorities and defense teams may not approve of court registries conducting and coordinating outreach on their behalf or in relation to their work. Care should be taken not to copy outreach models of international criminal courts in domestic settings without considering the local context. Where governments lack the capacity to conduct outreach themselves, or are too corrupt or unwilling to do so, the international community can still support outreach activities conducted by local civil society organizations. Where these too lack capacity, experienced international NGOs are well placed to provide guidance and training. No matter who organizes the outreach activities, local actors should be at the forefront as interlocutors for the public. Moreover, in domestic settings that may involve more than one institution conducting outreach, proper coordination and harmonization of outreach content and activities, preferably guided by an agreed outreach strategy, are of great importance.

In some domestic settings, it may be necessary to create a properly resourced and authorized special outreach coordination unit, or task an existing institution with such a role.

Linkages to existing rule-of-law priorities. To the extent that outreach is already included in general rule-of-law programming, it is usually intended to improve access to justice, for example by publicizing court locations and opening times. Some initiatives have sought to publicize court fees as a means of combatting judicial corruption. More ambitious access to justice programs may also try to explain the legal system in basic terms. Where such programs are already in the field, there may be opportunities for linkages. Unfortunately, this has not been the norm. For example the Australian-backed Cambodia Criminal Justice Assistance Project (CCJAP), a wide-ranging program that places foreign advisors throughout the Cambodian justice system, has had no interaction with the ECCC. At the same time CCJAP identified a need for improved general outreach on the justice system to the general public, the ECCC was working on its own outreach. Cooperation between the two approaches could have enhanced the reach and efficiency of both.⁴²

General rule-of-law benefits. Increasing the capacity of domestic jurisdictions to conduct their own outreach related to proceedings involving international crimes can reinforce common donor goals beyond the realm of transitional justice. Access to justice programs will benefit where outreach improves community understanding of such basic concepts as the independence of the judiciary and the rights of the accused. This understanding can also usefully raise community expectations and demands for transparency in governance, which ultimately can encourage governments to become more attuned and responsive to the concerns of their people. Ultimately, outreach can advance the important interest in building public confidence in state institutions and creating an enabling environment for far reaching rule-of-law reform. In these ways, outreach can be a key multiplying factor for the success of donor investments in justice and good governance.

How Proceedings for International Crimes Are Different

High costs of failure. Although outreach has generally not been a major focus in traditional rule-of-law development, and national courts and other relevant justice sector institutions do not typically have media or outreach offices, donors should be acutely aware that outreach can be indispensable to the success of proceedings involving inter-

national crimes. Early outreach can reduce costs at trial by making witnesses more willing to cooperate, and thus investigations more effective. It provides a means for communities to express their concerns and interests, and to defuse misinformation that could otherwise sow panic among ex-combatants and the general population, such as unfounded beliefs that all ex-combatants will be arrested. Ex-combatants and low-level perpetrators among them who hold such beliefs will be much less inclined to speak with investigators, and may be more inclined to take up arms again. Such misinformation can be intentionally spread by high-level suspects who have an interest in discrediting the justice mechanism.⁴³ Outreach can also serve to prevent unrealistically inflated expectations of the prosecution mandate or reparation schemes (where the latter exist) from leading to disappointment among affected populations.

High rewards of success. Proceedings involving international crimes will touch on the causes and dynamics of the underlying conflict, which often remain deeply disputed even after the conflict's end. If the justice process is to contribute to a common narrative of events and public recognition that justice is a matter of individual criminal accountability rather than community persecution, then the proceedings and the system of justice itself—crucially the safeguards in place for the independence of the prosecution and judiciary, as well as for the rights of the accused—must be transparent. Similarly, if international justice is to contribute to the deterrence of future atrocities, then would-be perpetrators must be aware of legal boundaries and the consequences of crossing them.

Security. Because the issues at stake in proceedings for international crimes tend to be sensitive or even contentious, security considerations must be factored into the design of any outreach program. In order to ensure the safety of outreach participants and organizers, a general security assessment for outreach activities should be conducted in the design phase and updated periodically, with more specific assessments conducted for individual outreach missions.

Examples of Donor Support

Outreach in **Sierra Leone** has been a notable success. Even before the establishment of the Special Court, civil society organizations—including No Peace Without Justice, Search for Common Ground, and various local NGOs—engaged with communities around the country to disseminate information and listen to views about the new mechanism. When the first small team of court officials arrived in 2002, the court's first prosecutor enthusiastically engaged in town hall meetings that eventually reached every district in the country. The court's registry established a dedicated outreach sec-

tion that could disseminate impartial information on the structure and administration of the court, as well as facilitate outreach by the prosecution, the defense office, and defense teams. All of these efforts included explanation of the limits on the court's mandate, especially the restriction that it only try those "bearing greatest responsibility" for crimes during the conflict. Outreach also addressed confusion about the parallel mandates of the court and the Truth and Reconciliation Commission. Through outreach events, the public had opportunities to engage with senior court officials about how the SCSL's mandate was being implemented. Notably, the SCSL outreach office has been run entirely by Sierra Leonean staff, with representation across the country. As the Special Court's work winds down, skilled and experienced outreach officers are well placed to assist in other judicial reform efforts in the country, whether from government positions, the media, or non-governmental organizations.

In **Cambodia**, outreach surrounding the ECCC is credited with breaking the predominant silence in the country about the events during the reign of the Khmer Rouge and opening a conversation in the country about justice. This occurred despite the reluctance or outright hostility of the government, the fact that the court is located outside of the capital, and the reluctance of some court officials to support outreach. Some observers credit less any ingenuity of the underfunded ECCC outreach operation, but the initiative shown by some judicial officials in engaging with the public, as well as strong engagement by civil society, notably the Documentation Center of Cambodia (DC-Cam).⁴⁴

In **Colombia**, USAID and the European Union have supported effective outreach on that country's Justice and Peace Law. This has led to a noticeable increase in victims' demands for justice, with 337,000 victims registering for participation in criminal proceedings.⁴⁵

Guidelines for Supporting Outreach

Assess

► **the scale and type of outreach needs:**

- How large and populous is the country?
- How literate is the population, especially those elements most affected by the conflict?
- What is the reach of newspapers, radio, television, and the internet, especially among those communities most affected by the conflict?

- How well are basic criminal justice concepts, including the rights of suspects and the accused, understood? How well are they understood within communities most affected by the conflict?
- How much trust is there in the domestic justice system, especially within communities most affected by the conflict?
- How well understood is the mandate of the international criminal justice mechanism (if already designed) including its temporal and geographic jurisdiction, and the types and approximate numbers of suspects to be pursued?
- How much popular support is there for proceedings involving international crimes, and to what extent does this support vary among identity groups involved in the conflict?
- What is the security situation in the country like, including the status of disarmament, demobilization, and reintegration programs, and the level of tension among former fighting factions?
- Were other states involved in the conflict?
- Are other transitional justice mechanisms active in the country, or have they been proposed?
- Is the ICC active in the country?
- ▶ **options for locating outreach capacity:**
 - Is there a registry or other administrative body that serves the judiciary, prosecution, defense, and victim representatives (where applicable)?
 - Or is the registry or other administrative body tightly aligned with the judiciary only?⁴⁶
 - Are there offices within the justice sector that already conduct outreach-type activities, perhaps in the ambit of access to justice programs? If so, do these offices represent the judiciary, prosecution authorities, or the justice system as a whole?
 - Is the government willing to conduct outreach?
 - What capacity do local civil society organizations have to organize or participate in outreach activities?
- ▶ **technical skills and available resources:**
 - Does the head of the outreach program have the strategic and managerial skills to develop a coherent outreach strategy and effectively oversee staff?

- Do outreach officers have a variety of complementary skills among them, including communications, education, legal, and language skills? Can the team reach all of the most important language groups, especially in communities most affected by the conflict?
- Do outreach officers have the skills to produce written, audio, and video materials in accurate and accessible language?
- Do outreach officers have the capacity to travel within the jurisdiction (including vehicles and fuel)?
- Do outreach officers have capable administrative support staff?
- Do outreach officers have adequate basic office equipment (including desks, chairs, telephones, copy machines)?
- Do they have audio, video, basic amplification equipment, and mobile generators, where necessary? Are there adequate resources for the production of written materials?
- Is information technology available and do outreach officers have the skills to use it?

Plan

► designing an outreach program:

- Situated in a registrar’s office or other administrative body that is not only identified with the judiciary or the prosecution authority, but which can neutrally administer a program for the judiciary, prosecution, defense, and victim representatives (where applicable).
- Scaled to the need of the country, taking account of the country’s size, population, degree of polarization and tension among rival factions, levels of trust in the judiciary, levels of knowledge about basic concepts of criminal justice, levels of support for proceedings involving international crimes, levels of understanding of the mechanism, and the extent to which independent actors are already conducting effective outreach. Consider multiple outreach field offices in large or populous countries where the need is great or the country remains badly fractured among former warring factions.
- Whose methods are tailored to most effectively interact the country’s population, especially victims, ex-combatants, and factions sympathetic to suspected perpetrators;

- That can cooperate and coordinate with outreach conducted by NGOs and the ICC (where applicable).
- ▶ **timing:**
- Aim to launch outreach activities at the earliest point possible, even before agreement on a particular international justice mechanism. Consider supporting independent civil society organizations to begin outreach before the state-run program is launched.
- ▶ **participation:**
- If necessary, encourage senior court officials to participate in outreach events, even those not organized by the government. Consider putting reluctant officials in contact with senior court officials from international courts who have participated in such events.

Resources

Coalition for the International Criminal Court (www.iccnw.org): A global NGO network involved in various outreach activities related to the Rome Statute.

Human Rights Watch (www.hrw.org): Facilitates outreach activities with local partners in some settings.

International Bar Association (www.ibanet.org): Through its ICC Monitoring and Outreach Program, conducts outreach on the Rome Statute in conjunction with local partners.

International Center for Transitional Justice (www.ictj.org): Organizes assessments and offers advice on structuring outreach programs.

International Criminal Court (www.icc-cpi.int): Conducts outreach on the Rome Statute and ICC proceedings, primarily in ICC situation countries.

No Peace Without Justice (www.npwj.org): Conducts outreach in conjunction with local partners and offers advice on the structuring of outreach programs.

Organisation Internationale de la Francophonie (www.francophonie.org): Organizes meetings and sponsors regional seminars with the ICC in the francophone world to raise awareness about all aspects of the Rome Statute.

Parliamentarians for Global Action (www.pgaction.org): Conducts outreach to parliamentarians through its secretariat and international parliamentarian-to-parliamentarian contacts.

Public International Law & Policy Group (www.publicinternationallaw.org): Organizes assessments and offers advice on the design of outreach programs.

Redress (www.redress.org): Offers advice on designing outreach programs that are effective in reaching victims.

Search for Common Ground (www.sfcg.org): Experienced in conducting community outreach initiatives, including those related to international justice.

Women's Initiatives for Gender Justice (www.iccwomen.org): Conducts outreach on the Rome Statute targeting women in ICC situation countries.

Various other organizations, including regional or local organizations, may have expertise. Where possible, donors should seek to involve well regarded local organizations.

Further Reading

Clara Ramírez-Barat, *Making an Impact: Guidelines on Designing and Implementing Outreach Programs for Transitional Justice*, International Center for Transitional Justice, January 2011, available at: http://www.ictj.org/static/Publications/ICTJ_MakingAnImpact_pb2011.pdf.

Robin Vincent, *An Administrative Practices Manual for Internationally Assisted Criminal Justice Institutions*, International Center for Transitional Justice, 2007, pp. 84–92 (section on outreach), available at: <http://www.ictj.org/images/content/9/3/931.pdf>.

Establishing a Legal Framework

Why

- ▶ Enabling domestic proceedings for international crimes.
- ▶ Creating legal clarity.
- ▶ Adopting international standards.

What

- ▶ Creating a sound legal basis for genuine domestic proceedings for international crimes.

Who

- ▶ Governments and parliamentarians.
- ▶ Civil society organizations.
- ▶ Academic experts.

In broad outlines, the required legal foundation for effective ordinary criminal justice and domestically applied international justice is the same. The independence of the prosecution and judiciary should be assured, including through the constitution, through budget autonomy, and through laws establishing independent processes for the selection and removal of prosecutors and judges. Budget laws should supply the judiciary with adequate resources, and the criminal procedure code should ensure respect

for the rights of suspects and accused persons. Accused persons should be able to mount a proper defense.

Linkages to existing rule-of-law priorities. Even beyond these areas of broad overlap, by assisting in strengthening a country's legal basis for the conduct of genuine prosecutions and credible trials related to international crimes, benefits will accrue to the justice system as a whole. When states ratify the Rome Statute and other treaties outlawing international crimes, and adopt legislation for their implementation, or when those states that are constitutionally required to do so adopt legislation for the implementation of customary international law, this advances international standards and domestic legal reforms. Such core principles as individual criminal responsibility will be strengthened, and the inclusion of international criminal law in domestic codes may result in broader updates in the entire domestic code—for example in updated definitions of such crimes as rape. Prosecuting crimes of sexual and gender-based violence as international crimes may also lead to increased pressure on governments to pursue prosecution of simple cases of these crimes, as has been observed in Sierra Leone. The international development community may find that if proceedings involving international crimes lend impetus to the establishment of new modalities for mutual legal assistance, states will be better prepared to deal with other forms of serious crime, from human and drug trafficking to high-level corruption and terrorism.

How Proceedings for International Crimes Are Different

Substantive law. The most obvious difference between general criminal proceedings and those for international crimes is the substantive law to be applied. This includes such fundamental treaties (and legislation derived from them) as the Rome Statute; the Geneva Conventions and their Additional Protocols; the Convention on the Prevention and Punishment of the Crime of Genocide; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Convention on the Elimination of All Forms of Discrimination against Women. Many countries may also recognize customary international law. Rooted in treaties or state practice, this reflects many states' longstanding observance of norms on the basis of a belief that these are legally binding. Precedent from other countries and international tribunals may be particularly important in countries with common law systems. However, within civil law systems that are integrating international criminal law there also has been an increasing effort to learn about legal precedents in the field. In some cases this may reflect the exposure of legal officials to international justice in other settings.⁴⁷ In such places as the DRC and Haiti where officials are grappling with substantive law that is novel

to them, it can also reflect a simple desire to see how others have approached similar legal issues.⁴⁸ Nevertheless, the limited latitude that many systems (especially civil law systems) have for the direct domestic application of customary international law means that codification of international criminal law takes on added importance.

Legal Education

Building technical capacity

By including legal education in support for proceedings related to international crimes, the international development community can boost technical knowledge among current and future prosecutors, defense attorneys, victim representatives, and judges, as well as lawyers who go on to careers in parliament, the justice sector bureaucracy, civil society organizations, and academia.

Building political will

Legal education represents one area where assistance usually still makes sense even in states where political will to undertake genuine proceedings for international crimes is lacking. This includes countries with scant awareness of international justice, or even of formal criminal justice. By engaging the next generation of justice sector officials on issues of international criminal justice, the ground-work can be laid for its eventual adoption, even if that takes years.

Means

Supporting legal education can take many forms, including courses, seminars, visits by external expert lecturers, academic exchanges, law clinics, and moot courts.

Tapping external expertise and material resources

Donors have extensive experience in supporting other aspects of legal education. Beyond providing direct supports to local law schools, the development community may be able to tap external expertise and material support from law schools that have a focus on international criminal justice, as well as foundations and bar associations around the world.

Short-term benefits for international criminal justice mechanisms

Support for legal education initiatives on international criminal justice can offer immediate benefits for participating attorneys already involved in the proceedings as prosecutors, defense counsel, victim representatives, or judges. But they also create other opportunities for supporting the justice mechanism in the immediate term. For example, students of international criminal law programs might be able to work as interns for the parties or chambers; or prosecution, defense and victims' attorneys might strike agreements with the law school allowing students to conduct legal research for use in actual cases.

Protection for women and children in armed conflict is an aspect of international criminal law that has gained in emphasis over recent years. Most recently in December 2010, the UN Security Council recalled these protections, reiterated the need to end impunity for sexual violence and crimes against children in armed conflict, and called for new means of identifying and sanctioning perpetrators.⁴⁹ This priority should be included in any legal assistance package.

In states that are attempting to apply international criminal law, newly ratified treaties and newly enacted legislation may come too late to be applied, depending on how strictly the country's legal system interprets the principle of legality (the notion that no one should be charged with a crime that was not classified as such at the time of the act). In systems that allow for the direct application of customary international law, the retrospective application of the Rome Statute and other relevant laws may be possible because the acts were considered illegal under international law at the time of the act. In Uganda, the International Crimes Act of 2010, which came into force on June 25, 2010, cannot be applied to alleged crimes committed during the conflict in Northern Uganda. The first war crimes case before Uganda's International Crimes Division is based upon the Geneva Conventions Act (which domesticated the grave breaches provisions of the Geneva Conventions) and domestic codes that were clearly applicable before the events in question.⁵⁰ Similarly, although Bangladesh ratified the Rome Statute in 2010, it must apply international criminal law as it existed in 1971 in its current effort to try alleged perpetrators of atrocities carried out during its war of independence. The lesson of these and other examples is that while it remains highly desirable to create a legal basis for the application of international criminal law on the basis of the Rome Statute and other modern standards of the field, it is possible to proceed with less.

Complexity. International criminal cases usually are more complicated than general criminal proceedings, in part because there are additional elements of the offense(s) to be explored. Investigators, prosecutors, defense counsel, and judges must be familiar with these. There are three key aspects to proving an international crime. The first is establishing the facts pertaining to the underlying criminal act, commonly referred to as the "crime base."⁵¹ These are crimes that in national jurisdictions would generally be identified as "rape" or "murder," for example. The second aspect requires proof that this crime base passes the threshold to classify it as an international crime, generally referred to as the "threshold," "chapeaux," or "contextual" elements. These differ for each type of international crime: war crimes, crimes against humanity, and genocide. The third aspect relates to proving that the accused is responsible, commonly known as the "linkage" or "mode of liability" elements. In some respects modes of liability under international criminal law differ from those found in many domestic systems; some states apply international law with regard to modes of liability while others do not.

The elements of international crimes can be quite different from the same acts when charged using standard criminal codes.

Mutual legal assistance and extradition. Although not necessarily unique to proceedings involving international crimes, the need for agreements on mutual legal assistance may gain urgency through their conduct. The conflict may have occurred across borders, or at least been influenced by other countries; victims and witnesses may have fled to other countries; and suspects may have fled or stashed assets abroad. Agreements and/or legislation may be needed to allow the collection of evidence from other states or international tribunals and ensure its admissibility; send investigators to other countries; have arrest warrants honored by other states; secure the extradition of suspects or accused; track, freeze, and recover their assets; and move witnesses across international borders. Some states may already have legal mechanisms in place to deal with these challenges, and others may be party to international or regional treaties that address at least some of them.⁵² However, beyond entering into international agreements, many conflict or post-conflict states may need to pass new legislation in order to establish a legal basis for such cooperation.

Political impediments. Creating the proper legal basis for credible proceedings is not always just a matter of technical capacity. The prospect of genuine criminal accountability for grave crimes in which governments may be implicated can, not surprisingly, create political difficulties.⁵³ In some situations political hurdles may be so great that they render technical assistance pointless. In other cases the legislation may languish simply because it is not seen as a priority.⁵⁴ Where donors are investing in technical assistance for the establishment of a solid legal basis, coordination between their own development and foreign ministries may be important to ultimate success. Increased support for outreach to parliamentarians and for local civil society organizations that advocate for justice reforms can also help to overcome political obstacles.

Examples of Donor Support

In various settings, donors have already effectively supported establishment of sound legal frameworks for the domestic prosecution of international crimes. The government of **Uganda** has been able to tap multiple international resources in designing its implementing legislation on the Rome Statute and establishing the International Crimes Division in the High Court (initially called the War Crimes Division). Key organizations involved in this effort included the Commonwealth Secretariat, International Center for Transitional Justice, Parliamentarians for Global Action, the Public International

Law and Policy Group, and the Institute for International Criminal Investigations. By tapping such expertise early in the process, donors—including Denmark, the European Union, and the United States—may have helped to avoid subsequent problems that could have created inefficiency and injustice. Beyond Uganda, the Commonwealth Secretariat’s model implementing legislation for the Rome Statute has been used as a reference by countries including **Kenya** and **Trinidad and Tobago**.⁵⁵ In the case of **Botswana** and **Namibia**, the International Crime in Africa Programme at the Institute for Security Studies in Pretoria also used the Commonwealth Secretariat’s model law in the early stages of drafting legislation that is specifically tailored for those countries’ needs. In **Colombia**, the International Committee of the Red Cross began pushing for integration of international humanitarian law into the domestic criminal code in 1998 and succeeded two years later.

Regional courts may also be of assistance in removing obstacles that stand in the way of a solid legal basis for credible international crimes proceedings, as well as other types of criminal proceedings. In Latin America, the Inter-American Court of Human Rights (IACHR) has played a pivotal role in accelerating legal reform and clearing political obstacles to accountability for gross violations of human rights. The IACHR struck down amnesty laws in **Peru** and **El Salvador**, and **Chilean** courts cited its jurisprudence in ruling that international law trumped its amnesty law. In **Guatemala**, IACHR rulings resulted in justice for specific victims of state-sponsored murders. By increasing national and international attention on political obstacles to justice and raising victims’ expectations that impunity can be overcome, the court has had an impact beyond the individual cases it has heard.⁵⁶ The nascent African Court on Justice and Human Rights lacks consistent political commitment and resources, and thus also the same authority enjoyed by the IACHR and the European Court of Human Rights, but could play a similar role in the future. The African Union Commission has been tasked by AU member states with examining the implications of the African Court on Justice and Human Rights taking jurisdiction over core international crimes. The AU was expected to decide on this matter during 2011, but it appeared that the decision could be delayed.

Guidelines for Supporting the Establishment of a Legal Basis

Assess

- ▶ **the general condition of the criminal justice system:**⁵⁷
 - Is the independence of the prosecution and the judiciary guaranteed by the constitution and statutory law?⁵⁸

- Do prosecution and judicial authorities enjoy budget autonomy?
- Are there adequate checks on executive power to appoint or remove judges and prosecutors?
- Are codes of conduct in place for judges and prosecutors? Are there robust, fair, effective, and transparent procedures in place to process complaints against judges and prosecutors?
- Are all judges and prosecutors required to submit financial disclosure statements?
- Is the state a party to the International Covenant on Civil and Political Rights or such regional treaties as the African Charter on Human and Peoples' Rights that include safeguards for the rights of suspects, accused persons, and convicts? If the applicability of treaty law requires domestication, have the treaties guaranteeing these rights been domesticated?
- Do national laws on pretrial detention conform to the "Tokyo Rules"?⁵⁹ Is there a pretrial evaluation and supervision service to allow, to the maximum extent possible, for pretrial release of accused persons, while ensuring that they appear in court, refrain from threatening the administration of justice, the public, or any specific individual?
- Do accused persons have the opportunity to mount a proper defense, including by engaging private counsel or being assigned counsel at state expense?
- Is there a right of public access to criminal proceedings? Are there also provisions to allow for closed proceedings when required for witness protection?
- Do victims have a right to participate in criminal proceedings, and if so at which stage of the criminal proceedings?
- Is press freedom established in law, so that the media can report independently on criminal proceedings?
- Does the state provide adequate resources for the justice sector?⁶⁰ Are adequate resources allocated to potential "bottlenecks" in legal structures (such as adequate numbers of officials designated to approve medical certificates in rape cases)?
- Do the state's laws create separate military and civilian judicial processes for those suspected of committing crimes? If so—and this would also apply to international crimes—all of the preceding questions should be answered for both systems.⁶¹

- Has the state entered into agreements on mutual legal assistance with countries where this would be most necessary for the deployment of investigators, collection of evidence, honoring of arrest warrants, tracking and extradition of suspects or accused, tracking of assets, and relocation of protected witnesses? If so and these agreements require domestic legislation to be realized, have the states involved passed such legislation?
- Do national laws regulate the admission of evidence collected and used by other courts, for example the ICC?

► **the status of international criminal law:**

- Can existing domestic laws be applied to prosecute the alleged criminal acts?
- Has the state ratified key treaties on international criminal law, international humanitarian law, and human rights law, including the Geneva Conventions, their Additional Protocols, and the Rome Statute of the International Criminal Court?⁶²
- Does the state accept the jurisdiction of regional human rights courts (in Africa, the Americas, and Europe)?
- Does the applicability of treaty law in the state require its domestication? If so, which of these treaties have been domesticated?
- If domestication has not yet taken place, are there any draft laws in existence, and if so, what was the process that resulted in these drafts being written, and what is their status? Why have the drafts not been completed and passed into law?
- When were the various treaties ratified, and if required, domesticated?
- Does the legal system allow the direct application of customary international law?
- Do the elements of international crimes in domestic law, if any, match those established in modern international law? If not, how do they differ?
- Is retrospective application of the law to acts that were illegal under international law but not domestic law at the time possible or prohibited? Is that a question of constitutional or statutory law?
- Based on answers to the above, is there agreement in the legal community about when various instruments of international law became applicable in the state, and if new instruments are ratified (and where required, domesticated), when these would become applicable?

- Does the state have any amnesty laws that could apply to violations of international criminal law? If so, have these ever been challenged in the courts? If they have not been challenged, are there political or technical reasons for this?
 - Are there constitutional or statutory immunities for the head of state or any other officials that might shield them from domestic application of international criminal law? Or are there provisions of the criminal procedure code that could result in *de facto* immunity for some officials?⁶³
- ▶ **political receptiveness:**
- What level of priority is accorded to international criminal justice issues in the country in relation to other justice sector needs and other developmental priorities? Which deficiencies in the legal system create the greatest barriers to genuine justice? To what extent are these deficiencies political or technical in nature?
 - In assessing these matters, it is important to consult widely, including with government officials, political principals and heads of relevant departments, members of all parliamentary factions, civil society organizations (notably law societies, bar associations, and human rights-focused civil society organizations), and others.
 - Has a truth and reconciliation commission or other transitional justice mechanism made recommendations related to the adoption of international treaties or other domestic legal reforms?
 - In the framework of the UN Human Rights Council, has the country made any commitments to relevant legal reforms under its Universal Periodic Review?

Plan

- ▶ **tackling political obstruction, possibly by:**⁶⁴
- Entering into a dialogue with state authorities to encourage needed reforms.
 - Building the awareness and capacity of political decision makers, senior government officials in the most important departments (foreign affairs, justice, and legislative drafting), and parliamentarians to understand the issues involved and mobilize support for reform.
 - Working through regional structures to raise awareness about the importance of international justice.
 - Increasing support to local civil society organizations, including victims' organizations, human rights organizations, and law societies/bar associations, to engage on these issues through outreach and advocacy.

- Where possible, supporting individuals and organizations in challenging problematic aspects of domestic legal codes before domestic courts and regional human rights courts.
 - Withholding assistance on technical aspects until the state agrees to needed reforms. Consider seeking agreement to a progressive program of conditionality, setting out what reform prerequisites will trigger certain types of aid.
 - In egregious cases, withholding aid beyond assistance to the justice sector.
 - In egregious cases, referring the situation to the ICC if the state is party to the Rome Statute, or urging UN Security Council referral if it is not.⁶⁵
- ▶ **address technical shortcomings:**
- Work with the government to prioritize needs while taking into account the views of civil society organizations.
 - Support the drafting of relevant reform legislation or new legislation that is specifically tailored to meet local needs and capacity, while using political channels to encourage adoption of the reforms and to monitor potential political resistance.
 - Identify entry points:
 - Identify key officials in government to include in international criminal justice trainings and related activities.
 - Identify potential civil society partners, including bar associations and NGOs that can organize trainings, workshops, and roundtables, and put forward their own proposals for draft legislation.
 - Identify outside experts who can provide assistance to government officials and parliamentarians on the drafting of legislation, either as behind-the-scenes advisors or as participants in public forums.
 - Identify the most relevant external partners who can share experiences or provide a forum for policymakers to interact with officials who have faced similar challenges. Such partners can include neighboring states, regional organizations, the Commonwealth Secretariat, the ICC, and the SASP.

Resources

Avocats sans Frontières (Lawyers without Borders) (www.asf.be): Offers expert advice on national legislation dealing with international crimes.

Coalition for the International Criminal Court (www.iccnw.org): Offers advice on Rome Statute implementing legislation.

Commonwealth Secretariat (www.thecommonwealth.org): Has a model law (which is being revised in 2011) on implementation of the Rome Statute useful for common law countries and offers advice to its member states.

Council of Europe (www.coe.int): Has vast experience in assisting legal reform in Central and Eastern Europe, including in some instances the domestication of international criminal law instruments.

International Bar Association (www.ibanet.org): Offers expert advice on national legislation dealing with international crimes.

International Committee of the Red Cross (www.icrc.org): Operates an Advisory Service on International Humanitarian Law to assist states with the domestication of treaties on international humanitarian law (which defines war crimes but not crimes against humanity or genocide).

International Center for Transitional Justice (www.ictj.org): Offers expert advice on national legislation dealing with international crimes.

International Crime in Africa Programme at the Institute for Security Studies (<http://www.issafrica.org/pgcontent.php?UID=18893>): Offers expert advice on the Rome Statute, national legislation on international crimes in Africa, as well as legislative drafting expertise and technical assistance with both the political and technical process of domesticating the Rome Statute.

International Criminal Law Services (www.iclsfoundation.org): Offers expert advice on international criminal law and practice.

No Peace Without Justice (www.npwj.org): Offers expert advice on national legislation dealing with international crimes.

Parliamentarians for Global Action (www.pgaction.org): Provides expert advice on international criminal justice issues to parliamentarian members who build important centers of support within national parliaments for adoption of domestic legislation on international crimes.

Public International Law and Policy Group (www.publicinternationallaw.org): Offers expert advice on national legislation dealing with international crimes.

United Nations Office on Drugs and Crime (www.unodc.org): Has a system to assess needs for mutual legal assistance, and provides advice and model laws on the subject.

Various other organizations, including regional or local organizations, may have expertise. Where possible, donors should seek to involve well regarded local organizations.

Further Reading

Amnesty International, *International Criminal Court: Updated Checklist for Effective Implementation*, May 2010, available at:

<http://www.amnesty.org/en/library/asset/IOR53/009/2010/en/38132683-2e8e-41fc-a6b6-ec9f69482a29/i0r530092010en.pdf>.

ICC Legal Tools project, (a database and interface with thousands of documents on international criminal law that can be helpful for individuals and organizations with advanced knowledge and skills), available at: www.legal-tools.org.

International Centre for Criminal Law Reform and Criminal Justice Policy at the University of British Columbia, *International Criminal Court: Manual for the Ratification and Implementation of the Rome Statute*, Third Edition, March 2008, available at: <http://www.icclr.law.ubc.ca/Publications/Reports/ICC%203rd%20Ed%20Manual%20for%20Website.pdf>.

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Vivienne O'Connor and Colette Rausch (eds.), *Model Codes for Post-Conflict Criminal Justice, Volume I: Model Criminal Code*, U.S. Institute of Peace, September 2007, available at: <http://www.usip.org/model-codes-post-conflict-justice-/volume-1>.

Vivienne O'Connor and Colette Rausch (eds.), *Model Codes for Post-Conflict Criminal Justice, Volume II: Model Code of Criminal Procedure*, U.S. Institute of Peace, October 2008, available at: <http://www.usip.org/model-codes-post-conflict-justice-/volume-2>.

Max du Plessis and Jolyon Ford (eds.), *Unable or unwilling? Case studies on domestic implementation of the ICC statute in selected African countries*, ISS Monograph Series no 141, March 2008, Pretoria, available at: <http://www.issafrica.org/pgcontent.php?UID=2113>.

Investigations

Why

- ▶ Supporting effective and fair criminal inquiries and prosecutions.

What

- ▶ Investigation planning.
- ▶ Case development and prioritization.
- ▶ Fulfilling operational requirements.
- ▶ Documenting the investigation process.
- ▶ Identifying and developing leads.
- ▶ Collecting reliable evidence.
- ▶ Taking witness statements.
- ▶ Organizing and analyzing evidence.

Who

- ▶ Investigative judges (civil law systems).
- ▶ Prosecution authorities.
- ▶ Criminal investigators, police, and other law enforcement officials.
- ▶ Human rights commissions and civil society organizations.

The importance of the investigation process to the overall delivery of justice cannot be overstated. Prosecutions must be based on reliable information, collected in accordance with applicable rules of procedure and evidence that meet international standards. In many ways, the investigative needs of local jurisdictions are similar whether they are dealing with cases of international crimes or not. Criminal investigators should have basic skills in conducting intelligence-led investigations; securing crime scenes; collecting, preserving, and maintaining the chain of custody for documentary, forensic, or other physical evidence; and recording witness statements of victims, perpetrators, insiders, and suspects. Investigators should be properly equipped with tools for evidence recording and management, and should understand and respect the rights of suspects and accused persons. As detailed below, however, additional skills and capacities are needed in all but the simplest investigations of international crimes. The international community can assist in developing this investigative capacity through trainings, mentorships, or even the temporary deployment of international personnel.

Linkages to existing rule-of-law priorities. Building capacity for the investigation of international crimes can result in the development of basic investigative skills, for example knowing how to approach a witness and effectively take witness statements, or how to advise suspects about their rights. Building advanced capacity for the investigation of international crimes will give national investigators greater skills to tackle other types of complex crime, including organized crime, terrorism, drug trafficking, and fraud. Donors already supporting capacity in those areas may be able to identify areas of overlap that can make their overall support more efficient. Investing in investigative capacity for dealing with international crimes can also contribute to police reform initiatives by informing vetting processes and bringing to the fore the need to remediate bias among investigators.

How Proceedings for International Crimes Are Different

Security. In dealing with criminal allegations of a sensitive nature in conflict or post-conflict settings, security must be a top concern from the moment the investigative process begins. Beyond concern for the safety of witnesses, outlined in greater detail below, that of investigators and any intermediaries between investigators and witnesses must also be assured. An initial threat assessment and needs assessment should be conducted before the investigation is launched, and policies and procedures put in place. The threat assessment should be updated periodically.

ICC Relationship Types

States parties to the Rome Statute

- ▶ Situations can be referred by own government or other states parties.
- ▶ The prosecutor can seek judges' permission to open an investigation under his own authority.

Non-states parties

- ▶ ICC has no jurisdiction unless alleged crimes were committed by citizens of states parties, or the UN Security Council refers the situation.
- ▶ UN referral gives the prosecutor the option of opening an investigation, but not an obligation to do so.

Situations under analysis

- ▶ The prosecutor is undertaking a review of information about alleged crimes, and examining questions of jurisdiction in order to determine whether to launch a full investigation.
- ▶ The review of jurisdiction includes analysis of whether the state is fulfilling its obligations to conduct genuine investigations and prosecutions of international crimes, i.e. realizing complementarity.
- ▶ Information from the prosecutor's preliminary analysis could be made available to support national investigations and prosecutions.
- ▶ The ICC option creates leverage for reform. Governments must take steps to conduct genuine investigations and prosecutions if they wish to avoid an ICC investigation.

Situations under investigation

- ▶ The prosecutor has opened a full criminal investigation into alleged international crimes, the judges may have issued arrest warrants, and trials may have started.
- ▶ The prosecutor may be able to share information with complementary investigations and prosecutions at the national level.
- ▶ The ICC Registry may be able to assist complementary national proceedings through modest assistance in such areas as witness protection, outreach, increasing journalists' knowledge of international criminal law, and court management.

Heavy reliance on witnesses. Investigations of international crimes are often conducted long after the crimes are committed, which can lead to the deterioration of existing physical evidence, particularly in the case of sexual and gender-based violence. In a

post-conflict situation, there is usually little infrastructure available for collecting, preserving, and analyzing physical evidence. It may be possible to collect viable physical evidence years after events. Such simple steps as photographing crime scenes can be useful even long after the events in question took place, but the skills necessary for more advanced techniques are often lacking. For some international crimes, such as forced labor or forcible recruitment of child soldiers, forensic evidence is unlikely to exist at all. Investigations are therefore often more reliant on witnesses testimony.

Traumatized witnesses. Investigations dealing with sexual and gender based violence require special skills trainings. Although women are usually the predominant victims of this type of crime, men and children are also frequently targeted. Depending on the conflict and cultural context, it can be important to ensure the inclusion of women on the investigative team as both investigators and interpreters. Witnesses may have suffered torture or various other types of trauma-inducing experiences that require specialized investigative skills. The conflict may have featured the use of child soldiers or other types of crime against children. Despite their trauma, vulnerable witnesses can still be highly valuable and reliable, and their value can be maximized by ensuring investigators' sensitivity to their needs.

Threats to witnesses. Witness testimony presents challenges as a result of the fragile security situations in which war crimes investigations usually take place. Witnesses often fear for their physical security or feel vulnerable in other ways. Witnesses from the victim population often don't live in fixed locations as they move among camps for the internally displaced or even across international borders. Fear is also common among informants and witnesses affiliated with perpetrator groups. For these individuals and their families, cooperation with investigators could result in exclusion from their communities, harassment, violence, or death. Collecting information from witnesses under such insecure environments requires witness protection and support measures, and possibly programs.⁶⁶ Learning how to securely contact witnesses and protect witness-related information is thus a key skill for any war crimes investigator. Beyond skills, however, it is important that standard operating procedures for contacting and interviewing witnesses are in place prior to the launch of the investigation.

Expert witnesses. Where a long time has passed between the commission of crimes and judicial proceedings, as in Cambodia, Haiti, and Bangladesh, the prosecution may need to rely heavily on expert witnesses to testify about the context and documentation related to the crimes and power structures among the alleged perpetrator group.⁶⁷ These experts are generally required to be identified during the investigations phase. Expert witnesses can also assist the process through testimony on such matters as post-

traumatic stress disorder, witnesses' fitness to stand trial, statistical or other forms of analysis related to the evidence, evaluating patterns of sexual violence, and explaining torture wounds in correlation to torture practices. In civil law systems, the investigating magistrate is generally responsible for the identification of experts, and in the common law system, the prosecution and defense can each call their own experts.

Interviewing skills. The quality of witness statements takes on added importance due to the length of time that can pass between the taking of a statement and the start of a complex war crimes trial. Questioning victims, high-level officials, and suspects requires specialized skills. For example, interviewing victim witnesses requires knowledge about the impact of post-traumatic stress disorder on memory recall. For suspects and insider witnesses, it is necessary for the investigator to have deep knowledge of the facts and to structure questioning in anticipation of potential witness deception. Investigators must avoid inappropriate or leading questions, suggestions, and the improper quotation of information from other sources. They must be aware of potential witness contamination and recognize hearsay evidence. And they must do all of this while also having the skills to establish effective communication, taking into account cultural considerations, diplomatic protocols, and gender issues. Witness information can be irretrievably tainted through inappropriate questions or interview practices.

Documentary evidence. Some international criminal cases, such as those related to Nazi Germany, the Khmer Rouge in Cambodia, and the national police in Guatemala, have involved extensive documentary evidence. Archival skills are needed to analyze the system used by those who stored the documents.⁶⁸ Reviewing the documentation requires specialized analysts, particularly in cases where vast quantities of documentary evidence require the ability to identify and authenticate key “smoking gun” documents, or to piece together key information from an array of different documents. Documentary evidence can take different forms. Investigations relating to some recent conflicts might require an ability to collect and analyze information from social media networks, for example.

Forensic exhumations. Exhumations, while very expensive to conduct, can provide persuasive proof of killings, particularly when corroborating witness testimony. Forensic investigations typically require a preliminary historical investigation based on documentary and physical evidence. The investigators need to form a hypothesis about what happened and identify where the burial sites lie. Detailed preliminary work should be conducted to determine whether an exhumation is likely to provide evidence to prove some element of a crime, and whether this is evidence that cannot be obtained from some other source. If it is determined that exhumations should proceed, it is also

important to consult with the families of those presumed killed and consider potential community or cultural objections to the exhumation, as well as matters related to the return of remains to the family. Prosecutors and investigators need to be made aware of the possibilities and limits of forensic tools. Exhumation capacity varies widely among different countries. Some are quite advanced (for example, Argentina and the former Yugoslav states), while others have no laboratories or schools for forensic pathology and anthropology (for example, East Timor). Sometimes the greatest need will be gloves for the conduct of autopsies rather than expensive, high-tech equipment that is never used due to lack of training or maintenance.⁶⁹ Following an assessment, donors should target the assistance to the locations where it is needed most, usually outside of the capital. Emphasis may need to be placed on securing and preserving the crime scene in order to prevent tampering. Where national investigations overlap with those of international tribunals, it may be possible to admit forensic evidence gathered by the international tribunal in domestic courts.

Financial investigation. Freezing a suspect's assets can be necessary to prevent his or her flight and secure funds to pay for the defense, and, in the case of conviction, fulfilling potential reparation orders. In some cases asset freezes may also be important to the cessation or prevention of further crimes. Investigation of a suspect's finances should begin simultaneously with the criminal investigation. Waiting for the time of indictment to trace and freeze assets is a mistake: upon indictment or arrest, suspects and their associates can quickly move assets if not frozen in advance. Assets may be stashed beyond the reach of national courts, including in some cases within the jurisdictions of donor governments. Where this is the case, donors may discover that the best way to help the financial investigation is through their own cooperation and reform.

Familiarity with international criminal law. Investigators need to know what they are looking for and why. Although investigators should be working in close concert with the prosecution authority, which should have expertise in the field, investigators' grasp of modes of liability and the contextual elements of international crimes (where these form a part of domestic law) is essential. For example:

- If investigating alleged perpetrators who had command responsibility, investigations will cover not only the crime base (acts of murder, rape, torture, looting, etc.), but also inspect the linkages between direct perpetrators and the suspect. Depending on the law in place, this means determining whether the suspect had effective control over his or her subordinates, gave relevant orders for the commission of crimes, or alternatively knew or should have known about their commission and failed to prevent or punish the acts. Even where a formal hierarchy was established, it remains up to the prosecutor to show that the hierarchy worked in practice.

Perpetrators generally try to cover their tracks, and investigators should be on the lookout for efforts to deliberately obscure the chain of command in order to create deniability of responsibility for criminal acts. Showing that a suspect in a position of authority “should have known” about crimes can, for example, be demonstrated through establishing that the offenses were broadly covered in media reports at the time. Investigators must recognize their relevance.

- The prosecution of criminal acts as war crimes requires evidence that they were committed in the context of an armed conflict.
- Qualifying criminal acts as crimes against humanity requires demonstrating that they were widespread or systematic.
- If investigating suspected crimes of genocide, investigators need to know that evidence of genocidal intent is critical.

Specialist skills. Investigating command responsibility or the contextual elements for international crimes may require special skills, including political, historical, anthropological, military or statistical analysis. Crimes of sexual and gender-based violence do not necessarily require any special forms of evidence beyond that used to substantiate other types of crime, but especially where many such crimes were committed it is highly advisable to support the development of specialized expertise in the area.

Information management. International cases are usually more complex because as a rule they involve many more perpetrators and many more victims. This is especially true for prosecutions of senior officials, or investigations of crimes against humanity or genocide, when the case may pertain to multiple crime scenes and thousands of witness statements. In such contexts, an information and evidence management system with search and retrieve functions should be in place from the start of the investigation. Failing to put such a system in place at the outset can create immense burdens.⁷⁰ The system should store all witness statements, documentary evidence, and translations securely and be capable of tracking evidence and the chain of custody. Further, the system should be capable of facilitating the disclosure of exculpatory evidence, and investigators must be aware of their obligations and skilled in identifying such information. In both civil and common law proceedings, this information must be readily available to the parties. Where there are a limited number of relatively simple war crimes cases (for example, investigating an alleged direct perpetrator for the execution of a prisoner of war) that do not produce voluminous evidence, a database may not be a high priority. Under either scenario, other forms of recording information, such as videotaping, may require assistance to local investigators in order to reach international standards on respect for the rights of suspects.

Organization. In all but the simplest of war crimes cases, the investigator constrained by finite time and resources will face a vast number of leads and decisions on which to follow as well as which sources to use, where and when to deploy, and how to delegate information gathering and analysis within their offices. In the early phases, significant attention must be given to developing a strategy that will meet the mandate of the investigation. Case prioritization through a transparent process should ensure that the most important cases are given priority over those of lesser significance. Detailed investigation and information collection plans, often not necessary in domestic cases, should be prepared to guide the investigation and to ensure that resources are focused where needed. The extent to which prosecution authorities make these decisions, and the thus the latitude that investigators have, will vary by justice system. Building investigators' capacity to make intelligent decisions in organizing their work will also assist them in investigating other types of complex crime.

Issues specific to civil law systems. The investigative magistrate must ensure that case files, which in international cases may be quite large, are accessible to both parties. The parties must have ready access to the investigating judge in order to make requests for investigative actions. In some civil law systems, investigative magistrates may use a tactic of allowing confrontations between witnesses. Where witnesses of international crimes are traumatized or otherwise vulnerable, this practice may need to be curtailed.⁷¹

Issues specific to common law systems. In common law settings, investigators for the prosecution should have a basic understanding of likely defense arguments in order to address potential lacunas in the case.

Skill assessment. A major issue in international support for domestic investigations of international crimes lies in assessing the strengths and weaknesses of domestic investigators in the various areas outlined above. This assessment should occur before assistance programming is designed. But the assessment of competence to pursue an investigation must extend beyond an analysis of technical skill.

Bias. In a conflict or post-conflict situation, domestic criminal investigators potentially hold affiliations with one of the factions involved in the dispute. Institutional bias or the perception of institutional bias among rival factions can undermine prospects for genuine justice. Investigators with personal loyalties related to the events in question may be prone to leaking information or undermining the investigation in other ways. Even where investigators conduct themselves professionally and ethically, perceptions of bias can still undermine broad public confidence in the results of the judicial process.

In deciding whether to support domestic investigative capacity, donors would be well advised to first consider whether authorities harbor institutional biases to such an extent that there is no hope of a genuine investigation. Where this is not the case and donors choose to proceed with capacity-building efforts, thought should be given to how bias and the perception of bias can best be mitigated. This might occur, for example, by including individuals with various sympathies in the underlying conflict in the control of investigations and participation on the investigative teams. In some circumstances, donors can include such mitigating factors among their conditions for provision of assistance.

Code of ethics. Another way to mitigate the threat of bias and perceived bias is to ensure that a written code of ethics for investigators exists. It should also include provisions on non-corruption and other aspects of professional conduct. A transparent process for receiving and handling complaints against investigators should be established.

International personnel. The provision of direct technical assistance through employing or secondment of international investigators marks another common difference between investigations of international crimes and regular domestic criminal investigations. Although useful for capacity building, international investigators are often unfamiliar with the conflict's history and context, the motivations of the parties involved, the country's geography, and local languages and cultures, and usually lack a network of relevant local contacts. Although in some cases witnesses may prefer to speak with an international investigator who is perceived not to have biases in the underlying conflict, in other cases it may be more difficult for international investigators to build trust with sources and witnesses. It can also take time to establish trust among national and international staff on the investigation team. Domestic investigators will be more open to learning new skills from international staff if their own skills and knowledge are respected. They will also be more open to learning from international staff with clear technical qualifications and who care about the outcome of the cases. Accordingly, the selection process for internationals should provide adequate scrutiny of expertise and motivation.

Cooperation with the ICC. In countries where the ICC's Office of the Prosecutor (OTP) is conducting preliminary analysis of alleged crimes or has launched a full investigation, the office may be able to share information with local investigators, and local investigators may be able to question individuals in ICC custody.⁷² Indeed, the OTP has provided material assistance to national investigators in Uganda.⁷³ This type of cooperation can face constraints, however, as in the DRC, where the OTP has been reluctant to share

information with local authorities out of concern for the security of witnesses, sources, and magistrates.⁷⁴

Preliminary assessment. In planning capacity-building programs for investigators of international crimes, donors would be well advised to start with a preliminary assessment mission. The range of basic skills among local investigators may vary greatly, and the design of a course on international criminal investigation must take this into account. Trainings may be more effective when it is possible to find local investigators who already have strong basic investigative skills. While theory and principles may best be taught in classroom-type settings, practical training in the field, working on real cases, can consolidate knowledge and test skills. Assessments should identify what mix of approaches best suits the given situation.

Examples of Donor Support

In the **DRC**, the UN mission was able to hand-select participants for a training conducted by the Institute for International Criminal Investigations (IICI). Following a preliminary seminar-style training, IICI was able to work alongside trainees in the field on an investigation into a mass execution.⁷⁵

In **Rwanda**, IICI and International Criminal Law Services provided a week-long training for investigators and prosecutors, which not only imparted technical knowledge but also strengthened the crucial relationship between them. In advance of the training, the international facilitators themselves received training in the domestic legal system from a former Rwandan investigator and prosecutor, which allowed them to tailor their sessions to the law and practice of the country.

At the Special Court for **Sierra Leone**, local police investigators benefitted from a combination of theoretical training and long-term mentorship. They all took part in a Hague-based training course conducted by IICI and then worked alongside international investigators. Not only was there a transfer of skills, but the internationals' technical knowledge paired with the local investigators' contextual knowledge and relevant contacts was crucial to the success of SCSL investigations. For the longer term, the arrangement resulted in a cadre of Sierra Leonean police detectives who are skilled in the conduct of war crimes investigations and also highly capable of investigating other types of serious crime.

Where state authorities have been implicated in crimes, donors may be able to support alternative investigations into the events. This was the case in **Kenya** following the post-election violence of 2007–2008 in which police and top officials were heavily implicated. Against this backdrop, the NGO No Peace Without Justice organized assis-

tance for the Kenya National Commission on Human Rights (KNCHR) in undertaking a preliminary investigation, cooperating with IICI to conduct training for human rights investigators and establishing a command post to coordinate the complicated investigation.⁷⁶ The KNCHR report influenced a subsequent investigation rooted in the agreement that ended the conflict; it also may have provided important leads to ICC investigators and could serve as an important starting point for credible domestic criminal investigations if those are undertaken.⁷⁷ No Peace Without Justice is reprising this role in **Afghanistan**, where it has organized trainings in investigation and analysis for members of the Afghanistan Independent Human Rights Commission who are preparing a conflict mapping report.⁷⁸ If domestic proceedings involving international crimes are ever launched there, this early effort at collecting, organizing and analyzing information could be invaluable. Similarly, the Office of the High Representative for Human Rights issued an extensive conflict mapping report on the **DRC**, which is sure to be helpful in ongoing and future domestic proceedings for international crimes.⁷⁹

Guidelines for Supporting Investigations

Assess

► **autonomy of the investigating authority and potential bias:**

- Are investigative decisions directed by political authorities or civil servants?
- Does the investigative authority have operational autonomy?
- Does the investigative authority have a track record of following criminal leads even where these touch on individuals allied with the government?
- Does the investigative authority have a track record of supporting unfounded charges against government opponents?
- Were police alleged perpetrators of serious crimes during the events in question?
- Do investigators have clear affinity to a particular faction in the conflict whose events are to be investigated?
- How diverse are the investigators? Are they disproportionately members of a particular ethnic, religious, or other identity group?
- Is there a code of ethics for investigators? If so, is it up to international standards? Is there a transparent process for receiving and handling complaints against investigators? Is it used?

- Do civil society organizations, including victims' organizations, suspect that the investigative authority is biased?
- In light of answers to the above, is there a realistic chance that the investigation can be genuine, and widely perceived as such, especially in affected communities?

► **context of the crimes:**

- Is there likely to be much documentary or forensic evidence of the alleged crimes, or will cases be heavily reliant on witness testimony?
- Have there been reports or other indications of widespread sexual and gender-based violence?
- Have there been reports or other indications of widespread crimes against children, including the use of child soldiers?
- Were the alleged crimes committed in the course of an internal or international conflict?
- Does the situation fall under potential ICC jurisdiction? If so, has the ICC prosecutor begun preliminary analysis or opened a full investigation? Is the ICC prosecutor willing to assist in facilitating national investigators' access to witnesses, share documentary or forensic evidence, or assist in other ways? Would information provided by the ICC be admissible under national law?
- What other bodies may have already collected information relevant to the alleged crimes, including neighboring states, the United Nations and other international agencies, the media, commercial bodies, and civil society organizations?

► **security:**

- Is the conflict ongoing?
- If not, have ex-combatants been disarmed, demobilized, and reintegrated?
- Do government security forces and/or international peacekeepers have effective control over regions where the investigation will take place?
- Have there been threats of violence in relation to proposed investigations for international crimes?
- Has anyone publicly perceived to be a potential witness been harmed or threatened?
- Have advocates for international criminal justice received threats?

- ▶ **design and procedures of the investigating authority:**
 - What is the structure of the investigating authority?
 - How is its work divided? For example, is there a separation of function among general policing, traffic policing, and criminal investigations?
 - Are criminal investigations personnel broken down into specialist teams?
 - Are there standard operating procedures in place to deal with all aspects of the investigative process, including witness interviews, suspect interviews, dealing with witnesses who become suspects, taking induced statements, processing and documenting crime scenes, arrests, and search and seizure operations?
 - If so, are these procedures adequate? Do they meet international standards?

- ▶ **available resources:**
 - Are there enough investigators to take on the task? Is it possible to organize a multidisciplinary team within existing resources?
 - Do investigators have capable administrative support staff?
 - Do investigators have adequate basic office equipment (including desks, chairs, telephones, copy machines)?
 - Where necessary, is basic information technology available (including computers, cameras, internet access, and printers)?
 - Do investigators have the capacity to travel within their jurisdiction?
 - Where necessary and appropriate, is equipment for the audio or video recording of witness statements available?
 - Is there a case management system in place to store and process evidence, track its chain of custody, transcribe and file witness statements, and facilitate disclosure? Is the scope and scale of the alleged crimes and the investigations into them such that a computer-based system will be necessary?

- ▶ **technical skills:**
 - Do those leading the investigation have the strategic skills to prioritize the leads to follow, sources to use, and decide where and when to deploy their staff?
 - What are the existing qualifications of criminal investigators? What is the standard of training? What topics are taught?
 - Does meeting international standards require trainings in basic investigative skills? For example, do investigators know how to secure a crime scene? Do they know how to take a good witness statement?

- Are investigators familiar with the elements required to prove war crimes, crimes against humanity, and genocide, and to prove that the crimes are linked to the accused?
- Are investigators fully aware of the rights of suspects and accused, including disclosure obligations? Are there internal accountability mechanisms in place to ensure that these are respected?
- Do investigators know how to deal with insider witnesses? Do investigators have the language skills to interact with sources and witnesses in the affected communities? If not, are trained interpreters available to assist? Do investigators know how to work through interpreters?
- Do investigators have the special skills to question vulnerable witnesses, especially children (or those who were children at the time of the alleged crimes) and victims of sexual and gender-based violence? Does the investigating authority have women investigators who have these skills? Are women interpreters available?
- Do investigators have the skills to contact witnesses discreetly and secure witness information?
- Are there investigators who have specialist skills that may be necessary, including the skills to trace and freeze suspects' assets, or conduct political or military analysis?
- Do investigators know how to audio record or videotape witness statements and organize these?
- In situations where documentation promises to supply extensive evidence, does the investigative authority have access to archival expertise? Do investigators have strong document analysis skills?
- In situations where forensic evidence will likely be important, are there investigators who are trained in consulting with communities and families and have the necessary technical skills and equipment?
- Are case selection prioritization models used?
- Do investigators have the skills to use basic information technology?
- What other types of training might be required?

Plan

► tackling bias:

- Decide whether the prospects for a genuine investigation are realistic enough to justify assistance.
- Decide whether to support unofficial investigations by trusted alternative bodies, such as human rights commissions or civil society organizations, if a genuine state investigation appears unrealistic.
- Consider measures to overcome bias within the investigative authority:
 - Make assistance dependent of institutional reforms, and ensure that consistent messages are sent by all relevant donor ministries and agencies;
 - Temporarily integrate well qualified and motivated international staff into the investigations team, and where bias is acute (and the government agrees), consider placing an unbiased foreigner in charge of the investigation;
 - Urge broad representation of different identity groups on the investigations team where this is a problem;
 - Urge investigative authorities to participate in community consultations about the investigations process.

► provision of resources and skills:

- Identify where gaps in technical capacity and resourcing exist, and how severe they are.
- Determine which gaps present the greatest obstacles, and thus which measures should have the highest priority.
- Identify whether existing rule-of-law programming, by any donor, already addresses similar gaps. If so, explore whether this could be modified to directly address the needs of the international crimes investigation.
- Determine which needs are best met in classroom-type trainings, and which skills can be integrated into the investigative workflow through subsequent mentorship models. Ensure that mentors and those being mentored have a common understanding of theory, and of expected outcomes.
- Determine how the success of trainings and mentorship can best be measured.
- Identify which donors are best suited to address which needs.
- Identify technical assistance and training providers.
- Ensure that donors coordinate their assistance on an ongoing basis in order to fill all priority gaps and avoid duplication.

Resources

Argentine Forensic Anthropology Team (www.eaaf.org): Provides forensics trainings for human rights and criminal investigations around the world.

Institute for International Criminal Investigations (www.iici.info): Provides theoretical and technical training in all aspects of investigations of international crimes, both through seminars and longer-term mentoring approaches.

International Bar Association (www.ibanet.org): Offers trainings in international humanitarian law.

International Centre for Asset Recovery at the Basel Institute of Governance (<http://www.baselgovernance.org/icar/>): Provides capacity building and training related to financial investigations, asset tracking and recovery, and mutual legal assistance.

International Criminal Law Services (www.iclsfoundation.org): Offers training in international criminal law for investigators.

Justice Rapid Response (www.justicerapidresponse.org): The organization was not conceived to focus on domestic capacity building, but rather to undertake short-term deployments by rostered, experienced investigators who can collect and preserve evidence for later uses. However, JRR's trainings for those investigators being rostered do increase the capacity of a diffuse group of criminal investigators around the world.⁸⁰

Physicians for Human Rights: (www.phr.org): Conducts some training in forensic investigation.

Public International Law and Policy Group (www.publicinternationallaw.org): Organizes needs assessments and offers trainings in international criminal law for investigators.

United Nations Office on Drugs and Crime (www.unodc.org): Published the *Criminal Justice Assessment Toolkit*, which includes a chapter titled "Crime Investigations" (http://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/3_Crime_Investigation.pdf).

War Crimes Studies Center, University of California at Berkeley (<http://socrates.berkeley.edu/~warcrime/index.html>): Organizes and conducts trainings in international humanitarian law.

Various other organizations, including regional or local organizations, may have expertise. Where possible, donors should seek to involve well regarded local organizations.

Prosecutions

Why

- ▶ Bringing individuals to justice for grave crimes.
- ▶ Breaking criminal organizations and sidelining key perpetrators.
- ▶ Stopping ongoing crime and preventing future crime.
- ▶ Revealing the facts and patterns of criminality at the heart of disputed events.
- ▶ Strengthening the rule of law.

What

- ▶ Building and presenting the legal case against alleged perpetrators of international crimes.

Who

- ▶ Prosecuting magistrates (civil law systems).
- ▶ State prosecutors (common law systems).

Donors supporting prosecution capacity for dealing with international crimes will already be familiar with basic prosecution needs in different contexts. Prosecution authorities vary in type, including between civil and common-law systems. Under both types of systems and those that have some mixture of the two, prosecutions related to international crimes will differ in some important respects from prosecuting regular domestic crimes.

Linkages to existing rule-of-law priorities. By investing in prosecutorial will and capacity to take on cases of international crime, the international community also lays the groundwork for prosecution authorities to deal with other types of complex crime. Many of the challenges and required skills are the same or similar. Further, fostering within national prosecution authorities the professionalism and integrity to seek justice for the most sensitive of crimes can catalyze fundamental reforms and enhance prosecutors' dedication to the rule of law. The high profile nature of international crimes can concentrate intense national and international focus on blockages to the reform of prosecution authorities and raise the political cost of efforts to maintain the status quo.

How Proceedings for International Crimes Are Different

Political obstacles. By their very nature, proceedings involving international crimes frequently touch on powerful political interests. This is especially true when state agents are among the main suspected perpetrators and there has been no substantial change in government following the conflict. In such cases, states may seek to establish domestic war crimes mechanisms that they can control. This could amount to little more than a public relations stunt intended to defuse international criticism or threats of humanitarian intervention. In countries subject to ICC involvement, such attempts may also be undertaken in an effort to trigger the principle of complementarity and render cases inadmissible in The Hague.⁸¹ This is arguably the intent behind Sudan's domestic investigations and prosecutions related to alleged crimes in its Darfur region. In other situations, governments may drag their heels on prosecutions because they do not want to offend neighboring states, don't like the precedent of holding senior officials accountable, or have other inscrutable objections. In East Timor, for example, the government prioritized the new country's relationship with Indonesia over seeing through justice for crimes committed by Indonesians or Indonesian-backed agents.⁸² And Senegal has consistently avoided charging and trying former Chadian president Hissène Habré for alleged war crimes and crimes against humanity despite previous assurances and a mandate from the African Union to do so.⁸³

Assessing prosecutorial credibility. Where political factors loom large, as is arguably the norm, donors face the fundamental decision of whether they should devote resources to potentially biased prosecutions, thereby also boosting the perceived legitimacy of such prosecutions. In making this decision, donors have to gauge the government's intent very closely. In some states where political opposition is intense, the prosecution authority may be sufficiently independent to conduct genuine investigations and prosecutions even in the face of political headwinds. In those cases much will also depend

on the ability of the individual prosecutors to carry out their duties without regard to political loyalties. But even if there is reason to believe that they will do so, these prosecutors are still likely to have difficulties in convincing all factions that their work will be independent and unbiased.

In many cases, prosecutorial credibility can be difficult to categorize. As in Uganda and Colombia, there may be reason to believe that technically correct prosecutions can be conducted with respect to the broader allegations, but that potential for political interference would arise with respect to atrocities committed by individuals connected to the state or state-allied factions. In other situations, political interference may allow investigations of factions with ties to the state but limit prosecutions to relatively low-level offenders. There is substantial fear that something similar to this could happen at Cambodia's ECCC, for example. There, it appears that pressure may be aimed at preventing the prosecution of individuals who are close to the current government.⁸⁴ In situations including the DRC, where there have been significant developments in the prosecution of international crimes, there may be a danger that political constraints are enforcing both of these types of limits. So too, in ICC situation countries it is not always clear whether efforts to establish local prosecution mechanisms are intended to result in genuine investigations and prosecutions, or just to subvert the ICC process. Kenya offers a prime example of a country where good intention behind the establishment of domestic justice mechanisms is plausible but doubtful.⁸⁵

Donors who have been involved in capacity-building for prosecutions relating to organized crime and corruption may see parallels to political obstacles that can arise in relation to those types of proceedings. In assessing these difficult questions and deciding whether and to what extent assistance ought to be provided, donors would be well advised to consult widely, including with the ICC where applicable, and intensively with local independent civil society organizations, especially victims' organizations.

Code of ethics. The sensitive nature of prosecutions for international crimes makes their ethical conduct all the more important if the proceedings are to enjoy trust among the various communities affected by the conflict. Any prosecution authority should operate under a written code of ethics or conduct in addition to any ethical codes established by the national bar association. Such codes can include issues of professional conduct, independence, and impartiality, and should have a transparent and fair enforcement mechanism.

Knowledge of international criminal law. Prosecutors seeking to charge criminal acts as international crimes must have a good understanding of relevant aspects of international criminal law. This begins with developing a solid understanding of each of the basic elements of such cases: the crime base (criminal acts committed by direct

perpetrators), linkage (for example, establishing command responsibility for the crime base to more senior perpetrators), and any applicable contextual elements that qualify the acts as international crimes.⁸⁶ Securing a conviction for war crimes entails establishing that the criminal act took place in the context of an armed conflict, and that the perpetrator had knowledge that it took place in this context. To prove that criminal acts amount to crimes against humanity, prosecutors are required to establish that they were part of a widespread or systematic attack. And if prosecutors attempt to charge killings as acts of genocide, they must show that in carrying out the killings, the alleged perpetrator intended to destroy a national, ethnic, racial or religious group in whole or in part.⁸⁷ Additionally, prosecutors must understand which criminal acts can be charged as international crimes and what elements define each crime. In part this will depend on how the particular state domesticated international law and the extent to which the legal system can look to precedents from international and other national jurisdictions. In some areas—notably crimes of sexual and gender-based violence—jurisprudence has evolved markedly over the past 20 years and international jurisprudence can serve as a useful source for domestic judicial processes. For example, the ICTR established that rape can be charged as an act of genocide, and the SCSL established that forced marriage can constitute an inhumane act chargeable as a crime against humanity.

Case selection. The generally much larger scale of crimes being confronted by the judicial system means that there are likely to be numerous perpetrators. Even with international assistance, in most cases there will be inadequate capacity to try all acts that amounted to international crimes. In legal systems where the principle of legality is heavily emphasized—typically more the case in civil law systems—by definition prosecution authorities may have little or no leeway in deciding which cases to select or prioritize. In theory, they are expected to pursue all offenses. Yet many legal systems offer prosecutors discretion (ranging from limited to expansive) in deciding which cases to pursue and in what order. For these prosecutors, deep knowledge of case selection criteria and methods can be invaluable.

Overall prosecution objectives can have a heavy influence on case selection.⁸⁸ Prosecutors may wish to prioritize cases against suspects believed to bear the greatest responsibility for the crimes; suspects for whom the evidence is strongest; suspects engaged in the ongoing commission of crime or who are otherwise threatening state stability or reconciliation; suspects who committed particularly notorious crimes, even if not in senior positions; suspects who are thought to be easiest to arrest; suspects in key positions of organizations implicated in the crimes (in order to dismantle these); or suspects whose prosecution would provide the most representative sample of the types of crimes committed during the conflict. Prosecutors may also have choices in how they attempt to build cases. They may decide to start with cases against low-level perpetrators

in order to lay a foundation for later cases that link alleged acts of these suspects to their commanders. One prosecutorial disadvantage to this approach is that witnesses called for each case may inevitably have some variation in their recollection of events, so that their credibility may be called into question by the time they testify against the most senior perpetrators. In systems where it is allowed, prosecutors may attempt to plea bargain and encourage low-level perpetrators or insiders to testify against their commanders. Where this is possible, prosecutors need skills and a strategy to know what type of deals to strike. This can create high-stakes trade-offs. While a potentially indispensable prosecutorial tool, plea bargaining requires reducing or eliminating sanctions for the insider's criminal responsibility, and can be unpopular with affected individuals and communities.

A conflict mapping exercise can be vital in helping prosecutors make wise strategic decisions, as can general consultations with affected communities.⁸⁹ Other considerations in determining a strategy include an assessment of mandate, resources, potential sources of evidence, and institutional capability. Once a strategy is established, it is important that prosecutors articulate what standards are to be used in case selection. The public—and especially those communities most affected by the conflict—should receive an explanation of why some suspected perpetrators will be held to account while others will not. Prosecutors can participate in outreach activities to explain the constraints involved and receive feedback from the public.⁹⁰

Information and case management. As discussed in the previous chapter on investigations, in all but the most basic of war crimes cases, the prosecution of international crimes can generate a much greater amount of information than standard criminal prosecutions. From the outset, prosecutors need a system for keeping witness statements, other evidence, and court documents secure and organized, and for tracking exculpatory evidence disclosed to the defense. Good case management should help to ensure consistency among different teams working on cases related to overlapping events.

ICC cooperation. As discussed in the chapter on investigations, where the ICC has jurisdiction and its Office of the Prosecutor has launched a preliminary analysis or full investigation of the alleged crimes, it may be possible for the OTP to provide information and other forms of assistance in support of domestic investigations.

Length of process. Donors involved in assisting these processes must be aware that the heavier evidentiary burden facing prosecutors means that investigations and prosecutions for international crimes take longer and cost more than if the acts involved were investigated and charged as ordinary crimes under national law. However, if there is a

series of related cases, prosecutors may only have to prove many of the extra elements outlined above once—for example the existence of a state of armed conflict, or the occurrence of widespread or systematic attacks. Prosecutors can also limit the number of charges in the indictment in order to help reduce trial time, although it can be difficult to weigh this imperative against the need to make the indictment sufficiently representative of the scope of the crimes.

Domestic vs. international crimes. Acts that can be charged by prosecutors as war crimes, crimes against humanity, or genocide are almost always considered crimes of some kind under existing domestic criminal codes. States whose criminal codes do not include international crimes may still be able prosecute mass killings, for example, as individual acts of murder, accessory to murder, or similar charges. Depending on their national legislation, states may also be able to cumulatively charge national and international crimes. If domestic codes and prosecutorial knowledge are already sufficient to pursue accountability for atrocities without defining them as international crimes, some donors may question the value of assisting states in undertaking more arduous charges. For some prosecutions, the practical effects of using international crimes may be negligible. However, where the alleged crimes were committed long ago, statutes of limitations may render impossible prosecutions based on national law, whereas there are generally no statutes of limitations for international crimes. Similarly, international crimes may be exempted from amnesties or immunities that might apply to crimes charged under national law. And some domestic criminal procedure codes lack such modes of liability as command responsibility and joint criminal enterprise that have been widely applied in international tribunals. In some countries that have domesticated international criminal law, these modes have nevertheless been adopted for specific application to international crimes, giving prosecution authorities greater flexibility. In addition to these pragmatic reasons, the prosecution of international crimes as such may more appropriately reflect the nature and gravity of the crimes and resonate more deeply with victims. The trials are more likely to delve into the patterns of crime, thus helping to establish a basis for torn societies to develop a common narrative of painful events.

Examples of Donor Support

Extended mentorship models that focus on specific cases have been highly effective in boosting the skills of national war crimes prosecutors. In 2004–2005, the prosecutor’s office at the ICTY sent the files of cases it had no intent to pursue (so-called “category two” cases) to national prosecutors in the Balkan region. Beyond transferring the files,

ICTY investigators and prosecutors interacted extensively with their counterparts in **Bosnia and Herzegovina, Serbia, and Croatia** through seminars and meetings. Operating cooperatively, participants were able to work through the details of the cases and the most promising legal approaches for each.⁹¹ Similarly, hybrid staffing at the Special Court for **Sierra Leone** has provided a number of Sierra Leonean prosecutors with considerable experience in building complex criminal cases.

Streamlining prosecutions of several incidents into single cases can also improve their efficiency. In **Iraq**, for example, Iraqi prosecutors were determined to pursue all of the alleged crimes as separate cases, which would have entailed proving all of the difficult extra elements of international crimes separately in each case. International trainers organized by the International Bar Association in February–March 2005 were able to persuade them of the advantages of combining cases in order to reduce this burden. In the event, prosecutors did combine some of the cases.⁹² The same dynamic has been at play in **Colombia**, where some prosecutors have sought to pursue patterned crimes as a series of individual crimes. There, the International Center for Transitional Justice has been working with the federal prosecution office to make prosecutions more efficient and reflective of the nature of the conflict.⁹³ Even in **Argentina**, a country with generally very high capacity, the apportionment of cases among autonomous district prosecutors made it difficult to pursue patterned cases, for example to show a series of crimes committed in different districts as having been widespread or systematic, thus constituting crimes against humanity. There too, ICTJ provided advice to a Coordination Unit in the federal prosecutor's office so that such linkages could be made and the vital patterns exposed.⁹⁴

The International Crime in Africa Programme (ICAP) at the Institute for Security Studies, in its trainings for prosecutors on the domestic and regional context, highlights regional perspectives and challenges and draws on African case studies and trainers wherever possible. ICAP has provided training of this nature to prosecutors from the East Africa region (**Tanzania and Uganda**), and **South Africa**.

Guidelines for Supporting Prosecutions

Assess

► government will:

- Have government leaders offered rhetorical support for genuine domestic prosecutions for international crimes? If so, does this support extend to prosecutorial scrutiny for members of all factions of the conflict who have allegedly committed atrocities, regardless of rank?

- Do government leaders publicly support specific reforms necessary for the conduct of genuine prosecutions?
- Do prosecutors feel secure in the execution of their duties? Are they being intimidated? If so, by whom? And what category of case generally results in difficulties for them?
- Do prosecutors feel that having an international prosecutor in the frontline would remove pressure from them while allowing them to do the job in the background, thus helping to move forward with the most difficult cases?
- Have prosecutors pursued cases of high-level corruption or other types of serious crime? If so, have these types of prosecutions been pursued against powerful individuals allied with the government? Has the government obstructed any such efforts?
- Where applicable, does the government have a record of good cooperation with the ICC or other relevant international courts?
- On all of these questions, it is vital to consult extensively with victims' and other civil society organizations.

► **autonomy and bias:**

- Are prosecution decisions directed by political authorities or civil servants?
- Does the prosecution authority have budget autonomy?
- Do prosecutors have clear affinity for a particular faction in the conflict?
- How diverse is the prosecution team? Do members disproportionately belong to a particular ethnic, religious, or other identity group?
- Do civil society organizations, including victims' organizations, suspect that the prosecution office is biased?
- Do willing and able prosecutors feel safe; is there an environment in which they can do their jobs?
- Is there a written code of ethics that applies to prosecutors and is up to international standards? Is it enforced?
- In light of answers to the above, is there a realistic chance that the prosecution can be genuine, and widely perceived as such, especially in affected communities?

► **available resources:**

- Are there enough prosecutors to take on the task, especially in key roles where decisions are required to advance proceedings?

- Do prosecutors have capable administrative support staff?
 - Do prosecutors have adequate basic office equipment (including desks, chairs, telephones, copy machines)?
 - Where necessary, is basic information technology available (including computers, internet access, and printers)?
 - Is there a case management system in place to store and process evidence, track its chain of custody, transcribe and file witness statements, and facilitate disclosure? Is the scope and scale of the alleged crimes and investigations into them such that a computer-based system will be necessary?
 - Is there a potential for the ICC's prosecutor to assist national prosecutors with information and advice on the cases?
- **technical skills:**
- Do those leading the prosecution have the strategic skills to lead a conflict mapping exercise, make proper decisions about which cases to select, and join related cases where appropriate?
 - Do those leading the prosecution have the necessary personnel and case management skills?
 - Do prosecutors have in-depth knowledge of the applicable structure of an international criminal case, including the crime base, the chapeau, and linkages?
 - Do prosecutors have in-depth knowledge of the applicable elements required to prove war crimes, crimes against humanity, and genocide, and to prove that the crimes are linked to the accused?
 - In legal systems where case law from other jurisdictions can be used, are prosecutors familiar with relevant case law, including from international and other domestic jurisdictions?
 - Do prosecutors have the knowledge and skills to make informed decisions on case selection and communicate their criteria clearly to the public?
 - Are prosecutors fully aware of the rights of suspects and accused, including disclosure requirements in common law systems? Are there internal accountability mechanisms in place to ensure that these are respected?
 - Do prosecutors have the language skills to interact with witnesses? If not, are trained interpreters available to assist?
 - In adversarial systems, do prosecutors have good advocacy skills for direct, cross, and re-direct examinations of witnesses?

- Do prosecutors have the special skills to question vulnerable witnesses, including children (or those who were children at the time of the alleged crimes), torture victims, and victims of sexual and gender-based violence?
- Are prosecutors familiar with the possibilities and limits of forensic evidence, and how such evidence can best be used?
- Do prosecutors know how to use expert witnesses to support their cases?
- Do prosecutors know how to introduce documentary evidence in support of their cases?
- Does the prosecution possess the legal and drafting skills to compose solid indictments, motions, briefs, and other legal documents at trial? Do they know best practices in relation to drafting indictments for international crimes?
- Do prosecutors have case management skills?
- Does the prosecution possess the legal skills to handle appeals?
- Where relevant, do prosecutors have the skills to use information technology?
- What other types of training might be required?

Plan

- ▶ **addressing political obstacles and bias:**⁹⁵
 - Urge prosecution authorities to participate in community consultations about the prosecution process.
 - Urge broad representation of different identity groups on the prosecution team where this is a problem.
 - Seek to temporarily integrate international staff into the prosecution team, and where bias is acute (and the government agrees), consider placing an unbiased foreigner in charge of the prosecution.
 - Make assistance dependent of institutional reforms, and ensure that consistent messages are sent by all relevant donor ministries and agencies.
 - In the face of insurmountable political interference, consider referral of the case to the ICC where this is an option.
- ▶ **provision of resources and skills:**
 - Identify where gaps in technical capacity and resourcing exist, and how severe they are.

- Determine which gaps present the greatest obstacles, and thus which measures should have the highest priority.
- Identify whether existing rule-of-law programming, by any donor, already addresses similar gaps. If so, explore whether existing programming could be modified to directly address the needs of the international crimes prosecution.
- Determine which needs are best met in classroom-type trainings, and which skills can be integrated into the prosecution workflow through subsequent mentorship models. Ensure that mentors and those being mentored have a common understanding of approaches and expected outcomes.
- Determine how the success of trainings and mentorship can best be measured.
- Identify which donors are best suited to address which needs.
- Identify technical assistance and training providers.
- Ensure that donors coordinate their assistance on an ongoing basis in order to fill all priority gaps and avoid duplication.

Resources

Aegis Trust “Wanted for War Crimes” Program (www.aegistrust.org) Assembles specific war crimes cases for prosecution in domestic jurisdictions, sometimes relying on local investigators and prosecutors.

American Bar Association Rule of Law Initiative (<http://apps.americanbar.org/rol>): Conducts trainings for prosecutors in international criminal law.

Avocats sans Frontières (Lawyers without Borders) (www.asf.be): Conducts trainings for prosecutors in international criminal law.

Commonwealth Secretariat: (www.thecommonwealth.org): Developing a training module on transnational crimes, including crimes under the Rome Statute, for member states.

Institute for International Criminal Investigations (www.iici.info): Provides training for prosecutors in investigating international crimes.

International Bar Association (www.ibanet.org): Offers trainings in international humanitarian law.

International Center for Transitional Justice (www.ictj.org): Organizes assessments and offers trainings for prosecutors in international criminal law.

International Committee of the Red Cross (www.icrc.org): Offers trainings in international humanitarian law.

International Crime in Africa Programme at the Institute for Security Studies (<http://www.issafrica.org/pgcontent.php?UID=18893>): Provides introductory and in-depth training for African prosecutors on international criminal law, the latest developments in international justice from an African perspective and as it affects Africa, the Rome Statute system, and the implementation of domestic ICC legislation (where relevant).

International Criminal Law Services (www.iclsfoundation.org): Conducts trainings for prosecutors in international criminal law.

Public International Law and Policy Group (www.publicinternationallaw.org): Organizes assessments and conducts trainings in international criminal law.

War Crimes Studies Center, University of California at Berkeley (<http://socrates.berkeley.edu/~warcrime/index.html>): Organizes and conducts trainings in international humanitarian law.

Women's Initiatives for Gender Justice (www.iccwomen.org): Offers trainings in laws on sexual and gender-based violence.

Various other organizations, including regional or local organizations, may have expertise. Where possible, donors should seek to involve well regarded local organizations.

Further Reading

International Criminal Tribunal for the former Yugoslavia and the United Nations Interregional Crime and Justice Research Institute, *ICTY Manual on Developed Practices*, 2009, available at: http://www.icty.org/x/file/About/Reports%20and%20Publications/manual_developed_practices/icty_manual_on_developed_practices.pdf.

Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Prosecution Initiatives*, 2006, available at: <http://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf>.

Max du Plessis (ed.), *African Guide to International Criminal Justice*, Institute for Security Studies, Pretoria, 2008, available at: <http://www.issafrica.org/pgcontent.php?UID=3820>.

UN Office on Drugs and Crime, *Criminal Justice Assessment Toolkit*, "The Prosecution Service," available at: http://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/3_Prosecution_Service.pdf.

Judges

Why

- ▶ Ensuring impartial judicial proceedings that fully respect the roles of the parties and the rights of suspects and the accused.
- ▶ Ensuring that victims and witnesses are not endangered, and are treated respectfully.
- ▶ Strengthening the rule of law.

What

- ▶ Deciding on requests for indictments and arrest warrants.
- ▶ Assessing indigence claims by the accused.
- ▶ Reaching verdicts on innocence or guilt of the accused.
- ▶ Ordering reparations.
- ▶ Hearing appeals and making final determinations.

Who

- ▶ Trial judges.
- ▶ Appellate judges.

The role of trial and appellate judges in proceedings related to international crimes is largely the same as it is in other criminal proceedings. With some variation by type of legal system, judges rule on preliminary legal matters, hear evidence from the prosecu-

tion and defense in the case, guarantee that due process standards are respected, ensure by appropriate judicial means the protection of witnesses, decide whether the accused has been proven guilty, and in the event of a conviction, determine the sentence to be imposed. In some systems, trial judges may determine what reparations are to be made in the event of a conviction, and to whom. Appellate judges hear appeals of the parties related to decisions initially issued by the trial chamber.

As in other types of capacity building for judges, successful capacity building related to international criminal law depends greatly on tailoring interventions to fit the existing institutional culture—so long as the culture does not require reform. Further, interventions related to international criminal justice should be designed to support or at least mesh with institution-building efforts. Judges should be consulted on the substance and type of capacity building they require, and international trainers, mentors, or advisors should have expertise and seniority commensurate to the task of working with seasoned judges.⁹⁶ Timely capacity-building for judges who may deal with constitutional challenges and appeals arising from trials involving international crimes should be planned.

Linkages to existing rule-of-law priorities. Capacity building for the judiciary on international criminal law may, depending on individual assessments, need to integrate training in such basic skills as how to write a judgment, how to conduct legal research, or how to manage a complex trial. Enhancement of these skills can benefit the quality of participating judges' work in any proceeding, and particularly boost judicial capacity in handling other types of complex criminal cases.

How Proceedings for International Crimes Are Different

Sensitivity of cases. While not unique to international criminal cases, judicial independence in such cases is of paramount concern because the crimes involved are generally socially and politically sensitive. Donors should not only scrutinize constitutional or statutory provisions that provide for independence of the judiciary (as discussed earlier in the “legal framework” chapter), but also the extent to which the judiciary has in fact demonstrated its independence. Some judiciaries have shown a propensity to give in to executive pressure or inducements, while others have demonstrated resolve in standing up to executive overreach. Popular perception also matters. Where judicial decisions do not gain the trust of a broad section of society, especially among those most affected by the conflict, the scope for such judicial decisions to have a positive impact on criminal justice, reconciliation, and deterrence will be minimized. The international community can assist judges in fending off undue political pressure by encouraging civil society—

including law societies and bar associations—to focus attention on court proceedings through court monitoring and advocacy.⁹⁷

Security. The politically and socially sensitive nature of many trials for international crimes can create security threats for judges hearing the cases. Support efforts should include an initial general security assessment and individual security assessments as needed. Appropriate security measures should be built into judicial support from the outset. In some cases this can be coordinated with donor support to national police to ensure that a national unit can deal with protection issues during and after trials.

Traumatized victims and witnesses. In many cases the victims of international crimes will be more traumatized than those of common crimes. Judges must have familiarity with potential symptoms of traumatization among victims appearing as witnesses and those represented as third-party participants (in systems where this is allowed). Judges should be sensitive to the need to protect vulnerable witnesses from re-traumatization in the courtroom to the extent this is possible and consistent with ensuring full respect for the rights of the accused.

Specialized and mixed chambers. Many countries have chosen to designate a particular court division or divisions to hear cases of international crimes. One advantage of doing so is that capacity-building specific to these cases can be focused on a very limited number of judges. This has the disadvantage, however, of limiting spill-over benefits of this capacity building for the judiciary as a whole, and may draw resources away from broader judicial capacity-building efforts. Where a specific chamber has been designated to hear international crime cases, the selection of judges is of paramount importance given the sensitivities discussed above.

Where there is a lack of popular trust in the independence of the judiciary, it may be desirable to temporarily assign foreign judges to the chamber, as has been done in Bosnia and Herzegovina and Kosovo. Here too, the selection process is critical because a poor process can hobble the entire international support effort. Foreign judges should be selected for their expertise in international criminal justice and trial management, their professionalism, and their cultural sensitivity. Contracts should be of sufficient duration to prevent judges' leaving just as they have become familiar with the domestic system and the context of the cases. It can be expensive to attract judges with these qualifications to serve in distant locations, particularly where there are security or health risks. High pay and living standards for international judges can cause resentment among national judges with whom they must work, while at the same time it is financially unsustainable to boost the pay of national judges to the equal levels.⁹⁸ There are no easy answers to this conundrum. International participation in the

judiciary can also raise other sensitivities. In some contexts it can be perceived by the public as introducing foreign biases into trial proceedings, or even determining trial outcomes. In settings where international crimes have occurred, sensitivities may be heightened even further, especially if the foreign assistance is coming from countries that are perceived by the public as having been more sympathetic to particular factions in the conflict. In designing international assistance to the judiciary in particular, as well as in recruiting and orienting international judges or support staff, donors should take these sensitivities into account.⁹⁹

Substantive law. The biggest difference for judges hearing international criminal cases relates to the substantive law.¹⁰⁰ As described in the chapters on investigations and prosecutions, above, international criminal law cases involve three layers: a crime base, contextual elements, and the question of whether the alleged crimes can be linked to the accused. The judges must have an excellent understanding of the applicable elements of war crimes, crimes against humanity, and genocide. They must also understand fully the various modes of liability that may be at issue in the cases before them. Judges will generally be very familiar with modes of liability used in their domestic systems, but the application of international criminal law can introduce options that may be new to them, including that of command responsibility and joint criminal enterprise. In many common law systems, judges should have very good familiarity with relevant case law on international crimes, including that from other jurisdictions.

In systems that allow victim representation, additional motions filed by victim counsel may assist judges who are new to the field of international criminal law by simply presenting them with additional considered arguments.¹⁰¹ Amicus curiae briefs filed by third parties can serve the same purpose, and over time can contribute to a shift in judicial culture that is more accommodating of international criminal law.

Case complexity, trial length, and trial management. Some cases for international crimes are not at all complex, and support should be tailored to individual circumstances. Yet trials for international crimes often involve a great many more facts, documents, and witnesses relating to a greater number of incidents and alleged perpetrators, over a greater period of time and wider geographical space than do ordinary criminal trials. This underscores a need for trial management skills. Depending on what domestic criminal procedure codes allow, judges may have options for limiting the scope and expanding the format of admissible evidence. For example, they can limit the number of witnesses that the parties are allowed to call, decide to accept written evidence rather than oral testimony on some matters, or allow the joining of related trials where there are no major conflicts in the interests of the accused.¹⁰² Beyond joining the trials of multiple accused persons, judges may have opportunities to join various charges against

one individual into a common trial rather than allow multiple trials for different charges against the same person. Judges should also be aware of potential defense tactics aimed at undermining proceedings through frivolous delay, and have the skills to differentiate these from legitimate concerns in order to keep trials on track. In particularly complicated trials that are expected to last a long time, and where allowed by domestic law, donors may want to encourage countries to consider naming an alternate judge to the case for the event that one of the trial judges becomes incapacitated.¹⁰³ The prospect of drawn-out proceedings also means that suspects and accused persons may be subject to prolonged periods of detention before and during trial. International standards state that such detention should be the exception rather than the rule.¹⁰⁴ In order to protect the rights of suspects and the accused and make effective use of resources, judges should be fully aware of international standards and options for non-custodial measures.

Examples of Donor Support

As in other areas of training, that of judges has perhaps worked best when it has been based on continuing support rather than through one-off trainings. At the State Court of **Bosnia and Herzegovina**, a combination of trainings and steady interaction with foreign judges led to an improvement in the domestic judges' ability over time.¹⁰⁵ This direct interaction among judges has been important to success, as judges can be highly sensitive to receiving training from more junior foreign legal professionals. Even in a situation where there is no mixed chamber and long-term mentorship among peers is not possible, judge-to-judge information sharing such as that facilitated by the International Center for Transitional Justice has a much greater chance for acceptance. Judges from the ad hoc tribunals have been particularly effective in training counterparts from other systems.

Advisory models can also meet with considerable success. Since 2009, the European Union has sponsored two international experts to advise three judges of a trial chamber in **Colombia** that is responsible for implementing that country's "Justice and Peace Law" (Law 975). The experts work in a low key manner, but on a continuing and intensive basis with the chamber, offering advice on substantive, procedural, and evidentiary elements of the cases, as well as issues related to reparation for the victims of the crimes. The approach has noticeably improved the quality of the chamber's decisions. Whereas the Colombian Supreme Court had rejected some of its earlier decisions, recent decisions have been upheld.¹⁰⁶

The International Crime in Africa Programme (ICAP) at the ISS has provided training for judges that highlights regional perspectives and challenges and draws on

African case studies where possible. Training has been provided to judges from the **East African region**, and ICAP recently delivered the first in a series of training courses for the judges of **Uganda's** newly established International Crimes Division (ICD). Superior Court judges in Uganda who may deal with constitutional challenges and appeals stemming from trials before the ICD have received training jointly organized by the Institute for International Criminal Investigations, International Criminal Law Services, and Public International Law and Policy Group.

Guidelines for Supporting the Judiciary

Assess

► **real and perceived judicial independence:**

- Are cases assigned by political or judicial authorities?
- Does the judiciary enjoy budget autonomy?
- Are there adequate checks on executive authority in the appointment and removal of judges, for example through involvement of truly independent judicial services commissions in the appointment and disciplinary process?
- Does the judiciary have a track record of independence in hearing sensitive cases? Have there been rulings against government interests in such cases?
- Do judges have clear affinity for a particular faction in the conflict that is being examined at trial?
- How diverse is the bench? Are judges disproportionately members of a particular ethnic, religious, or other identity group?
- Are there benchmarks in place for judicial integrity? Are judges required to file financial disclosure statements? Are there robust and transparent procedures in place to provide appropriate oversight and discipline?
- Do civil society organizations, including victims' organizations, suspect judicial bias?
- In light of answers to the above, is there a realistic chance that the judiciary will be fair and impartial, and widely perceived as such, especially in affected communities?
- Do willing and able judges feel safe? Can national police provide security if required?

► **technical skills:**

- Do trial and appellate judges have the basic skills required for any criminal trial, including knowing how to conduct legal research, how to match the evidence presented to the charges, how to weigh the evidence, and how to draft judgments?
- Do the judges have strong trial management skills that will allow them to guide potentially complex and lengthy trials?
- Do the judges have excellent knowledge of the structure of an international criminal case, including the crime base, the chapeau, and linkages?
- Do the judges have excellent knowledge of the elements required to prove war crimes, crimes against humanity, and genocide, and to prove that these crimes are linked to the accused?
- In systems where case law from other jurisdictions can be used, are the judges familiar with relevant case law, including from international and other domestic jurisdictions?
- Are the judges fully aware of the rights of suspects and accused, including international standards on detention before and during trial, and, in common-law systems, disclosure requirements?
- Do judges have knowledge of how to assess claims of indigence by the accused?
- Have judges been fully trained in the needs of vulnerable witnesses, especially children (or those who were children at the time of the alleged crimes) and victims of sexual and gender-based violence?
- In systems allowing victim participation, are judges familiar with the handling of victim representation issues?
- Where courtroom interpretation will be used, do the judges have a clear understanding of the role of interpreters, and know how to work through them?¹⁰⁷
- Does judicial support staff have adequate research, drafting, and administrative skills?
- Do judges and their staff have the skills to use information technology?

► **available resources:**

- Have trial and appellate judges been assigned to hear cases of international crimes and related appeals? Are there enough judges and trial benches to handle the anticipated caseload?

- Do the judges have adequate legal and administrative support staff?
- Do the judges have adequate basic office equipment (including desks, chairs, telephones, copy machines)?
- Where necessary, is information technology available?

Plan

► confronting political influence, corruption, and bias:

- Urge the adoption and enforcement of financial disclosure requirements for judges, as well as codes of conduct consistent with international standards.
- Where real or perceived bias is a problem, consider:
 - urging broad representation of different identity groups on the bench;
 - temporarily integrating international judges into the bench, and where bias is acute (and the government agrees), potentially naming a foreigner as presiding judge for international criminal cases, or putting international judges in a majority on the panel;
 - making assistance conditional on institutional reform and reform implementation, and ensuring that consistent messages to this effect are sent by all relevant donor ministries and agencies;
 - in egregious circumstances and jurisdiction permitting, considering referral to the ICC.

► provision of resources and skills:

- Identify where gaps in technical capacity and resourcing exist, and how severe they are.
- Determine which gaps present the greatest obstacles, and thus which measures should have the highest priority.
- Identify whether existing rule-of-law programming, by any donor, already addresses similar gaps. If so, explore whether this could be modified to directly address the needs of the judiciary related to international crimes cases.
- Attempt to tailor interventions related to international criminal justice to the judiciary's institutional culture and any existing efforts at institution-building.
- Determine which needs are best met through advisory services, classroom-type trainings, or mentorship models. Ensure that advisors and mentors, as well as judges and judicial staff, have a common understanding of theory and of expected outcomes.

- Explore other potential entry points, including support for victim representation and third-party amicus briefs, which can increase judges' exposure to well-reasoned legal arguments on the cases before them.
- Urge judiciaries to appoint one judge (from the specialized international crimes division, if one exists) to be responsible for organizing continuing education for the bench, and to factor judges' participation in these trainings into their evaluations.
- Determine how the success of mentorship, advisory services, and trainings can best be measured.
- Identify which donors are best suited to address which needs.
- Identify technical assistance and training providers, and forums for such training, including local judicial schools and academies.
- Ensure that donors coordinate their assistance on an ongoing basis in order to fill all priority gaps and avoid duplication.

Resources

Commonwealth Secretariat (www.thecommonwealth.org): Developing an online training module on transnational crimes, including crimes under the Rome Statute, for member states.

Institute for International Criminal Investigations (www.iici.info): Offers trainings in investigation of international crimes, including for judges.

International Bar Association (www.ibanet.org): Offers trainings in international humanitarian law.

International Center for Criminal Justice (www.ictj.org): Facilitates needs assessments and organizes trainings for judges and legal officers, including facilitation of trainings by judges experienced in international criminal law.

International Crime in Africa Programme at the Institute for Security Studies (<http://www.issafrica.org/pgcontent.php?UID=18893>): Provides introductory and in-depth training for African judges on international criminal law, the latest developments in international justice from an African perspective and as it affects Africa, the Rome Statute system, and the implementation of domestic ICC legislation (where relevant).

International Criminal Law Services (www.iclsfoundation.org): Conducts trainings for judges and legal officers.

Kenyan Section of the International Commission of Jurists (ICJ Kenya) (<http://www.icj-kenya.org>): Conducts training for judges in the East African region on international criminal law and the Rome Statute.

Public International Law and Policy Group (www.publicinternationallaw.org): Facilitates needs assessments and organizes trainings for judges and legal officers.

Various other organizations, including regional or local organizations, may have expertise. Where possible, donors should seek to involve well regarded local organizations.

Further Reading

International Criminal Tribunal for the former Yugoslavia and the United Nations Interregional Crime and Justice Research Institute, *ICTY Manual on Developed Practices*, 2009, available at: http://www.icty.org/x/file/About/Reports%20and%20Publications/manual_developed_practices/icty_manual_on_developed_practices.pdf.

UN Office on Drugs and Crime, *Criminal Justice Assessment Toolkit*, “The Independence, Impartiality, and Integrity of the Judiciary,” available at: http://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/2_Independence_Impartiality_Integrity_of_Judiciary.pdf.

Defense Counsel

Why

- ▶ Upholding fundamental human rights guarantees for suspects and accused persons.
- ▶ Strengthening the credibility of the legal process and the popular acceptance of its outcomes.

What

- ▶ Representing the legal interests of suspects and accused persons throughout the proceedings.

Who

- ▶ Attorneys approved for practice in the national justice system.

International due process standards assert the right of an accused person to present his own defense, engage counsel of his own choosing, or if he cannot afford it, to have capable defense provided at no cost by the authorities when this is in the interests of justice.¹⁰⁸ As in other criminal cases, the role of the defense in cases of proceedings involving international crimes will vary between civil and common law systems. Without an investigating judge, the latter entails a broader role, with the defense needing to conduct its own investigation. And beyond questioning the prosecution's facts, defense counsel will also seek to impeach the credibility of witnesses testifying against their clients.

Linkages to existing rule-of-law priorities. Legal aid schemes already form an important component of rule-of-law development programming, and the basic elements are the same for international criminal cases. Donors thus already have a wealth of experience in working with states and bar associations to identify eligible defense attorneys, develop fee schedules for their representation of indigent accused, and finance it. Especially where such efforts have not yet begun or are in their early stages, there is great potential for assistance related to proceedings for international crimes to contribute to institution-building. One of the most important legacies from the application of international criminal justice can be its role in establishing legal aid programs.

How Proceedings for International Crimes Are Different

Political sensitivities. Proceedings involving international crimes can present states and donors with particular challenges in ensuring quality representation for suspects and accused persons. In some conflict or post-conflict situations, it can be difficult to find public defenders for suspects who are reviled by the public. For example, in East Timor, most of the pro-Indonesian population fled the territory at the end of the conflict, leaving for the most part only independence supporters behind. Among this population, it was difficult to find public defenders willing to represent pro-Indonesian accused.¹⁰⁹ Defense investigators and attorneys working on international criminal cases may also find it more difficult to gain access to witnesses, particularly in cases where their client was opposed to the state and potential witnesses serve within state security services or are being held by them.

Especially where populations remain deeply divided and suspects and accused persons enjoy some base of popular support, defense counsel involved in cases of international crimes may feel greater temptation to focus on political arguments both within and outside the courtroom. For this reason, codes of conduct take on added importance. If necessary, the international development community should urge the local bar association to establish or clarify its codes as appropriate. Transparent procedures for attorney misconduct should be in place and enforced.

Reconciliation. While defense rights are important to the credibility in any criminal proceeding, their importance in cases of international criminal trials cannot be overemphasized. At stake are not only the human rights of the suspect or accused person, but also the extent to which the judicial proceedings are accepted among different communities in a post-conflict situation and not easily dismissible as “victors’ justice.” Proceedings that benefit from a strong and capable defense are better able to establish commonly accepted truths about disputed historical events, and thereby aid in reconciliation and

the prevention of future conflicts. As discussed in the separate chapter on outreach, it is of vital importance that populations sympathetic to alleged perpetrators, including ex-combatants, receive at least a basic understanding of defense rights and mechanisms in place to ensure their observation. This type of outreach may most usefully entail the participation of defense teams.

Security. Because trials for international crimes often take place in societies still polarized by the underlying events, defense counsel for suspects and the accused may face threats to their security. At the Iraqi High Tribunal, an apparent lack of planning for the security of defense counsel cost some attorneys their lives.¹¹⁰ Defense counsel needs should be considered in preliminary security assessments.

Defense's investigation skills. Especially in systems where the defense is responsible for the conduct of its own investigations, defense counsel must know how to manage these. Some of the challenges will be similar to those facing prosecution investigators (discussed in greater detail in that chapter). These include conducting extensive research on the conflict, identifying potential witnesses who may be vulnerable or mobile, and selecting the best leads from a multitude of possibilities. Defense counsel and investigators will need at least basic knowledge in forensics, document analysis, and, where charges are based on voluminous documentary evidence, archiving. Defense teams may require access to expert assistance in these and other areas. They should also be skilled in taking witness statements and handling vulnerable witnesses with appropriate sensitivity, inside and outside the courtroom. The defense must also have a system in place to manage extensive information collected through its own investigations or disclosed by the prosecution (or in civil law systems, made available by investigating judges).

Resources. In any criminal trial, there should be sufficient resources to ensure an adequate defense for suspects and the accused. The equality of arms can take on added importance in trials for international crimes, particularly where complex defense investigations are required. Defense costs can be covered or offset if, as recommended in the chapter on investigations, the assets of accused persons are identified and frozen at the beginning of the criminal investigation. Nevertheless, there must be a functional legal aid regime in place to cover the defense costs of indigent accused. The overall complexity of many international criminal cases can present obstacles in securing competent defense counsel for indigent suspects and accused persons. Some countries, including Uganda, have a flat fee structure for the provision of legal aid that makes no distinction between cases of simple crime that might take just days or weeks to resolve and complex criminal cases that could consume an attorney's time and energy for months or even years.¹¹¹ Where states have adopted Rome Statute implementing legislation that closely

mirrors the treaty's provisions on defense, the right to legal assistance may extend beyond accused persons. The Rome Statute goes further than the International Covenant on Civil and Political Rights by asserting the right of indigent suspects as well as accused persons to defense counsel at no cost where the interests of justice require it.¹¹²

Substantive law. Beyond this potentially expanded scope of defense eligible for state support, the clearest difference in defense needs for systems dealing with international crimes is in knowledge of substantive law. As is the case with prosecutors and judges (discussed in greater detail in those chapters), a pool of eligible defense counsel must become familiar with applicable international criminal law and the particularities of how it applies in the state. They should be familiar with the applicable elements of international crimes, including contextual elements, and new modes of liability introduced to the legal system through the domestication of international criminal law. Especially in common law systems, defense counsel may have to possess a firm grasp of relevant jurisprudence from the state and other national, as well as international jurisdictions. In some locations, defense attorneys from private practice may have better knowledge and skills in these areas than judges and prosecutors working for the state. Capacity building for defense counsel should be planned according to the results of needs assessments. Ensuring a quality defense may also require a vetting or “listing” system for counsel qualified to appear in proceedings for international crimes, as suspects and accused in some locations have shown a propensity to select counsel for reasons other than their legal skills.

Foreign participation. Where it is difficult to identify domestic counsel for unpopular suspects and accused, or where ethical or substantive deficiencies among local counsel are major problems, the involvement of foreign lawyers may be necessary to ensure a proper defense. Donors may need to plan support in cases where suspects and accused are indigent or their assets have not been traceable. If qualified foreign counsel are deemed necessary, governments should be urged to lift any unreasonable barriers to their working in the jurisdiction, including waiving exorbitant licensing fees.

Examples of Donor Support

Several organizations have conducted effective donor-sponsored trainings for defense counsel and investigators. For example, in **Uganda** the Institute for International Criminal Investigations has organized workshops on defense investigations and the Public International Law and Policy Group has conducted trainings on international criminal law relevant to Uganda's first war crimes trial. Organizations including *Avocats sans*

Frontières, the International Center for Transitional Justice, and the International Bar Association's Human Rights Institute have conducted trainings in international criminal law for defense counsel in various locations. The International Crime in Africa Programme (ICAP) at the ISS has provided training for defense lawyers in **Southern and East Africa**, both at the national level and through the regional law societies of both regions.

The internationally-assisted defense mechanism established at the State Court for **Bosnia and Herzegovina** offers an intriguing model for more comprehensive defense support.¹¹³ The international war crimes registry created the defense office ("OKO," is the Serbo-Croatian acronym) and in accordance with Bosnian law, the judges of the court's war crimes and organized crime chambers gave it licensing authority over attorneys wishing to practice before the State Court. To become eligible, defense counsel must meet criteria for experience and expertise, and critically, must have completed two three-day OKO-provided trainings in international humanitarian law and the revamped Bosnian criminal procedure code (which introduced adversarial elements into a civil law system). To remain on the list, counsel must participate in continuing professional trainings. Optional trainings provided by OKO include such topics as advocacy technique, war crimes investigation, written legal argument, legal research, and ethics. The office also provides administrative support for defense counsel, including facilitation of travel outside the country, and access to ICTY evidence and witnesses. OKO is able to provide research capacity, critique defense arguments and offer expert legal advice, as well as file motions in furtherance of defense arguments. Observers credit OKO with improving the quality of defense arguments related to procedural and substantive law before the Bosnian State Court. As will be discussed later, OKO provides a mechanism for international mentoring and expert assistance that can be phased out as local capacity grows.¹¹⁴

The OKO model is adaptable to other situations in accordance with needs assessments. Donors could work with states and existing national bar associations, where the latter are strong and respected, to develop special licensing requirements for counsel who want to represent suspects and accused in proceedings involving international crimes. This could ensure that counsel have requisite knowledge and skills. Likewise, national bar associations could be strengthened to provide the type of trainings and administrative and legal support provided by OKO in Bosnia and Herzegovina. Donors could also fund the temporary provision of international experts to provide trainings and assist in other relevant ways.

Guidelines for Supporting Defense Capacity

Assess

► legal, regulatory, and political conditions:

- Does the state have constitutional or statutory guarantees for defense rights that meet international standards?
- If so, have these generally been observed in practice?
- In particular, does the state ensure legal aid for indigent suspects and accused persons?
- Are foreign attorneys allowed to work in the country? Are there any unreasonable obstacles to their doing so, for example arbitrary or expensive licensing requirements?
- Is the national bar association well organized and widely respected? Is it effective in ensuring the quality of defense in criminal cases? Is it effective in ensuring accountability for unethical conduct or ineffective representation?
- Do defense counsel representing government opponents and critics face harassment or professional disadvantages?
- Does the state provide the defense with access to state-held evidence and potential witnesses under its control, and does it respect court orders in such matters?
- Do populations sympathetic to alleged perpetrator groups, including ex-combatants, trust the state to allow a strong defense? If not, are their concerns well founded?
- Will defense witnesses return to the country to give evidence, and if not, can this be done by video link?¹¹⁵

► security:

- Have there been incidents of violence against counsel for unpopular clients in the past?
- Have there been any threats against defense counsel related to cases for international crimes?
- Have there been threats or acts of violence against anyone who has spoken publicly on behalf of putative suspects?
- Is the conflict over?

- If not, have ex-combatants been disarmed, demobilized, and reintegrated?
- **technical skills:**
- Do defense attorneys have a solid grasp of general legal skills?
 - Do they have excellent knowledge of the rights of suspects and accused, and do they show a willingness to vigorously defend their clients?
 - Do they have in-depth knowledge of the country’s criminal procedure code?
 - Do defense attorneys and investigators have the language skills to interact with witnesses? If not, are trained interpreters available to assist?
 - Do defense attorneys have good advocacy skills for direct, cross, and re-direct examinations of witnesses and raising potential objections during trial?
 - Are defense attorneys familiar with the possibilities and limits of forensic evidence, and how such evidence can best be used?
 - Do defense attorneys know how to use expert witnesses to support their cases?
 - Do defense attorneys know how to introduce documentary evidence in support of their cases?
 - Do defense attorneys possess the legal and drafting skills to compose quality motions, briefs, and other legal documents at trial?
 - Do defense attorneys possess the legal skills to handle appeals?
 - Are defense attorneys well trained in defense ethics?
 - Do defense attorneys have a firm understanding of applicable international criminal law, and the skills required to defend international criminal cases?
 - Do senior defense attorneys have the personnel and case management skills to manage a complex case?
 - Do defense attorneys have in-depth knowledge of the structure of an international criminal case, including the crime base, the chapeau, and linkages?
 - Do defense attorneys have in-depth knowledge of the applicable elements required to prove war crimes, crimes against humanity, and genocide, and to prove that the crimes are linked to the accused?
 - In systems allowing for the use of case law from other jurisdictions, are defense attorneys familiar with relevant case law, including from international and other domestic jurisdictions?
 - Do defense attorneys and investigators have the special skills to question vulnerable witnesses, including children (or those who were children at the time of the alleged crimes) victims of torture, and victims of sexual and gender-based violence?
 - In adversarial systems, do defense attorneys and investigators working for them have the skills to run an investigation for international crimes?

- Do defense teams have the skills to conduct basic research on the conflict?
- Do investigators have the skills to take quality witness statements?
- Are defense investigators trained in accessing witnesses who are vulnerable and/or mobile?
- Do defense teams have the strategic skills to properly prioritize investigative leads?
- Do defense counsel have the skills to use any required information technology?

► **available resources:**

- Commensurate with the anticipated caseload, is there a sufficient pool of defense attorneys willing to defend suspects and accused persons of any faction?
- Is there a legal aid scheme in place to ensure payment for quality representation of suspects and accused persons? Is it adequately funded, and does it have fee scales to account for case complexity?
- Are there adequate funds available for defense investigations?
- Do defense teams have access to expert assistance in such areas as forensics, document analysis, and archiving, if needed?
- Is there a mechanism in place for continuing legal education?
- Do defense attorneys and investigators have the capacity to travel as needed? Do defense teams have administrative and logistical support for necessary international travel, including visa facilitation?
- Do defense counsel and investigators have adequate basic office equipment (including desks, chairs, telephones, copy machines)?
- Where necessary, is information technology available?

Plan

► **addressing political obstacles and anti-defense bias:**

- Where bias against the defense is a problem, consider:
 - engaging with government officials and parliamentarians on the importance of defense rights.
 - supporting civil society organizations, including bar associations, that advocate for defense rights.
 - making assistance conditional on institutional reform and reform implementation, and ensuring that consistent messages to this effect are sent by all relevant donor ministries and agencies;
 - in egregious circumstances and jurisdiction permitting, considering referral to the ICC.

► **provision of resources and skills:**

- Identify where gaps in technical capacity and resourcing exist, and how severe they are.
- Determine which gaps present the greatest obstacles, and thus which measures should have the highest priority.
- Where the national bar association is not sufficiently strong and credible enough to immediately take on the task of credentialing, training, supporting, and ensuring accountability for counsel in international criminal cases, consider:
 - working with the state to create a separate licensing authority for international criminal cases that could feature temporary international participation;
 - investing in the bar association’s capacity so that credentialing and training counsel can be integrated into its responsibilities.
- Identify whether existing rule-of-law programming, by any donor, already addresses similar gaps. If so, explore whether this could be modified to directly address the needs of the international crimes investigation.
- Determine which needs are best met in classroom-type trainings, and which skills can be integrated into subsequent mentorship models. Ensure that mentors and those being mentored have a common understanding of theory, and of expected outcomes.
- Determine how the success of trainings and mentorship can best be measured.
- Identify which donors are best suited to address which needs.
- Identify technical assistance and training providers.
- Ensure that donors coordinate their assistance on an ongoing basis in order to fill all priority gaps and avoid duplication.
- Use outreach to populations that are most sympathetic to alleged perpetrator groups, including ex-combatants, to explain the rights of suspects and the accused, and how these are safeguarded. The importance of defense rights should also be highlighted in outreach to victim communities.¹¹⁶

Resources

Avocats sans Frontières (Lawyers without Borders, www.asf.be): Provides training in international criminal law to defense attorneys and organizes defense of indigent persons charged with international crimes before national courts.

Commonwealth Secretariat (www.thecommonwealth.org): Developing an online training module on transnational crimes, including crimes under the Rome Statute, for member states.

Institute for International Criminal Investigations (www.iici.info): Offers trainings in investigations of international crimes, including for defense counsel.

International Bar Association (www.ibanet.org): Conducts assessments of legal systems, including defense issues, advises on establishment of frameworks for legal aid mechanisms and pro bono representation, and offers trainings in international humanitarian law.

International Center for Transitional Justice (www.ictj.org): Provides training to defense counsel in international criminal law.

International Crime in Africa Programme at the Institute for Security Studies (<http://www.issafrica.org/pgcontent.php?UID=18893>): Provides introductory and in-depth training for African defense lawyers on international criminal law, the latest developments in international justice from an African perspective and as it affects Africa, the Rome Statute system, and the implementation of domestic ICC legislation (where relevant).

International Criminal Defense Attorneys Association: (www.aiad-icdaa.org): Provides trainings on international criminal law for defense counsel.

Kenyan Section of the International Commission of Jurists (ICJ Kenya) (<http://www.icj-kenya.org>): Conducts training for defense lawyers in the East African region on international criminal law and the Rome Statute.

Public International Law and Policy Group (www.publicinternationallaw.org): Organizes assessments and advises on international criminal defense structures and policies.

Various other organizations, including regional or local organizations, may have expertise. Where possible, donors should seek to involve well regarded local organizations.

Further Reading

Jolyon Ford, *Bringing fairness to international justice: A handbook on the International Criminal Court for defence lawyers in Africa*, Institute for Security Studies, Pretoria, 2009, available at: <http://www.issafrica.org/pgcontent.php?UID=30446>.

UN Office on Drugs and Crime, *Criminal Justice Assessment Toolkit*, “Legal Defence and Legal Aid,” available at: http://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/4_Legal_Defence_and_Legal_%20Aid.pdf.

Witness Protection and Support

Why

- ▶ Upholding trial quality by creating a climate for witnesses to testify truthfully and without fear of potential repercussions.
- ▶ Engendering trust in the proceedings among the public and among other potential witnesses.

What

- ▶ Preventing physical and psychological harm to witnesses as a result of their participation.
- ▶ Compensating witnesses for the reasonable costs of their participation.
- ▶ Attending to witnesses' health needs during the legal process.

Who

- ▶ Witness protection officers.
- ▶ Police.
- ▶ Providers of physical and mental health services.
- ▶ Administrators.

When

- ▶ From the beginning of the criminal investigation.
- ▶ Before, during, and after witness testimony.

Witness protection entails conducting risk assessments for each witness, protecting their privacy where required, ensuring that there are secure locations in which investigators and lawyers can interview them, minimizing the exposure of the witness to risk, promptly receiving and responding to security threats, relocating witnesses as needed within the country or in some cases internationally, ensuring they receive basic medical and psychosocial support as needed, compensating witnesses for lost income due to their participation in judicial proceedings, and frequently housing and supporting them during the time when they give their evidence. Needs assessments may indicate that courtroom procedures should be adjusted to protect the identity of the witness from the public (although not from the accused person, who has a right to know it). Some hearings may be held in closed session (“in camera”), measures may be taken to screen witnesses from public view or distort their voices, or witnesses may not be present at all, instead offering their testimony by video-link. Protection and support are provided during the investigations process as well as the period prior to, during, and after the witness gives testimony.

Witness protection and support should be tailored to the general situation and individual witness needs. A principle of proportionality should be observed, whereby the measures employed are commensurate to each witness’s levels of risk and need. Witness protection measures can be provided for in a number of different ways, including through criminal codes, criminal procedure codes, government policy statements and decrees, and rules of the court, or through various types of legislation. Legislation may pertain generally to victims’ rights, to particular types of victimization, including sexual and gender-based violence and child abuse, or be found in other areas of law, such as laws on refugee protection. Protection programs, by contrast, are more institutionalized. According to the Council of Europe, witness protection programs are “regulated by legislation aimed at the protection of witnesses and victims in cases of serious intimidation which cannot be addressed by other protection measures, and where the testimonies of such witnesses are of special significance for criminal proceedings.”¹¹⁷ Witness protection programs usually include options for relocation, including internationally. Not every country has, or necessarily needs, a witness protection program.

Linkages to existing rule-of-law priorities. International standards call for the protection of victim witnesses,¹¹⁸ as well as certain categories of witnesses, including children,¹¹⁹ and the international development community has increasingly supported witness protection measures and programs around the world. The technical skills required to conduct witness protection for international criminal cases overlap with those used in other types of high-profile cases based purely on domestic law. Rather than developing this capacity specifically for trials dealing with international crimes, in many circumstances donors may be able to urge the combining of efforts with other domestic courts tackling

sensitive cases, for example cases related to organized crime and corruption. Support provided for proceedings related to international crimes can then subsidize overall witness protection and support capacity. Provision of psychosocial support, by contrast, is less common in standard criminal proceedings, although it may exist on a small scale, for example in cases of domestic abuse.

How Proceedings for International Crimes Are Different

Planning ahead. Planning for witness protection and support should begin prior to the launch of investigations. Individuals can potentially come into danger the moment they are contacted by investigators. Protocols must be in place to provide guidance to investigators (whether they work for investigating judges, prosecutors, or defense counsel), police, and protection officers, and provide a menu of options for various circumstances. Likewise, there should be clear and transparent protocols for witness support that set out how issues of compensation and medical treatment will be handled. Without such transparent protocols, excessive witness support could amount to inducements to testify in a certain manner, or could be mischaracterized as inducements.

Threat assessment. Because each situation is different and protection and support issues will not be the same everywhere, an assessment of general threat levels should be conducted at the outset. These can vary greatly according to the severity and nature of the conflict, how old the criminal allegations are, and the extent to which suspected perpetrators maintain ties to parties involved in the conflict. Threat levels also depend on how cohesive and potent those parties are, and how resonant their causes remain among ethnic, religious, or other identity groups.

In a given situation, threat levels are likely to vary by type of witness, including whether the witness is testifying for the prosecution or defense, or is a victim witness, insider witness, or expert witness. Witnesses living as minorities within majority communities may face added danger, as could witnesses who are incarcerated in proximity to suspects or their associates. The initial assessment should seek to identify vulnerable groups that are likely to provide sources of witnesses, whose access to justice may require particular types of protection or support. For example, where the conflict involved many child combatants, investigators should be primed with knowledge and tools for the protection and support of children or those who were children at the time of the events. Other types of expertise and preparation may be in particular demand where there were many victims of torture, where atrocities left many potential witnesses disabled, or where there are indications that victims of sexual and gender-based violence will feature prominently in the trials.

Protective measures to be applied, as well as support needs, must eventually be determined through individual witness assessments. These should be conducted with a thorough understanding of the social system that exists in the witness's own environment. Social factors can determine whether approaches to witness problems prove successful. For example, for witnesses and victims in small communities, repeated absences for extended periods can draw attention. Protection specialists must work with the victims and witnesses to establish explanations for absences that will be plausible within the community. A greater variety of protective measures may be needed for witnesses, depending on the range of potential security situations they face. For those facing severe threats, international relocation may be necessary, but donors and protection officials should not always assume it is the best solution.

The larger numbers of potential witnesses associated with many (but not all) proceedings for international crimes mean that the system may need to be prepared to handle a greater number of individuals. But having a large pool of potential witnesses can also have advantages, in that any one witness is less likely to bear the complete burden of relating information of interest. Similarly, if one witness is too endangered or traumatized to testify, it may be easier to find witnesses who are in a better position to do so.

High stakes. In a complex international criminal proceeding involving many witnesses and victims, it should be expected that those returning to their communities after meeting investigators or giving testimony may relay information about how they were treated throughout the process, and how they continue to be treated. This can have a major impact on decisions by other potential witnesses about whether to participate in proceedings. Where the quality of witness protection and support is poor, and especially where security is compromised, not only can there be deadly consequences for the witnesses concerned, but the overall judicial undertaking can face chronic and expensive delays or even be fatally undermined by a lack of evidence. This underscores the general importance of getting witness protection right in all of its phases: during the investigation, and before, during, and after testimony is provided.

Building trust. Gaining witnesses' trust is a major hurdle when the state and its security forces are suspected of having committed atrocities and witnesses needing protection and support come from communities opposed to or skeptical of the government. Clearing these hurdles requires government agreement on reforms to an extent that the most affected communities can develop trust in protection and support measures. To gain this level of trust and confidentiality, the security and protection mechanisms utilized in proceedings will have to be operationally independent from the government, have sufficient vetting in place to screen out suspected perpetrators and their supporters,

and reflect the society's diversity among its directors, staff, and oversight body. Even where significant reforms in this direction are agreed to, as in Kenya following the post-election violence, new measures or programs will require time to demonstrate their trustworthiness to affected communities.¹²⁰ Where reforms have been insufficient or protection officials and bodies have not yet gained the trust of affected communities, effective witness protection and support may temporarily require the deep involvement of international officials and/or local and international civil society organizations.

Logistical challenges. Development officials should be aware of the logistical challenges facing witnesses and protection officials in many locations, including a lack of infrastructure. For example, transport and communication problems can arise if witnesses are not able to afford telephones or live in areas without phone reception or accessible roads.

Overlapping jurisdiction. Where more than one court has jurisdiction over international crimes in a given location, coordinating witness protection and support can become more complicated. This has happened in the Balkans, where the ICTY and domestic courts dealing with international crimes have experienced overlap among their witnesses. Questions arise over who should coordinate witness contacts, and how witness statements given to one court can be used in the other. Such issues can be especially difficult when the protective measures offered to the witness differ between the two courts. These issues are likely to arise again, particularly where the ICC is active in parallel with national proceedings. Finding solutions to such problems requires close consultation between the two systems' witness protection officials, between the two overlapping prosecution authorities, and potentially between defense counsel in one jurisdiction and protection officials in the other.

Flexible planning. In the context of proceedings involving international crimes, it can be much more difficult to accurately project at the outset how long protection and support measures will be required after a witness has testified. As in other criminal proceedings, protection needs can vary with the personal circumstances of the individual witnesses. But developments in the conflict or post-conflict setting can significantly influence these needs. Progress in peace and reconciliation can generally be expected to reduce the duration of protection and support needs, while rising tensions can generally be expected to prolong them. Donors should allow for flexible planning, based on periodic systemic and individual risk assessments.

Psychosocial and medical needs. Victims of international crimes who are potential witnesses often have been victimized by multiple crimes, and are often eyewitnesses to others. They also frequently have been affected in numerous other ways by the context

of violence, including through family separation, loss of their home or shelter, loss of access to such basic needs as medical treatment, and the daily fear associated with hostilities and a general environment of insecurity. It is no surprise, then, that traumatization is often more prevalent among these victims than it is for those of most ordinary crime. This is especially true for child victims (including those who were perpetrators and those who are no longer children but were at the time of the atrocities), victims of torture, and victims of sexual and gender-based violence. This means that not only must protective measures generally be more robust, but so too must provision of support services, including psychosocial support for victim witnesses. Health support may also be necessary for persons with injuries as a result of international crimes, particularly victims of rape and sexual assault who need access to antiretroviral drugs and other forms of treatment as a result of physical injuries sustained.

Examples of Donor Support

The type and extent of international assistance related to witness and victim issues in proceedings involving international crimes has varied. In **East Timor**, and more recently in **Kenya**, UNODC provided expert advice for the creation of new witness protection agencies. The ICC has a trust fund for witness relocation. Partnering with UNODC, the court is helping to build local capacity, which has spill-over benefits not only for protection needs related to domestic trials for international crimes, but also those for other forms of serious crime.

In some situations, the international community has taken on a more expansive role. In **Bosnia and Herzegovina**, for example, the new Bosnian witness protection agency (an independent unit of the state police) was placed under the supervision of the Registry in the War Crimes Chamber. It appointed a foreign protection specialist to temporarily lead the otherwise all-Bosnian agency, which worked in coordination with the EU military mission. The witness support office within the Bosnian War Crimes Chamber also established a Court Support Network to facilitate cooperation among NGOs in supporting witnesses who testified before the chamber.

At the Special Court for **Sierra Leone**, international staff have provided leadership of the Witness and Victims Section and engaged in long-term mentoring of Sierra Leonean national staff through the court's hybrid staffing model. Furthermore, in 2009 it organized a month-long training for 36 Sierra Leonean police officers in order to increase domestic capacity. This will be important for the ongoing protection of some of the court's witnesses following the court's closure, and provides core expertise for the formation of a new witness protection agency in the country.¹²¹

Successful Psychosocial Support

South Africa pioneered the provision of psychosocial support for victims and witnesses of international crimes not for criminal proceedings, but for its Truth and Reconciliation Commission (TRC). Where courts and TRCs exist together, there may be scope for shared efforts in providing such services, and South Africa has a wealth of expertise.

Where psychosocial facilities have been established, the justice mechanism should tap these existing resources. This was possible in the Balkans, where the ICTY relied on a network of local service providers to support its vulnerable witnesses. When ICTY cases were transferred back to domestic war crimes divisions in **Bosnia and Herzegovina, Serbia, and Croatia**, these courts were able to continue to use the same network. Even where existing infrastructure is weak, donors have found success with the approach. In the **DRC**, a wide-ranging effort to provide support for survivors of sexual and gender-based violence has been successful, even as poor security and rampant impunity have meant that such crimes continue on a vast scale. Various UN agencies have been involved and donors have provided extensive support for hospitals, clinics, and local NGO service providers.

Guidelines for Supporting Witness and Victim Protection and Support

Assess

- ▶ **the independence and potential bias of protection officials:**
 - Are there allegations that state officials or allies committed international crimes during the conflict? Do such allegations involve the police or other officials involved in directing and implementing witness protection?
 - Are the police or other witness protection authorities trusted by witnesses and their communities, and would prosecution and defense witnesses alike trust the authorities to provide proper protection?
 - Where witness protection measures or a program already exist, do these have a good record of protecting witnesses? How do witnesses themselves feel about their experience with protective measures?
 - Is there diversity in the makeup of protection staff? Are individuals from the identity groups most involved in the conflict included in directing and implementing witness protection?

- If there is a full witness protection program in place, is it operationally independent? Do political actors have access to sensitive witness information?
- Do civil society organizations, including victims' organizations, have trust in protective measures or programs, or the officials who are foreseen to direct and implement newly created measures or agencies? Has the government conducted meaningful consultations with these organizations about possible concerns?

► **the existing framework:**

- Is there specific legislation on witness protection and support? Is there a witness protection agency or program established by law?
- Are there other laws that touch on issues of witness protection and support, including the criminal code and criminal procedure code?
- Are there government decrees or policy statements, court orders, or court precedents that provide guidance on issues of witness protection and support?
- Are there standard operating procedures in place with regard to the contact and interview of witnesses in the investigation phase?
- Are there transparent protocols for witness handling, including reimbursement to prosecution and defense witnesses for such items as lost income, travel expenses, communication expenses, and reasonable healthcare expenses?
- Are there procedures in place for conducting general and individual threat assessments, including periodic re-assessments? If so, do the guidelines call for the initial assessment to identify groups of potential witnesses who may have vulnerabilities of which investigators and the court should be aware?
- Are there adequate options in place for the potential relocation of witnesses and their families within the country, and where necessary, internationally?
- Are agreements in place for the international relocation of witnesses and their families, if this becomes necessary?
- Do witness protection measures cover the period during the investigation, as well as before, during and after the trial?

► **likely scale of need:**

- How extensive are the allegations of international crimes in terms of number of victims, and the time period and geography involved?
- Do the alleged crimes appear to be complex in nature (with a broad crime base, or need to prove command responsibility, for example) or relatively simple (such as trials for the direct perpetrators of individual war crimes)?

- What is the mandate of the prosecution mechanism, and are there any legal constraints (such as amnesties or the non-retrospective application of newly adopted international crimes laws) that may restrict the number of cases likely to be brought to court?
- ▶ **knowledge and technical skills:**
 - Are protection and support officials familiar with all relevant laws, regulations, and policies?
 - Do protection and support officials know how to conduct general and individual threat assessments?
 - Do protection and support officials have the skills on staff to conduct psychosocial evaluations of witnesses, provide psychosocial support to vulnerable witnesses during their testimony, advise the court of special needs, and otherwise provide care or refer them for treatment?
 - Do they have the managerial capacity to coordinate security, transportation, housing, communications, medical support, and payments, often on short notice?
 - Do they know how to manage accounts, meticulously record payments and give disclosure to the parties or the judges as required?
 - Do they know how to facilitate contacts with the witness while minimizing risk?
 - Do they know how to orient witnesses to the judicial process and the courtroom itself before they testify?
 - Do they know how to implement witness protection procedures in the courtroom, and familiarize judges, prosecutors, defense counsel, and court management officials with these procedures?
 - Do they know how to train court staff on the respectful treatment of witnesses and participating victims?
 - Do they have the skills to facilitate witnesses' reintegration into their communities following their testimony?
 - Do they have the linguistic skills to interact with all witnesses, regardless of ethnicity? If not, are trustworthy interpreters available?
 - Do they know how to manage both defense and prosecution witnesses in the same case without compromising the parties and the witnesses?
 - Do protection and support officers have the skills to use information technology?

► **available resources:**

- Are there enough protection and support officers?
- Are there adequate safe locations for interviewing witnesses, and is there temporary housing available if the safe locations are far from witnesses' homes?
- Is there adequate support staff at safe houses, and are there enough drivers and discreet, unmarked vehicles to transport witnesses? Have these staff been vetted?
- Are courtrooms equipped to screen the witness from public view, distort the witness's voice, and allow for testimony by video link?
- Are there means to ensure that witnesses can remain in contact with protection officers and officials for either the prosecution or defense, where necessary, through the provision of mobile phones, SIM cards and phone credit?
- Under some circumstances, some witnesses may require lifetime support. Are resources available for this eventuality?
- Do protection and support officers have the capacity to travel within the jurisdiction (including vehicles and fuel)?
- Do protection and support officers have adequate basic office equipment (including desks, chairs, telephones, copy machines)?
- Is information technology available?

► **overlapping jurisdictions:**

- Is an international court, including the ICC, active in the country? Are there any indications that it could become active in the country?
- Does the ICC or another international court have witnesses under protection in relation to the same investigation?
- If so, has there been any communication between relevant officials in the national and international jurisdiction about the coordination of witness protection issues?
- Has the international court expressed any concerns about national witness protection will or capacity?

► **efficiencies:**

- Are there other transitional justice or criminal justice mechanisms in existence or development that also have witness protection and support needs? Would it be possible to share resources or develop some capabilities jointly without

putting witnesses or victims at added risk or undermining the integrity of the judicial process?

- Is there an existing local network of psychosocial and healthcare providers that could be used by the court to assist witnesses and participating victims in need?
- Do efforts to extend psychosocial and medical services to witnesses intersect with existing or planned development assistance programs related to healthcare services?

Plan

▶ **confronting bias, perceived bias, and a lack of independence:**

- Urge a requirement that all officials who come into contact with protected witnesses sign confidentiality agreements.
- Where real or perceived bias or a lack of independence are problems, consider:
 - Urging government consultations on witness protection issues with affected populations;
 - Urging the diversification of protection and support officers among various identity groups;
 - Supporting a rigorous vetting of protection and support officers to exclude suspected perpetrators and their sympathizers, or those suspected of pursuing a political or criminal agenda;
 - Urging amendments to the legal framework on witness protection and support to ensure the agency's operational independence and de-politicization at all levels, including in its oversight body;
 - Where trust is a major hurdle, consider the temporary insertion of international staff to participate in, or even lead, the protection and support agency.
 - Where trust is a major hurdle, consider temporary reliance on trusted international and national NGOs to offer ad hoc support and protection measures.

▶ **establishment of an adequate witness protection and support framework:**

- Determine whether the scale of the allegations and corresponding trials as well as the severity of threats witnesses are likely to encounter justify the establishment of a full witness protection program. If so, encourage legislation to establish one.
- Determine which weaknesses in existing witness protection measures present the greatest obstacles to witness security, quality trials, and public trust in these. Offer to support the government in addressing the priority list.

► **avoidance of problems where jurisdictions overlap:**

- Encourage close communication and coordination among national and international court officials when there is likely to be overlap between pools of witnesses for both.

► **provision of resources and skills:**

- Identify where gaps in technical capacity and resourcing exist, and how severe they are.
- Determine which gaps present the greatest obstacles, and thus which measures should have the highest priority.
- Identify whether existing rule-of-law programming, by any donor, already addresses similar gaps. If so, explore whether this could be modified to directly address witness protection and support needs.
- Determine which needs are best met in classroom-type trainings, and which skills can be integrated into the workflow of witness protection and support through subsequent mentorship models. Ensure that mentors and those being mentored have a common understanding of theory, and of expected outcomes.
- Determine how the success of trainings and mentorship can best be measured.
- Identify which donors are best suited to address which needs.
- Identify technical assistance and training providers.
- Ensure that donors coordinate their assistance on an ongoing basis in order to fill all priority gaps and avoid duplication.

Resources

Center for Victims of Torture (www.cvt.org): Provides services for victims of torture from around the world, and capacity building assistance for torture treatment centers in twenty countries.

Commonwealth Secretariat (www.thecommonwealth.org) Trains judges, prosecutors, and defense counsel on how to interact with vulnerable witnesses; general witness and victim protection trainings are under development for member states.

International Crime in Africa Programme at the Institute for Security Studies (<http://www.issafrica.org/pgcontent.php?UID=18893>): Provides introductory and in-depth training for African criminal justice officials on witness protection within the con-

text of complex crimes including the core international crimes. The training focuses on the particular challenges facing African countries and regions, and includes witness protection requirements in the Rome Statute and domestic ICC legislation (where relevant).

International Rehabilitation Council for Torture Victims (www.irct.org): Provides expertise and small grants to rehabilitation centers for torture victims.

Public International Law and Policy Group (www.publicinternationallaw.org): Organizes assessments and provides advice on witness protection and support in proceedings involving international crimes.

Redress (www.redress.org): Works at the policy level to assess protection and support needs.

UNICEF (www.unicef.org): Has a wealth of expertise and experience in providing psychosocial support services, especially for children, in support of truth and reconciliation commissions.

UNODC (www.unodc.org): Advises on the establishment of witness protection programs and has a model law on witness protection in Latin America.

Various other organizations, including regional or local organizations, may have expertise. Where possible, donors should seek to involve well regarded local organizations.

Further Reading

Stjepan Gluščić, et al., *Procedural protective measures for witnesses—Training manual for law-enforcement agencies and the judiciary*, Council of Europe, 2006, available (for purchase) at: http://book.coe.int/EN/ficheouvrage.php?PAGEID=36&lang=EN&produit_aliasid=2130.

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United Nations Office on Drugs and Crime, *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime*, January 2008, available at: <http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Febo8.pdf>.

Victim Participation

Why

- ▶ Allowing victims to tell their stories and contribute to the justice process.
- ▶ Recognizing victims' suffering.
- ▶ Recognizing claimants for potential judicially ordered reparations.

What

- ▶ Legal participation in the proceedings even for those victims not called as witnesses.

Who

- ▶ Victims of the alleged international crimes.

The Rome Statute provides for victim participation in ICC trials, as do the statutes for the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the Special Tribunal for Lebanon (STL). Colombia also allows for victim participation, including for trials of international crimes under that country's Justice and Peace Law. In all of these cases, victims may participate even if they are not called as witnesses. Although a recent development in proceedings involving international crimes, the practice has roots in civil law systems, including those of France, Germany, Spain, and several countries in Latin America. The concept will therefore be familiar to some donors. Lessons may also

be drawn from victim participation in civil cases for reparations, whether in regional human rights courts, foreign tort cases, or in domestic civil litigation.

How Proceedings for International Crimes Are Different

Numbers of victims. Victim participation is an evolving concept in the practice of international criminal law, and in the near future may only be relevant in a limited number of jurisdictions. From the first experiences at the ICC and the ECCC it has become clear that one major challenge is ensuring that a large number of victims can be represented without the proceedings becoming unwieldy. And if victims are grouped together to share representation, the question arises as to how groups should be delineated, for example by geographic region or the category of crime being charged. Another important challenge is effective participation, especially when groups are large and representation is shared.

Communication. Even in domestic settings where there is no mechanism for the participation of victims in the proceedings unless they are called as witnesses by the two parties, as is the rule in common-law systems, there are still ways to make the proceedings friendlier for vulnerable victim witnesses. These include being honest with victims about the risks they may face by testifying, and the possible impact of their testimony; maintaining regular communication with victims who will be testifying; educating victims about the legal process, including the role of the defense in cross-examination; training court staff on the respectful treatment of victim witnesses; and familiarizing victims and witnesses with the courtroom and court procedures in advance of their appearances.¹²² Full disclosure of the trial process, including potential disclosure of identity to the defense and the potential for acquittals, should also be communicated to manage expectations and to ensure that an informed decision is made on whether to assist in proceedings, where such a choice is possible.

Examples of Donor Support

Although experience with victim participation in proceedings involving international crimes is limited, there have been some successes. In **Cambodia**, the ECCC had to approach victim participation in a pragmatic way due to lack of resources.¹²³ Half of the victims' representatives have been Cambodian, and some feel that there has been a significant transfer of skills from international attorneys, particularly to the younger of their Cambodian colleagues. In **Colombia**, many victims have faced frustration over the modalities of participation, some have received threats, and there have even been some

killings. Nevertheless, victim participation in legal proceedings has been skyrocketing, which in part can be attributed to effective outreach.¹²⁴

Guidelines for Supporting Victim Participation

Assess

▶ available resources:

- Is there a legal aid scheme that could be used to facilitate victim representation? Is it adequately funded, and does it have fee scales to account for case complexity?
- Where victim participation in the proceedings is a possibility, are there enough skilled attorneys available to represent victims?
- Are there public information and outreach initiatives in place that can specifically inform victims about options for their participation?
- Are there state or non-governmental institutions in place that could prepare a mapping of victim communities, including physical location and the types of crimes committed, in order to tailor victim-focused public information and outreach?
- Is psycho-social counseling available to participating victims?
- Do victim representatives have the capacity to travel within the jurisdiction (including vehicles and fuel)?
- Do prosecutors have capable administrative support staff?
- Do victim representatives have adequate basic office equipment (including desks, chairs, telephones, copy machines)?
- Is information technology available (including computers, printers, and internet access)?

▶ technical skills:

- Do attorneys for civil parties have a solid grasp of general legal skills?
 - Do they have excellent knowledge of the rights of victims?
 - Do they have in-depth knowledge of the country's criminal procedure code?
 - Do victim representatives have the language skills to interact with witnesses? If not, are trained interpreters available to assist?
 - Do victim representatives have the advocacy skills necessary for examining witnesses and raising potential objections during trial?

- Are victim representatives familiar with the possibilities and limits of forensic evidence, and how such evidence can best be used?
- Do victim representatives possess the legal and drafting skills to compose quality motions, briefs, and other legal documents at trial?
- Do victim representatives have a firm understanding of international criminal law and the skills required for complex cases?
 - Do victim representatives have the personnel and case management skills to manage a complex case?
 - Do victim representatives have in-depth knowledge of the structure of an international criminal case, including the crime base, the chapeau, and linkages?
 - Do victim representatives have in-depth knowledge of the elements required to prove war crimes, crimes against humanity, and genocide, and to prove that the crimes are linked to the accused?
 - In systems where it is possible to apply case law from other jurisdictions, are victim representatives familiar with relevant case law, including from international and other domestic jurisdictions?
 - Do victim representatives have the special skills to question vulnerable witnesses, including children (or those who were children at the time of the alleged crimes), torture victims, and victims of sexual and gender-based violence?
- Do victim representatives have the skills to use basic information technology?

Plan

► provision of resources and skills:

- Identify where gaps in technical capacity and resourcing exist, and how severe they are.
- Determine which gaps present the greatest obstacles, and thus which measures should have the highest priority.
- Identify whether existing rule-of-law programming, by any donor, already addresses similar gaps. If so, explore whether this could be modified to directly address the needs of the international crimes investigation.
- Determine which needs are best met in classroom-type trainings, and which skills can be integrated into the investigative workflow through subsequent mentorship models. Ensure that mentors and those being mentored have a common understanding of theory, and of expected outcomes.
- How can the success of trainings and mentorship be measured?
- Determine which donors are best suited to address which needs.

- Identify technical assistance and training providers.
- Ensure that donors coordinate their assistance on an ongoing basis in order to fill all priority gaps and avoid duplication.

Resources

Avocats sans Frontières (Lawyers without Borders, www.asf.be): Provides legal assistance and representation for victims at the ICC.

International Federation for Human Rights (www.fidh.org): Facilitates victim participation and representation at the ICC, the ECCC, and in domestic proceedings for international crimes.

Public International Law and Policy Group (www.publicinternationallaw.org): Organizes assessments and provides advice on victim participation in proceedings involving international crimes.

Redress (www.redress.org): Works at the policy level to promote victim representation in proceedings involving international crimes.

Various other organizations, including regional or local organizations, may have expertise and/or particular credibility with victim communities. Where possible, donors should seek to involve well regarded local organizations.

Further Reading

International Criminal Court, *A Guide for the Participation of Victims in the Proceedings of the Court*, available at: <http://www.icc-cpi.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSBookletEnglish.pdf>.

International Federation for Human Rights, *Victims' Rights Before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs*, April 23, 2007, (also available in Spanish and French), available at: <http://www.fidh.org/Victims-Rights-Before-the-International-Criminal>.

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Reparations

Why

- ▶ Acknowledging victims' suffering.
- ▶ Compensating victims' losses.

What

- ▶ Judicially ordered payments, benefits, or symbolic recompense for individual victims of convicted perpetrators.
- ▶ Separate transitional justice institutions that provide reparations not linked to specific trials (not considered here).

Who

- ▶ Victims of the crimes.
- ▶ Victims' legal representatives.
- ▶ Judges.

The basic concept of reparation for harm done is an old one. In the realm of criminal justice, national systems may make allowances for reparations to varying degrees and in different forms. In working to strengthen a state's ability to collect fines and seize assets in compliance with judicial orders, rule-of-law donors are likely to have familiarity with limited technical aspects important to the administration of reparations. However,

reparation is one area where international criminal justice poses many challenges that are likely to be new to most traditional rule-of-law donors.

Reparations can be provided in two basic ways, both of which intersect with proceedings to redress international crimes, including war crimes. Comprehensive reparation programs can be established as separate transitional justice institutions that run in parallel to the process of criminal accountability. With adequate support, these are capable of reaching the large numbers of victim beneficiaries with symbolic and material forms of reparation and do not have to rely on the outcome of criminal trials. Reparations emerging from criminal proceedings, considered here, provide reparations on a narrower basis to beneficiaries whose victimization by a specific perpetrator or perpetrators has been affirmed through the trial process.

How Proceedings for International Crimes Are Different

Reparation as a right. International human rights law, international humanitarian law, and international criminal law have increasingly recognized the rights to remedy and reparation through various treaties and tenets of customary international law.¹²⁵ In February 2005, the UN independent expert on combatting impunity confirmed that victims of gross human rights violations have the right to truth, the right to justice, and the right to reparation/guarantees of non-repetition.¹²⁶ In December 2005, the UN General Assembly adopted *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.¹²⁷ Among other provisions, this codified state obligations to provide for reparations. States are required to make available different forms of reparation, including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.

Challenges. Judicially-ordered reparations for international crimes face a number of challenges. The nature of international crimes means that, with some exceptions, trials will relate the suffering of large—even massive— numbers of people. The judicial system must have a framework in place to determine who qualifies as a victim for purposes of court-ordered reparation. In some instances, judges may find that collective reparation is the most appropriate and feasible method of providing benefits to a group of victims. Whether on an individual or collective basis, awarding reparations also requires administrative challenges in locating beneficiaries, consulting with them on the form of reparation, and disbursing payments or other benefits. Identifying resources to pay for material reparation poses other challenges. Convicted perpetrators may be destitute or have hidden assets that are difficult to trace, and the state may have limited resources

for the financing of restitution, compensation, or rehabilitation measures. This has been a problem in the DRC, where military tribunals have made reparations orders that are often unrealistically high given the lack of resources, with the result being greater victim disillusionment. Judges must be realistic, while at the same time greater effort is needed to identify resources that make reparations payments possible.

Reconciliation. The link between criminal justice and reparations can be especially useful in fostering reconciliation and healing and re-establishing civic trust in a torn society. Victims may be dissatisfied with criminal justice if their suffering is not alleviated through other symbolic or material forms of reparation. Likewise, victims may be dissatisfied with compensation in the absence of recognition of the perpetrators' guilt, opportunities to tell of their experiences, and exploration into the facts behind often complicated events.

Outreach. Reparations issues should be integrated into outreach programs from the start. This can help in managing the expectations of victims and affected communities. An added benefit could be the exposure of judges to affected communities, which may help the jurists in recognizing opportunities for symbolic reparation.

Examples of Donor Support

There has been little experience with judicially-ordered reparations in proceedings involving international crimes. The Rome Statute offered a new model by including provisions for judicially-ordered reparations through the ICC and a significant parallel reparations effort to operate in countries of ICC jurisdiction. The Trust Fund for Victims, established by the Rome Statute to independently administer both types of reparation, has launched multiple projects in the **DRC** and **Uganda** that directly benefit some 42,300 victims and indirectly around 182,000 of their family members.¹²⁸ In June 2011, the Trust Fund announced the launch of programs in the **Central African Republic** too. But because there have not yet been convictions at the ICC to date, the Trust Fund has not yet exercised its procedures for the administration of judicially-ordered reparations.

At the Extraordinary Chambers in the Courts of **Cambodia** (ECCC), despite progressive inclusion of victim participation in the proceedings, there were limited provisions for "collective and moral" reparations included in the court's rules of procedure and evidence as applied to the first trial. In their September 2010 plenary, the judges gave the trial chamber more flexibility in ordering reparations for the benefit of civil parties to the proceedings. In the second case and any to follow, reparations are to be administered by the ECCC's Victim Support Section, with the possibility of coordination

with the government or NGOs. The chamber will have the authority to order such symbolic reparations as educational programs and memorials, and there are new options available for soliciting funds for the projects.¹²⁹

Even in the absence of experience with judicially-ordered reparations for international crimes at the national level, there has been support for various relevant programs at the state level. For example, in **Peru** the International Center for Transitional Justice and the national NGO Asociación pro Derechos Humanos have developed a program to monitor the administration of collective reparations. In **South Africa**, the Khulumani Support Group of apartheid survivors and their families has been effective in organizing and mobilizing victims to engage the government on reparation issues. And in **Morocco** the National Human Rights Council has compiled material on its work involving community reparations.

Guidelines for Supporting Judicially Ordered Reparations

Assess

► the legal framework:

- Are there clear definitions and procedures in law for judges to determine who qualifies as a potential beneficiary of reparations?
 - Does the legal framework allow for civil parties to participate in legal proceedings?
 - Do judges have other clear legal guidance on how to determine who qualifies as a victim of international crimes?
 - Do the family members of victims qualify as victims under the law?
 - Does the law allow judges or reparations administrators to consult on reparation decisions with experts, international organizations, and civil society organizations, including victims' organizations?
- Which agency is currently responsible for administering judicially-ordered fines and forfeitures? Do victims generally have faith in the ability of the government in general, and this agency in particular, to handle the task in relation to proceedings involving international crimes?
- Is there an institution already charged with administering a broader reparations program that operates parallel to the criminal proceedings that could take on the task of judicially-ordered reparations?
- Are there legal guidelines for determining the size and nature of awards, how awards to more than one individual are to be apportioned, and under what circumstances reparations should take the form of collective awards?

- Are there legal provisions in place to ensure the accountability of reparations administrators and the transparency of the process?
 - Are there legal guidelines in place that indicate how reparations payments or other benefits are to be technically disbursed?
- ▶ **knowledge and technical skills:**
- Are judges familiar with the goals of reparations and international best practices in weighing reparation issues?
 - Do reparations administrators have the skills to collect judicially-ordered fines and dispose of seized assets in a transparent manner? Do they have the skills to cooperate with partners in tracing the assets of convicted perpetrators?
 - Do reparations administrators have the skills to identify beneficiaries of reparations payments in accordance with judicial orders where these may be necessarily vague about who qualifies as a victim?
 - Do reparations administrators have the skills to design collective award proposals in consultation with victims, experts, and civil society organizations?
 - Do reparations administrators have the skill to interact with potential beneficiaries who are protected witnesses without endangering them?
 - Are reparations administrators skilled in dealing with traumatized victims?
 - Are reparations administrators skilled in dealing with victims of sexual violence?
 - Do reparations administrators have the skills to organize the disbursement of reparations payments and other benefits, and account to the judiciary for all transactions?
 - Do reparations administrators have the skills to use information technology?
- ▶ **available resources:**
- Are there enough administrators and support staff to implement judicially ordered reparations?
 - Do reparations administrators have adequate basic office equipment (including desks, chairs, telephones, copy machines)?
 - Is information technology available?
- ▶ **potential sources of funding for reparations:**
- Does the state have the potential to fund a reparations program?
 - Do suspected perpetrators have financial resources?

- Could judicially-ordered reparations be paid from donor funds through a state-administered trust fund?

Plan

- ▶ **support for the establishment or improvement of a reparations framework:**
 - Support amendments to current law where judicially-ordered reparations are not currently allowable.
 - Urge the government to consult with victims and victim organizations to determine which body should be tasked with administering judicially-ordered reparations.
 - Urge the state to create procedures to ensure that judicially-ordered reparations are carried out in a transparent manner, and that all funds are accounted for.
 - Support efforts to ensure that victims are aware of their eligibility for judicially-ordered reparations, for example by including information on reparations in outreach programs.
 - Facilitate international cooperation agreements with the state to make tracing the assets of convicted perpetrators easier.
- ▶ **provision of resources and skills:**
 - Identify where gaps in technical capacity and resourcing exist, and how severe they are.
 - Determine which gaps present the greatest obstacles, and thus which measures should have the highest priority.
 - Identify whether existing rule-of-law programming, by any donor, already addresses similar gaps. If so, explore whether this could be modified to directly address reparation needs.
 - Determine which needs are best met in classroom-type trainings, and which skills can be integrated into the workflow of reparations administration through subsequent mentorship models. Ensure that mentors and those being mentored have a common understanding of theory, and of expected outcomes.
 - Determine how the success of trainings and mentorship can best be measured.
 - Identify which donors are best suited to address which needs.
 - Identify technical assistance and training providers.
 - Ensure that donors coordinate their assistance on an ongoing basis in order to fill all priority gaps and avoid duplication.

Resources

International Center for Transitional Justice (www.ictj.org): Conducts extensive study of reparations programs and offers advice on their design and implementation.

International Federation for Human Rights (www.fidh.org): Offers support to victims seeking representation.

Public International Law & Policy Group (www.publicinternationallaw.org): Organizes assessments and offers advice on reparations policy.

Redress (www.redress.org): Offers advice on reparations policy.

Trust Fund for Victims (www.trustfundforvictims.org): Administers reparation programs in ICC situation countries, including those judicially ordered in ICC proceedings.

Various other organizations, including regional or local organizations, may have expertise. Where possible, donors should seek to involve well regarded local organizations.

Further Reading

Pablo de Greiff (ed.), *The Handbook of Reparations*, Oxford University Press, 2008.

Lisa Magarrell, *Reparations in Theory and Practice*, International Center for Transitional Justice, October 2007, available at: <http://www.ictj.org/static/Reparations/0710.Reparations.pdf>.

Office of the United Nations High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Reparations Programmes*, 2008, available at: [http://www.unrol.org/files/ReparationsProgrammes\[1\].pdf](http://www.unrol.org/files/ReparationsProgrammes[1].pdf).

Redress, *Implementing Victims' Rights: A Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation*, March 2006, available at: <http://www.redress.org/downloads/publications/Reparation%20Principles.pdf>.

Court Management

Why

- ▶ Ensuring fair and efficient trials.

What

- ▶ Filing and storing of records and evidence.
- ▶ Courtroom interpretation and translation of documents.
- ▶ Courtroom services and logistics.
- ▶ Courtroom security.

Who

- ▶ Court clerks.
- ▶ Court reporters.
- ▶ Interpreters and translators.
- ▶ Security personnel and witness liaisons.

Traditional rule-of-law donors are familiar with supporting judicial systems through the strengthening of court management systems. As in other proceedings, court management in support of proceedings involving international crimes entails providing a broad array of services in support of the judicial process. Court management must liaise with all officials whose activities intersect in the courtroom: to provide the judges with all

relevant documents and papers for court hearings; receive, file, distribute, and archive motions, responses, and other legal filings among the parties and the bench (in a secure manner including all confidential documents before the court and documents that may disclose the identity of witnesses); ensure accurate and organized recording and transcription of court proceedings, including simultaneous translation where necessary; coordinate the scheduling of cases and ensure efficient use of the courtroom; coordinate the appearance of witnesses and develop contingency plans for the non-appearance or unforeseen early departure of witnesses; provide translation and interpretation services; and ensure public access to the trial to the extent that security allows.

How Proceedings for International Crimes Are Different

Although there is nothing fundamentally different about court management training or systems related to proceedings involving international crimes, some challenges in this context are more pronounced.

Ethics. As with other types of sensitive cases, where court management staff have biases regarding the underlying conflict, there may be heightened concern about leaks of confidential information from closed court sessions, confidential filings from the parties, and confidential information on the judges' deliberations. These could potentially place protected witnesses in danger, undermine the case of one of the parties, and discredit the proceedings.

Language. At a more technical level, provision of language services may be more challenging where the conflict involved speakers of multiple languages, languages that are not widely spoken, unwritten languages, or languages that lack legal terminology. International fair trial standards require the free provision of an interpreter for any suspect or accused who does not understand the language used in court.¹³⁰ Witnesses or participating victims may also require interpretation. It may be necessary to train interpreters from various language groups in legal terms when such expertise is not otherwise available.

Recordkeeping. Donors should also be aware of the much higher stakes of proper court management for proceedings involving international crimes. A small criminal trial may make do with minimal handwritten notes, for example. But a complex trial examining whether various elements of the crime have been proven, involving numerous witnesses, and taking place over a matter of months can end in disaster if the same practice is followed. Without proper recording of the trial and organization of those records, the

judges, the parties, and the public lose common references about the facts in the case. Judgments may lose their credibility and appeals become impossible. For complex cases, there may also be a need for increased flexibility in deadlines for filings by the parties.

Services and logistics. Similarly, with a higher number of witnesses, including vulnerable witnesses, than in standard criminal proceedings, international criminal trials also render more important the coordination between the court, prosecution authorities, and prison authorities. Efficient proceedings require that the appearance of witnesses, some of whom may be protected and traveling from various locations, is timed to coincide with the appearance of the accused in court. The challenge can be greater in a place like East Timor, where the special war crimes division was centralized rather than in local courts.¹³¹ Again, this need is nothing particularly new for the rule-of-law community, but donors should be aware that beyond creating inefficiencies in the proceedings, shortcomings in this area can significantly damage the credibility of proceedings. If victims and witnesses are brought to court more than necessary, it can damage the ability of the prosecution or defense to secure their further cooperation and that of their communities. Superfluous travel to court could also psychologically or physically endanger vulnerable victims and witnesses.

Security and public access. Proceedings related to international crimes are likely to be more sensitive and controversial than those for most other types of crime, which may raise heightened security concerns in the courtroom. (This should not be assumed in every case, however, and threat levels should be determined through general and specific threat assessments.) At the same time, such proceedings are often conducted within systems that have very limited resources. International standards require that trials be public, but also allow for exclusion of the public from part or all of the trial, including in the interests of public order, national security, or when the court deems it necessary for the interests of justice.¹³² Where resources are particularly scarce, security may require curtailing public access. Where such a trade-off is made, however, the interests of transparency can be somewhat compensated through particular efforts to encourage journalists to attend and cover the proceedings.

Examples of Donor Support

In many states being assisted, limited resources could create pressure to find efficiencies in court management. This has been the case in the War Crimes Chamber of **Bosnia and Herzegovina's** State Court, where there are not enough resources to provide full written transcripts of the proceedings. The Court Management Trial Support Team

makes audio and video recordings of all of the proceedings, which are the sole official records. Court officers take detailed minutes of the trials, which serve as a navigation tool for the recordings. Judges may request transcription of specific parts of the trial, but these requests are prioritized and fulfilled within the limits of existing means.¹³³ The ECCC in **Cambodia** has had success with very similar procedures.

Mobile courts in the **DRC** offer an example of no-frills court management in a setting with very limited resources. Basic courtroom security and witness protection are provided without high technology, and records of the proceedings are either kept by hand or on laptop computers. By bringing the hearings to the affected communities, the logistics of moving witnesses, civil parties, and accused is vastly simplified. The latter efficiency in particular should be taken into account when assessing the feasibility of mobile court models, as they offset some of the other costs and logistical challenges associated with them.

In countries where the ICC is active, the court may be able to share some language resources with local court authorities. For example, in **Uganda**, the ICC codified the unwritten Acholi language, including legal terms, and has offered to share this resource with Uganda's International Crimes Division.¹³⁴

In many locations, such as **Bosnia and Herzegovina**, court management can be conducted with an all-domestic staff. However, capacity levels in other locations may require extensive trainings and/or temporary international participation. The Special Court for **Sierra Leone** offers a successful model of long-term mentoring in court management. Hybrid staffing in the Court Management section is leaving behind a group of Sierra Leoneans who are skilled in every aspect of the field.

Guidelines for Supporting Court Management

Assess

► potential bias and corruption:

- Are court management staff members overwhelmingly from an identity group associated with one or more of the factions in the conflict, or are they a diverse group?
- Have leaks of confidential information from the judiciary been a problem in the past?
- Do civil society organizations, including victims' organizations, have concerns about bias among court management staff? Are public perception surveys on the propriety of court officials available?
- Are there transparent and fair procedures for the recruitment of court staff?

- Do court staff receive pay and benefits commensurate to the local cost of living and positions of similar skill in other sectors?
 - Is there an ethics code for court staff encompassing issues of fidelity to duty, confidentiality, conflict of interest, and performance of duties?¹³⁵
 - Are court staff trained on ethics issues?
 - Are court staff required to file financial disclosure forms? If so, are these ever audited?
 - Are there transparent and fair written disciplinary procedures for instances of misconduct?
- ▶ **management:**
- Do senior court managers have the personal, communications and organizational skills to effectively coordinate the smooth operation of the courtroom with judges, prosecution authorities, the defense, victim representatives (where present), witness protection and support officials, detention officers, public information and outreach officials, and court security guards, as well as with their own technical staff (including court recorders, interpreters, and information technology experts)?
 - Is there an operational manual for court management staff that explains relevant laws, court rules, and other policies in easy-to-understand terms?
- ▶ **recordkeeping:**
- Are systems in place for the receipt, distribution, and filing of legal documents, and the careful documentation of all transactions? Are they automated? If not, would automation be feasible in the given context?¹³⁶
 - Do staff have the skills to make the system work? Are there court procedures or practice directions in place for the filing of documents by the parties?
 - Do staff have the skills required to accurately record the legal proceedings in writing and/or audio and video, then log, distribute, and file them?
 - Are there clear laws, rules, or policies on which court records are to be open to public review? Are these guidelines followed in practice?
 - Are there occasional audits of court records to spot-check their integrity?
- ▶ **language services:**
- Are there interpreters for all languages spoken by anticipated witnesses, and are these interpreters familiar with the legal process and legal terminology?

- Is the ICC or another international legal body active in the country? If so, have they developed guides for interpreters and translators working in local languages? Have they trained speakers of local languages in legal terminology and courtroom work? If so, can the domestic mechanism tap into these resources?
- ▶ **court services and logistics:**
 - Do court managers have the skill to track courtroom usage statistics, search for efficiencies, make sound recommendations on the scheduling of cases, and tactfully suggest other gains in efficiency to the judges?
 - If there is to be a library to support the proceedings, is there a trained librarian, and are there sufficient relevant books and other reference materials?
- ▶ **general skills and resources:**
 - Do case management officials have adequate basic office equipment (including desks, chairs, telephones, copy machines)?
 - Is information technology available and do case management staff have the skills to use it?

Plan

- ▶ **tackling bias and corruption:**
 - As needed, consider urging:
 - diversification in the makeup of court management staff;
 - a transparent process for the recruitment of court management staff;
 - a rigorous vetting process for applicants;
 - adoption of UNODC’s Principles of Conduct for Court Personnel or a similar written code of ethics;
 - a requirement for staff to sign confidentiality agreements;
 - a requirement for staff to disclose financial assets;
 - a random independent audit process for financial disclosure forms;
 - staff training in ethics;
 - adequate pay and benefits for court management staff;
 - adoption of an oversight mechanism with fair and transparent disciplinary procedures.
- ▶ **providing resources and skills:**
 - Identify where gaps in technical capacity and resourcing exist, and how severe they are.
 - Determine which gaps present the greatest obstacles, and thus which measures should have the highest priority.

- Identify whether existing rule-of-law programming, by any donor, already addresses similar gaps. If so, explore whether this could be modified to directly address court management needs.
- Determine which needs are best met in classroom-type trainings, and which skills can be integrated into the court management workflow through subsequent mentorship models. Ensure that mentors and those being mentored have a common understanding of theory, and of expected outcomes.
- Determine how the success of trainings and mentorship can best be measured.
- Identify which donors are best suited to address which needs.
- Identify technical assistance and training providers.
- Ensure that donors coordinate their assistance on an ongoing basis in order to fill all priority gaps and avoid duplication.

Resources

International Center for Transitional Justice (www.ictj.org): Organizes assessments and offers advice on case management issues in the context of proceedings involving international crimes.

National Center for State Courts—International (www.ncscinternational.org): Provides court management expertise and training within various types of judicial systems around the world.

Public International Law and Policy Group (www.publicinternationallaw.org): Organizes assessments and offers advice on case management issues in the context of proceedings involving international crimes.

Various other organizations, including regional or local organizations, may have expertise. Where possible, donors should seek to involve well regarded local organizations.

Further Reading

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Robin Vincent, *An Administrative Practices Manual for Internationally Assisted Criminal Justice Institutions*, International Center for Transitional Justice, 2007, pp. 32–44 (section on court management), available at: <http://www.ictj.org/images/content/9/3/931.pdf>.

Archival Management

Why

- ▶ Leaving a legacy for those seeking the truth about events in question.
- ▶ Providing information for appeals or review proceedings.
- ▶ Providing information for related investigations and prosecutions.
- ▶ Building a body of case law (in common law systems).

What

- ▶ Organizing the records of criminal investigations, prosecutions, and trials.
- ▶ Providing access to these records.
- ▶ Safeguarding sensitive information.

Who

- ▶ Archivists.
- ▶ Court administrators.
- ▶ Civil society.

Any functioning criminal justice system needs a way of organizing the records of criminal investigations, prosecutions, and trials.¹³⁷ These records may be needed later for related investigations and prosecutions, judicial appeals, or review proceedings, or in common law jurisdictions, as contributions to a body of case law that could be cited

as precedent. Court records may be kept in prosecution and court offices, in a district or central judicial archive, or in a national archive that includes legislative and judicial records. At stand-alone tribunals, archiving is a function of court management. At the national level, the extent to which archiving is considered an element of court management varies by system.

Donors already active in supporting countries in the development of archiving will be familiar with most of the archival needs of investigators, prosecutors, and courts working on international crimes cases. As in other settings, archivists will need to decide what to keep and what to discard, document what records are being kept, and then arrange and describe the records. For the latter step, international standards have been developed. A common challenge facing many jurisdictions, in any type of proceeding, is determining admissibility standards for the documents. Efforts to digitize court records, for example, can run up against outdated legislation that only allows admission of original paper documents.

While many of the required skills and challenges are the same or similar for all types of criminal justice proceedings, trials for international crimes create some special challenges of which donors should be aware.

How Proceedings for International Crimes Are Different

Volume and complexity of records. The sheer scale of investigations, prosecutions, and trials is often (although not always) much greater for international crimes than for standard criminal cases. For officials involved directly in the cases and those who may have to rely on the records later, it is therefore of much greater importance to have a proper system in place for the archiving and retrieval of these voluminous records. The earlier a system is put in place, the better. Archival shortcomings will be magnified in these more complex cases, as they would be in other types of complex cases.

Access. The greatest difference between archives of international crimes proceedings compared to standard criminal justice archives involves questions of access. Any archive must have a records classification system and rules regarding who can access which documents and when. But there are particular sensitivities surrounding the archives of international crimes investigations, prosecutions, and proceedings. Many witnesses likely will have participated under some form of protection, perhaps testifying using a pseudonym or in court sessions entirely closed to the public. Records that directly or indirectly reveal their identities could put them in danger. At the international tribunals, states and international organizations have provided intelligence and other information on a privileged basis, and public access could divulge sources and risk future

cooperation. This type of cooperation with domestic jurisdictions would also raise such sensitivities.

Yet even as these concerns militate for more restrictive access, other factors create greater demands for the accessibility of archives related to international crimes than is usually the case in regular domestic criminal proceedings. International crimes cases are more likely to have multiple accused persons on trial for related events. This means that a greater number of prosecutors and defense counsel are likely to want access to the records from previous investigations, prosecutions, and trials. In ICC situation countries, it is quite possible that the ICC prosecutor and counsel for the defense and victims will seek information from domestic archives for use in related trials in The Hague. Similarly, other international organizations may seek information from such documents in implementing mandates to carry out human rights investigations or fact-finding inquiries. And critically, such documentation could be seen as vital to the success of other transitional justice mechanisms, including reparations schemes, vetting mechanisms, and truth and reconciliation commissions. Members of the general public may seek access to the archives of war crimes trials to find out the truth about what happened to their family members, friends, and communities. The principles against impunity elaborated by the UN Commission on Human Rights, updated in 2005, included a people's "right to truth" and victims' "right to know."¹³⁸ Even when focusing on access issues in the country where archival capacity is being built, donors should be aware of the possibility that intense interest in the details of crimes related to conflicts can also extend to other countries that were involved in the conflict.¹³⁹ International donors supporting domestic archival capacity would be well advised to take these sensitivities and competing interests into account during the program design phase. The location of archives, for example, can have a significant effect on access to them.

Legacy and outreach. The records of proceedings related to international crimes can build an important legacy for affected societies. This is especially the case where societies have found it difficult to agree on a common historical narrative about the causes and conduct of conflict, where elements of society have shown a reluctance to recognize that their identity group's chauvinism (i.e. of an ethnic, tribal, religious, or ideological nature) fuelled atrocities, or where some leaders remain reluctant to have their exploitation of such chauvinism—and their share of responsibility for the results—laid bare. If international criminal justice is to have positive transformative benefits for peace and justice, as discussed in the introduction to this handbook, then it is not enough for the records of its proceedings to be made passively available to the public. The archive should be organized in ways that make the dense information contained within them presentable and understandable to the public. They should include public viewing areas, and can form the basis for exhibitions, documentaries, and public presentations.

Outreach activities should continue beyond the end of proceedings in order to reach affected populations with information from the archives on the conduct and outcomes of the trials.

Examples of Donor Support

As governments and donors examine issues of archival access, they may wish to look at the experience of hybrid and ad hoc tribunals, including the Special Court for **Sierra Leone**, the International Criminal Tribunal for the **former Yugoslavia**, and the International Criminal Tribunal for **Rwanda**. As all of these institutions approach the end of their mandates, they have faced these very same questions. But with proper awareness of issues specific to proceedings involving international crimes, there is no reason that archivists without a specialized background in international criminal justice cannot lead efforts to build national capacity in this area.

Over many years the Documentation Center of **Cambodia** (DC-Cam) compiled extensive records on international crimes that have been critical to investigations and prosecutions at the Extraordinary Chambers in the Courts of Cambodia (ECCC). Although it does not house an official archive of ECCC trials, DC-Cam provides a very good example of how dense, complex records can be presented in understandable ways to the public, including through innovative outreach programs.¹⁴⁰

Guidelines for Supporting Archive Management

Assess

- ▶ **the existing legal framework:**
 - Is there a clear existing legal framework for judicial archives?
 - Must legal documents be kept in hard copy for possible later use in judicial proceedings, or are electronic copies admissible?
 - Is it clear when judicial institutions are to transfer documents to archives, and who controls access to the documents from that time?
 - Are there laws on access to judicial archives?
- ▶ **technical skills:**
 - Do archivists have the skills to decide which types of documents to keep and which to discard?

- Do archivists have the skills to arrange and describe the records?
 - Do archivists have the skills to manage access to records?
 - Do archivists have the skills to make dense information presentable to the public, or to coordinate with outreach specialists in order to do so?
 - Do archivists have the skills to use basic and specialized information technology?
- ▶ **available resources:**¹⁴¹
- Do archivists have capable administrative support staff?
 - Do archivists have adequate basic office equipment (including desks, chairs, telephones, copy machines, scanners, and long-term preservation acid free boxes)?
 - Is adequate, climate-controlled space available to store the archive? Is the electricity supply to this space reliable?
 - Is information technology available, including software to catalogue the collection of records, as well as systems to back-up digital files?
- ▶ **likely demands for access:**
- Does a large caseload mean that many prosecutors and defense counsel are likely to seek access to the archive for information that could be useful in new cases?
 - Is the country an ICC situation country, meaning that information from the archive could be sought for use by the parties and participants in trials in The Hague?
 - Are other international organizations likely to seek information from the archive?
 - Are there other transitional justice mechanisms in the state, such as a truth commission, vetting process, reparations scheme, or memorial effort that may want access to information in the archive?
 - Has there been a high demand among victims and their relatives for information on the conflict and associated crimes?
 - Did the conflict involve other states, and are those states and their citizens likely to want access to information in the archive?

Plan

- ▶ **assistance for the development or improvement of policies on archive access:**
 - Work with the government, justice sector officials, and civil society to determine how the needs for future investigations and prosecutions, protection of fair trial rights, the interests of other transitional justice mechanisms, and public access can best be accommodated:
 - Determine what type of public access can be offered, and what location would best facilitate public access.
 - Determine how the identities and security of protected and vulnerable witnesses can best be assured.
 - Determine how long documents should remain under the purview of investigative, prosecution, and judicial authorities, and at what point archivists take control of the documentation.
 - Determine whether there should be a distinction in how access to certain types of documents is regulated.
 - Urge the government to amend existing national laws and policies as needed.
- ▶ **provision of resources and skills:**
 - Identify where gaps in technical capacity and resourcing exist, and how severe they are.
 - Determine which gaps present the greatest obstacles, and thus which measures should have the highest priority.
 - Identify whether existing rule-of-law programming, by any donor, already addresses similar gaps. If so, explore whether this could be modified to directly address archiving needs.
 - Determine which needs are best met in classroom-type trainings, and which skills can be integrated into the archiving workflow through subsequent mentorship models. Ensure that mentors and those being mentored have a common understanding of theory, and of expected outcomes.
 - Determine how the success of trainings and mentorship can best be measured.
 - Identify which donors are best suited to address which needs.
 - Identify technical assistance and training providers.
 - Ensure that donors coordinate their assistance on an ongoing basis in order to fill all priority gaps and avoid duplication.

Resources

International Council on Archives (www.ica.org): An international association of archivists with a wealth of information on standards and best practices in archiving.

Swiss Federal Department of Foreign Affairs (www.eda.admin.ch): Has extensive experience in sending experts to support the establishment and improvement of domestic archives in developing countries.

Various other organizations, including regional or local organizations, may have expertise. Where possible, donors should seek to involve well regarded local organizations.

Further Reading

Trudy Huskamp Peterson, *Archives against Amnesia*, *Politorbis*, Dealing with the Past (Nr. 50), issue 3/2010, available at: http://www.eda.admin.ch/etc/medialib/downloads/edazen/doc/publi/publi2.Par.0099.File.tmp/Politorbis%2050%20-%20Dealing%20with%20the%20Past_3%20.pdf

Trudy Huskamp Peterson, *Temporary Courts, Permanent Records*, Woodrow Wilson Center, June 2008, available at: http://www.wilsoncenter.org/topics/pubs/TCPR_Peterson_HAPPOPo2.pdf

Management of Prisons and Detention Facilities

Why

- ▶ Providing credibility to judicial enforcement.
- ▶ Keeping dangerous accused and convicted persons from committing crimes.
- ▶ Demonstrating to skeptical populations that the state can uphold the human rights of detainees and prisoners.

What

- ▶ Assuring that those accused of international crimes and detained prior to judgment do not escape.
- ▶ Assuring that those convicted of international crimes serve their judicially ordered sentences.
- ▶ Upholding international standards on the rights of detainees and convicts.

Who

- ▶ Justice sector policymakers.
- ▶ Detention center administrators and guards.
- ▶ Prison administrators and guards.

In terms of the skills required, there is nothing inherently different about managing detention and prison facilities in the context of proceedings involving international crimes. In post-conflict situations, problems with prisons and detention facilities as they relate to international crimes are generally the same as those plaguing all other criminal proceedings, namely the co-mingling of accused and convicted persons, indifferent and/or unskilled managers and guards, and inhumane conditions arising from overcrowding, inadequate food, and other provisions.¹⁴²

Linkages to existing rule-of-law priorities. Because in this area the needs related to proceedings for international crimes are so similar to those for other types of crime, any new resources arising from efforts to make international justice work domestically will have a large spill-over effect for general rule-of-law development.

How Proceedings for International Crimes Are Different

Bias and political influence. In settings where the conflict took place along deep societal divisions, donors should be aware that the potential for some problems is likely to be greater. In the wake of an ethnic conflict, for example, an accused or convicted individual could be placed in great danger if sent to a detention facility or prison that is managed overwhelmingly by members of a rival group. By the same token, individuals sent to facilities managed by members of their own group may enjoy undue favoritism or even be allowed to escape. Similarly, if prison authorities do not enjoy substantial autonomy, they may be prone to political influence to the detriment or advantage of detainees and convicts. These concerns place a premium on effective vetting, and in some cases lustration, for administrators and guards of detention facilities and prisons. Likewise, there should be a rigorous code of conduct for administrators and guards, with transparent procedures for complaints, and strict oversight and enforcement.

Potential segregation. Where detainees or prisoners held in the same institution come from rival factions, it could conceivably be necessary to ensure their segregation in order to avoid violence. However, it should be noted that experience from the ad hoc tribunals and ICC thus far has shown that accused persons from rival factions as a rule are able to co-exist peacefully in the same detention facility. A need for segregation should not be assumed.

High stakes. Donors should be aware that shortcomings in the management of detention facilities and prisons can undermine capacity building for international justice mechanisms across the board. In the DRC, the Dutch government supported systemic

capacity and infrastructure development in the province of Maniema, with the goal of bringing perpetrators of sexual and gender-based violence to justice. The program was effective, and by October 2010, 70 convicts were sent to a refurbished prison in Maniema. But prison management and resources had not been included in the plan, and all 70 convicts escaped.¹⁴³ Failure to ensure properly managed detention facilities and prisons can have devastating consequences for witness protection, witness cooperation with investigators, deterrence, and overall establishment of respect for the rule of law.

Examples of Donor Support

Both the Special Court for **Sierra Leone** and the War Crimes Chamber in the State Court for **Bosnia and Herzegovina** have had dedicated detention facilities that meet international standards.¹⁴⁴ Beyond dedicated infrastructure, both have been staffed by a mix of national and international staff, which has had a direct impact on local prison capacity. Further, as part of the SCSL legacy strategy, the court undertook special trainings for the Sierra Leone Prison Service, thereby contributing to an important general rule-of-law development goal for the country. However, the extent to which trainings and long-term mentoring can sustainably develop national capacity also depends on the state's willingness to institute simultaneous policy and management reforms.¹⁴⁵

Guidelines for Supporting Detention Facility and Prison Management

Assess

► **bias and political interference:**

- Do directors and staff in detention facilities and prisons come overwhelmingly from one identity group, or is there broad diversity?
- Have there been past problems of abuse or favoritism on the basis of race, ethnicity, religion, or other identity category?
- Have civil society organizations and defense counsel raised concerns about bias in the management or operation of detention facilities and prisons?
- Is there a vetting process in place for administrators and guards? If so, how has it worked?

- Is there a code of conduct in place for administrators and guards? What is included? Is it enforced in a transparent manner?
- ▶ **whether detention facilities and prisons meet international standards:**
- Are detainees and prisoners protected from torture or cruel, inhuman, or degrading treatment or punishment, and have guards been trained in these standards?¹⁴⁶
 - Are all detainees and prisoners “treated with humanity and with respect for the inherent dignity of the human person”?¹⁴⁷
 - Are accused persons kept separately from convicted persons, except under exceptional circumstances?¹⁴⁸ Are men and women separated? Are members of the military and civilians separated? Are child suspects and convicts kept separately from adults?
 - Are UN Standard Minimum Rules for the Treatment of Prisoners observed, including: provision of adequate space, sanitation facilities, ventilation and light, food and water, opportunity for exercise, medical care, the right to contact with the outside world, and the right to freely practice religion?¹⁴⁹
- ▶ **technical skills:**
- Are staff well trained in the rules of detention?
 - Are staff trained in communications, humanitarian restraint, conducting body searches with sensitivity, and conducting cell searches?
 - Do detention facility and prison staff have the skills to interact with legal and family visitors and afford the proper mix of observation and privacy?
 - Do detention facility and prison staff have the skills to transport detainees and convicts securely to and from the courtroom?
 - Do detention facility and prison staff have the skills to detect smuggling into or out of the facility?
 - Do detention facility and prison staff have the skills to recognize signs of mental illness and early warning signs of potential suicide?
 - Do detention facility and prison staff have the skills to properly deal with the complaints of detainees and prisoners?
- ▶ **available resources:**
- Is there a functional pretrial evaluation and supervision service in place that can reduce the need for pretrial detention of accused persons?

- Are there enough administrators and guards?
- Do administrators have adequate basic office equipment (including desks, chairs, telephones, copy machines)?
- Is basic information technology available (including computers, cameras, internet access, and printers)?
- Do guards have the capacity to transport detainees and convicts (including vehicles and fuel)?
- Are guards appropriately armed?

Plan

- ▶ **confronting problems of bias and political influence:**
 - Urge the development of strong, independent, and transparent oversight mechanisms for dealing with misconduct by staff.
 - Urge the establishment of a robust vetting regime for all administrators and staff.
 - Urge the diversification of directors and staff.
 - Urge that officials of the prison service consult affected communities.
 - Urge enhanced monitoring by international and national civil society organizations.
 - Where problems are acute, consider pressing for a lustration process to remove biased administrators and staff.
 - Where problems are acute, consider pressing for the temporary inclusion of international detention or prison authorities.
- ▶ **transparent rules of detention, including provisions on:**
 - Accommodation, medical care, discipline, restraint, use of force, disturbances, surveillance, segregation, isolation.
 - Detainee and prisoner rights, including a process for handling complaints, procedures for visitation (and consequences for abuses of visitation policies), detainee and prisoner communications, provisions for the free practice of religion, work programs, recreation, and personal possessions.
 - Removal and transport of detainees and prisoners.

► **provision of resources and skills:**

- Identify where gaps in technical capacity and resourcing exist, and how severe they are.
- Determine which gaps present the greatest obstacles, and thus which measures should have the highest priority.
- Identify whether existing rule-of-law programming, by any donor, already addresses similar gaps. If so, explore whether this could be modified to directly address the needs of detention facility and prison management.
- Determine which needs are best met in classroom-type trainings, and which skills can be integrated into the workflow of facility administration through subsequent mentorship models. Ensure that mentors and those being mentored have a common understanding of theory, and of expected outcomes.
- Determine how the success of trainings and mentorship can best be measured.
- Identify which donors are best suited to address which needs.
- Identify technical assistance and training providers.
- Ensure that donors coordinate their assistance on an ongoing basis in order to fill all priority gaps and avoid duplication.

Resources

International Committee of the Red Cross (www.icrc.org): Visits detainees, conducts assessments on the conditions of detention, and advises governments on how they can meet international standards in detention facilities and prisons.

United Nations Office on Drugs and Crime (www.unodc.org): Conducts assessments, provides technical assistance to member states on building and reforming their prison systems in line with the UN standards and norms in crime prevention and criminal justice, including prison management, pretrial detention, alternatives to imprisonment, and social reintegration.

Various other organizations, including regional or local organizations, may have expertise. Where possible, donors should seek to involve well regarded local organizations.

Further Reading

United Nations Office on Drugs and Crime, *Custodial and Non-Custodial Measures: The Prison System* (Criminal Justice Assessment Toolkit), 2006, available at: http://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/1_Prison_%20System.pdf.

Robin Vincent, *An Administrative Practices Manual for Internationally Assisted Criminal Justice Institutions*, International Center for Transitional Justice, 2007, pp. 65-73 (section on detention), available at: <http://www.ictj.org/images/content/9/3/931.pdf>.

National Policy Coordination

Why

- ▶ Ensuring the effective planning and implementation of proceedings for international crimes.
- ▶ Applying resources efficiently.

What

- ▶ Coordination within government.
- ▶ Coordination with all domestic stakeholders.
- ▶ Coordination with the international community.

Who

- ▶ Top government officials and parliamentarians.
- ▶ Key justice sector officials.
- ▶ Civil society.
- ▶ The international community.

Policy coordination is important to the success of any new rule-of-law initiative, including the domestic application of international criminal justice. Governments being assisted to develop this capacity need to effectively coordinate communication, prioritization, planning, budgeting, implementation, and evaluation of policies and programs

among their own agencies and with other domestic stakeholders. And policies and support need to be coordinated between domestic actors and the international community.¹⁵⁰

Linkages to existing rule-of-law priorities. Because issues of war crimes, crimes against humanity, and genocide have the potential to garner greater interest from policymakers and the media, in some situations they can shed attention on problems of national policy coordination that might otherwise fester in obscurity. Where pressure to conduct credible proceedings for international crimes creates pressure to improve justice sector policy coordination, this should have benefits for overall justice system development.

How Proceedings for International Crimes Are Different

Number of stakeholders. As a country attempts to deal with the aftermath of international crimes, a greater number of government agencies and other stakeholders may be involved than would be the case for common domestic crimes. Foreign ministries may be engaged in discussions with other countries and international organizations about how to deal with the aftermath of the crimes and best meet the needs of justice and peace. There may be a need to facilitate cooperation with the military in order to ensure access to suspects or witnesses, or to coordinate security needs for the justice mechanism in areas of ongoing conflict. Interested parties outside of the government who should be included in policy planning and coordination include victims, human rights organizations, bar associations, as well as representatives of other transitional justice mechanisms, including truth commissions, vetting processes, reparations schemes, memorials, and amnesty boards. The increased number of stakeholders can make coordination all the more difficult at the domestic level, and also between the domestic and international actors.

Examples of Donor Support

Uganda has a well-established sector-wide approach to policy planning and coordination, through a mechanism called the Justice, Law and Order Sector (JLOS). However, JLOS and an adjunct donor coordination mechanism called the Development Partners Group (DPG) found that they lacked expertise in transitional justice, including the foreseen domestic application of international criminal law before a special division of the Ugandan High Court. Donors have taken a broad approach to addressing this

shortcoming. The Danish government sponsored a study tour to international courts in The Hague, Sarajevo, and Freetown for officials involved in the pending proceedings involving international crimes, and also included JLOS officials among the participants. The United States is supporting the Public International Law and Policy Group (PILPG) to provide confidential expert advice on transitional justice to JLOS. And the DPG tasked PILPG and the International Center for Criminal Justice with organizing an assessment mission carried out by experts on various aspects of international criminal justice. The mission's report will serve to assist the DPG and JLOS in prioritizing core needs for the successful implementation of the domestic proceedings.¹⁵¹

Guidelines for Supporting Policy Coordination

Assess

► the framework for policy coordination:

- Is the government committed to coordination, and has an expectation of cooperation with the coordinating body been made clear to the leaders of all relevant agencies?
- Are all relevant ministries and agencies represented in the government's coordination group?
- Do the ministries have the capacity to prepare strategic plans setting out goals and financial implications for institution building within the state?
- Does the coordination group have a sensible structure, allowing it to effectively deal with the broad range of justice issues, for example by sorting technical issues from policy questions? Do policy and technical committees, subcommittees, and working groups have clear relationships to each other in the decision-making process?
- Is there a committee, subcommittee, or working group dedicated to transitional justice, and are the most relevant actors represented there?
- Is there a formal mechanism to consult regularly with transitional justice mechanisms, civil society organizations (including victims' organizations and bar associations), and the donor community on questions of transitional justice?
- Are there regular meetings between representatives of the state coordination mechanism and the donor coordination mechanism at both the policy and technical levels?

- Do representatives of the two coordination mechanisms have open lines of communication among themselves to allow for informal contacts between meetings?
 - Are lines of responsibility for policy coordination sufficiently clear that shortcomings by the state or international community cannot be blamed on the other, but can be clearly identified and addressed?
- ▶ **technical skills:**
- Is the coordination group effective in identifying capacity gaps and prioritizing these?
 - Does the coordination group have the capacity to develop an operational plan outlining steps that need to be taken, who is responsible for each, and what support is needed to achieve goals?
 - If there is a subcommittee or working group on transitional justice, do its members have expertise, or access to expertise on transitional justice?
 - Do officials responsible for the coordination have the organizational and personal skills to coordinate effectively with other stakeholders, including keeping members informed of important developments, collating sector-wide budget information, and running efficient meetings through realistic and timely agenda-setting, strong facilitation, and timely distribution of minutes?
 - Do officials responsible for policy coordination have the skills to use information technology?
- ▶ **available resources:**
- Does the justice ministry or similar body have enough staff to take on the coordinating function?
 - Do officials responsible for justice policy coordination have adequate basic office equipment (including desks, chairs, telephones, copy machines)?
 - Is information technology available?

Plan

- ▶ **supporting the improvement of the framework for coordination:**
- Identify the areas of greatest weakness and need in the existing framework.
 - Urge the government to address priority needs.
 - Explore options of supporting improvements in the policy coordination framework through material support or by providing expertise.

- ▶ **improving policy coordinators' knowledge of transitional justice, and access to expertise:**
 - Support transitional justice trainings for staff of the coordination mechanism.
 - Support the hiring of transitional justice experts to support the office, including temporary international experts if qualified local experts are unavailable.
 - Support expert external consultants or contractors to advise on matters of transitional justice.
- ▶ **provision of resources and skills:**
 - Identify where gaps in technical capacity and resourcing exist, and how severe they are.
 - Determine which gaps present the greatest obstacles, and thus which measures should have the highest priority.
 - Identify whether existing rule-of-law programming, by any donor, already addresses similar gaps. If so, explore whether this could be modified to directly address the need to improve national policy coordination.
 - Determine which needs are best met in classroom-type trainings, and which skills can be integrated into the workflow of justice sector officials through subsequent mentorship models. Ensure that mentors and those being mentored have a common understanding of theory, and of expected outcomes.
 - Determine how the success of trainings and mentorship can best be measured.
 - Identify which donors are best suited to address which needs.
 - Identify technical assistance and training providers.
 - Ensure that donors coordinate their assistance on an ongoing basis in order to fill all priority gaps and avoid duplication.

Resources

International Center for Transitional Justice (www.ictj.org): Organizes assessments and offers advice on policy coordination in the realm of transitional justice.

Public International Law and Policy Group (www.publicinternationallaw.org): Organizes assessments and offers advice on policy coordination in the realm of transitional justice.

Various other organizations, including regional or local organizations, may have expertise. Where possible, donors should seek to involve well regarded local organizations.

Further Reading

Amanda Sserumaga, “Sector Wide Approaches in the Administration of Justice and Promoting the Rule of Law: The Uganda Experience,” paper presented at the Seminar on the Rule of Law European Initiative for Democracy and Human Rights, July 2003, available at: <http://www.gsdrc.org/docs/open/SSAJ107.pdf>.

Support through Provision of International Personnel

Why

- ▶ Raising public confidence in the objectivity of the justice process.
- ▶ Filling gaps in expertise to make proceedings for international crimes work.

What

- ▶ Temporarily inserting international personnel to participate in, jointly administer, or run proceedings for international crimes.

Who

- ▶ Judges, investigators, prosecutors, defense counsel, victim representatives.
- ▶ Court administrators, protection officers, security personnel, archivists.
- ▶ Detention facility and prison administrators.
- ▶ Experts in international criminal law, policy administration and outreach.

The insertion of international personnel into a state's domestic institutions has been tried in many different contexts, and with varying degrees of intrusiveness. The spectrum runs from the isolated deployment of international personnel to help solve individual problems, through the wider temporary placement of key international personnel in ministries and agencies (Liberia), and on to robust international supervision (Kosovo

and Bosnia and Herzegovina) and the rare, mammoth undertaking of occupying, restructuring and taking responsibility for the administration of an entire state amid ongoing conflict (Iraq).

How Proceedings for International Crimes Are Different

Importance of preparation. Because proceedings involving international crimes can be highly sensitive, it will be all the more important for foreigners, including donors involved in the process, to have a good understanding of the sensitivities in advance. This will enable them to have a better contextual understanding of the alleged crimes, more quickly identify potential bias among colleagues, and better avoid inadvertently causing offense.

Importance of an open mind. In any scenario where foreign experts are inserted into a local justice system, there is a propensity for them to show bias for the way things are done in their own legal systems. This can come across as condescending and put local legal professionals on the defensive, which is not conducive to a constructive transfer of skills. International criminal law experts run this same risk, and can not only show bias for their home legal systems, but also for the way international law has been practiced at international tribunals or in other settings with which they are familiar. In both types of situations, there will be times when criticism of the local system is warranted and shortcomings cannot and should not be ignored. But donors should encourage international criminal law experts to be open to working with other acceptable legal approaches and express criticism respectfully. International experts should themselves receive training in the system within which they will be working.

Examples of Donor Support

The design of international staffing in support of domestic war crimes proceedings in **Bosnia and Herzegovina** may be significantly responsible for its success in achieving local buy-in. The presence of international officials provided political cover to local officials when they encountered resistance during the course of their duties. Initial planning for the assistance included timelines for the gradual phase-out of internationals. This may have helped to limit local resentment over the involvement of foreigners, while also making clear that indefinite reliance on their expertise was not an option. Donors also appreciated that the project had a limited lifespan. Another design advantage in Bosnia was the explicit incorporation of the mentoring function in the job descriptions of internationals.

In **Bosnia and Herzegovina, Cambodia, Sierra Leone** and elsewhere, levels of success can vary according to the age and experience of the local officials who are involved. Younger domestic officials are likely to be the primary beneficiaries of exposure to international experts as well as modern technology. More experienced officials are more likely to be set in their ways and proud of their work within the existing system. Language is another factor. In many places, it is the younger officials who are more likely to speak English, French, or another widely spoken language used by the international officials. Capacity building through mentorship is more effective when both parties are able to communicate directly rather than through an interpreter.

Guidelines for the Provision of International Personnel

Assess

- ▶ **the extent to which international personnel can and should be deployed:**
 - Is the government willing to accept international officials working within its justice system? If not, do the main objections reflect:
 - a desire to maintain political influence or control over sensitive judicial proceedings?
 - concern about national sovereignty and pride, and a desire for maximum domestic ownership of the process?
 - concern about disparity in payments and benefits between international and national officials?
 - concern about the qualifications of international personnel on offer?
 - concern about the sustainability of assistance?
 - other concerns?
 - Are there legal barriers to the involvement of international personnel in the justice system?
 - How extensive are the country's capacity gaps?
 - Can capacity gaps be addressed without using international personnel?
 - What is the scope of anticipated proceedings involving international crimes?
 - How credible is the domestic justice system in the eyes of affected populations, and especially within communities most affected by atrocities?
 - How polarized is the society?
 - On what scale and over what timeline are resources available?

- ▶ **potential sources of international personnel, including:**
 - secondments from states and international organizations;
 - experts from civil society or academia;
 - independent contractors;
 - or the possibility of establishing a full-blown recruitment process for longer-term, more comprehensive international participation.

Plan

- ▶ **countering reasonable government hesitation:**
 - Ensure there is a strategy for the phasing out of international personnel, preferably pegged to benchmarks of independence and capacity rather than time.
 - Explore the suitability of tapping established and accepted mechanisms for the use of foreign legal expertise, for example as widely practiced within the Commonwealth.
 - Ensure that to the extent possible, international legal experts on offer come from similar legal systems (i.e. civil law or common law), and that they receive training in the national law with which they will be working.
 - Explore the possibilities of using international personnel from the same region, rather than personnel from distant countries.
- ▶ **countering government reluctance to lose inappropriate political influence over proceedings:**
 - Make other aspects of international assistance contingent on the government's agreement to accept international personnel, or on the government's agreement to reforms that would obviate the need for international personnel.
 - Back an alternative ICC investigation into the alleged crimes, where the court has possible jurisdiction.
 - Where the ICC is not an option, pursue the creation of an independent hybrid tribunal that is beyond the reach of domestic political manipulation.
- ▶ **scaling the international involvement and its duration:**
 - to specific capacity needs.
 - to the anticipated scope of proceedings.
 - to levels needed to gain public trust.

► **conditions for productive mentorship and collaboration:**

- Make contracts for international judges, prosecutors, and other legal officials of sufficient duration (at least one year) to prevent problems of constant turnover and reorientation.
- Require orientation trainings for international experts, conducted by local staff or local civil society experts, covering such information as the country's geography, cultures, languages, an overview of the conflict, and an introduction into the country's legal system and practice.
- Pair international experts of only similar rank and experience to train and work alongside judges and other senior domestic officials.
- Involve the local staff whose capacity is to be developed in the recruitment process for international personnel.

Resources

International Center for Transitional Justice: (www.ictj.org): Organizes assessments and advises on the provision of international personnel in support of proceedings involving international crimes.

Justice Rapid Response (www.justicerapidresponse.org): Maintains a roster of international criminal justice professionals available to assist through deployments of up to three months.

Public International Law and Policy Group: (www.publicinternationalallaw.org): Organizes assessments and advises on the provision of international personnel in support of proceedings involving international crimes.

International Criminal Law Services (www.iclsfoundation.org): In the process of setting up a database of former personnel from international and mixed war crimes tribunals.

Various other organizations, including regional or local organizations, may have expertise. Where possible, donors should seek to involve well regarded local organizations.

Further Reading

Alejandro Chehtman and Ruth MacKenzie, *Capacity Development in International Criminal Justice: A Mapping Exercise of Existing Practice*, DOMAC/2, September 2009, available at: <http://www.domac.is/media/domac-skjol/DOMAC2-2009.pdf>.

Bogdan Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court*, (ICTJ Prosecutions Case Studies Series), 2008, available at: <http://www.ictj.org/images/content/1/0/1088.pdf>.

David Tolbert and Aleksandar Kontić, *Final Report of the International Criminal Law Services (ICLS) Experts on the Sustainable Transition of the Registry and International Donor Support to the Court of Bosnia and Herzegovina and the Prosecutor's Office of Bosnia and Herzegovina in 2009*, ICLS, December 15, 2008, available at: <http://www.iclsfoundation.org/wp-content/uploads/2009/05/icls-bih-finalreportwebsitecorrected.pdf>.

Robin Vincent, *An Administrative Practices Manual for Internationally Assisted Criminal Justice Institutions*, International Center for Transitional Justice, 2007, available at: http://ictj.org/sites/default/files/ICTJ-Global-Administrative-Practices-2007-English_0.pdf.

Models of International Support

The mechanism for international crimes proceedings can take various forms, reflecting varying degrees of international influence or control. If possible, it is generally preferable to work within the domestic system and its existing courts in order to maximize general capacity-building gains from the more specific international criminal justice initiative. To the extent political interference and identity-group bias—or perceptions of either—are problems, these weigh in favor of models with heavier international safeguards.

Proceedings within the regular national courts

- ▶ Conditions: the expected caseload is small; political will and technical capacity are good.
- ▶ Example: Argentina.

Special chambers within the national justice system—national control

- ▶ Conditions: the caseload may be too large for regular courts; political will should be good.
- ▶ Examples: Colombia, Rwanda, Uganda.

Special chambers within the national justice system—joint control

- ▶ Conditions: problems of political interference or bias require international involvement.
- ▶ Disadvantage: national government can still block a process that has implicit international approval.
- ▶ Example: Cambodia, East Timor.

Special chambers within the national justice system—international control

- ▶ Conditions: major problems of bias or perceived bias; technical capacity varies.
- ▶ Examples: Bosnia and Herzegovina (initially), Kosovo.

Hybrid court within the country, but outside the national justice system

- ▶ Conditions: major problems of bias or perceived bias; generally low technical capacity.
- ▶ Example: Sierra Leone.

Ad-hoc tribunal based outside the country

- ▶ Conditions: no political will; technical capacity varies.
- ▶ Disadvantages: remote from populations affected by the conflict; little or no capacity transfer; expensive to conduct outreach, investigations, witness protection, and to transport witnesses to court.
- ▶ Examples: ICTY, ICTR.

Journalism

Why

- ▶ Strengthening public understanding and acceptance of the legal process and its outcomes.

What

- ▶ Supporting journalists to develop the knowledge and skills to report accurately on proceedings for international crimes.
- ▶ Encouraging ethical reporting on the proceedings.

Who

- ▶ Journalists from radio, television, and newspapers, as well as bloggers.
- ▶ News media editors.

In relation to the justice sector, skilled journalists who convey facts about processes and proceedings can contribute to the public's understanding and embrace of the rule of law, while unskilled and unprofessional journalists can spread misinformation, contribute to polarization and sensationalism, and undermine public acceptance of legal processes and outcomes.

Linkages to existing rule-of-law priorities. The international development community already has extensive experience in building journalistic capacity in the realm of legal

reporting, and there are no major differences in doing so for the sub-topic of international criminal justice. Supporting journalistic capacity in relation to proceedings for international crimes can leave an important legacy for legal reporting—and journalism more generally—in the country.

How Proceedings for International Crimes Are Different

Specific background knowledge. Through trainings, workshops, mentorship schemes, joint programming, and other means, journalists will need to learn about international justice institutions and how they relate to each other and the basics of international criminal law. Depending on levels of skill, knowledge, and professionalism, these capacity-building exercises may also need to cover such basic concepts as the rights of suspects and the accused.

Political sensitivities and security. In countries where international criminal law is highly controversial, journalists covering the issues could be more prone to suffering political violence. Less drastically, journalists may find it difficult to publish articles on the topic if their editors are reluctant to court controversy, or are themselves loyal to authorities with an interest in squashing coverage of international justice.

Complexity and length of trials. Many (but not all) trials for international crimes will be more complex and of longer duration than trials for ordinary crimes. Maintaining journalists' interest through weeks and months of dense testimony and legal argument can be a major challenge. The donor community may be able to assist in meeting this challenge by supporting a spokesperson function within the justice mechanism, or alternately a media liaison program outside of it. The spokesperson or liaison can work with journalists in identifying interesting stories that are expected to emerge from the trials, facilitate media access to outreach events, facilitate access to court officials (within appropriate bounds), and provide basic background information and information on developments. Another way to ensure media coverage is to support media projects devoted to covering the proceedings, dedicated radio series on the trials, soap operas that touch on trial-related themes, or documentaries. Including editors in capacity-building projects can also increase the amount and quality of coverage the proceedings receive.

Examples of Donor Support

A number of international and national NGOs have provided trainings in international criminal law for journalists. These are easily organized and can be integrated into existing support programs for journalistic capacity building. There have also been more intensive training efforts. In 2007 and 2008, the BBC World Service Trust partnered with two NGOs, the International Center for Transitional Justice and Search for Common Ground, to arrange a series of extensive trainings on transitional justice for journalists in **Burundi**, the **DRC**, **Liberia**, **Sierra Leone** and **Uganda**. Topics included not just the basics of international criminal law institutions and concepts, but also an overview of court reporting principles and practical advice on what research to conduct in advance of a trial. The trainings resulted in a lengthy handbook that can serve as a training resource.

The international community has supported dedicated coverage of ICTY trials in the **Balkans** through backing for the Balkan Investigative Reporting Network (which had its roots in the Institute for War and Peace Reporting) and SENSE News Agency. The reports of these organizations have brought informed, intelligent reporting about the trials to publics in the region and made it more difficult for the tabloid press to distort what is happening in The Hague.

Guidelines for Supporting Journalism

Assess

- ▶ **media freedom and independence:**
 - How does the country rank on existing surveys of journalistic freedom?
 - Do suspected perpetrators, including within the government, have significant ownership, control, or influence over media outlets?
 - Does the state actively harass or otherwise place improper pressure on journalists and editors? Does the state offer improper inducements to journalists and editors?
- ▶ **other potential sources of journalistic bias:**
 - Is the media landscape polarized along the same lines as the factions in the conflict, or are media outlets diverse in their ethnic, religious, and other identity-group composition?

- Do journalists routinely display bias for their own identity group, and against perceived rival identity groups?
- ▶ **basic levels of journalistic skill and professionalism;**
- ▶ **journalists' and editors' familiarity with court processes and court reporting;**
- ▶ **target audiences:**
 - Do the most affected populations get their news predominantly from radio, print, television, or the internet, or some mix of these?
 - What languages are understood among the most affected populations?
 - What is the literacy rate among most affected populations, and at what level must reports be written or broadcast in order to be widely understood?
 - How well are basic concepts of criminal justice understood among affected populations?
 - How well is the proposed international criminal justice mechanism already understood among affected populations, including in relation to the ICC or other international courts, where applicable?

Plan

- ▶ **confronting issues of media freedom:**
 - Ensure that journalists and editors are trained in journalistic ethics.
 - Facilitate access for journalists and editors to international officials in order to help boost their profiles and credibility.
 - Press the government to reform legal barriers to media freedom and to refrain from actions that impair press freedom.
 - Provide direct support to independent-minded journalists and editors.
 - Support outside media initiatives that can bring unbiased information on the proceedings to the public.
- ▶ **reaching the most affected populations:**
 - Support the types of media that are most accessible to affected populations.
 - Where required, give special priority to journalists who speak minority languages.
- ▶ **provision of resources and skills:**
 - Identify where gaps in technical capacity and resourcing exist, and how severe they are.

- Determine which gaps present the greatest obstacles, and thus which measures should have the highest priority.
- Identify whether existing rule-of-law programming, by any donor, already addresses similar gaps. If so, explore whether this could be modified to directly address the need to build journalists' capacity to cover proceedings for international crimes.
- Determine how the success of capacity building projects can best be measured.
- Identify which donors are best suited to address which needs.
- Identify technical assistance and training providers.
- Ensure that donors coordinate their assistance on an ongoing basis in order to fill all priority gaps and avoid duplication.

Resources

BBC World Service Trust (www.bbc.co.uk/worldservice/trust/): Has supported media trainings on transitional justice issues.

Fondation Hironnelle (www.hironnelle.org): Operates radio stations in conflict and post-conflict countries, where coverage includes issues of international criminal law.

Institute for War and Peace Reporting (www.iwpr.net): Conducts extensive trainings for journalists in conflict and post-conflict countries, and has in-house expertise on international criminal law.

Interactive Radio for Justice (www.irjf.org): Works with local radio partners in ICC situation countries to create programming designed to increase understanding between affected communities and national and international justice authorities.

International Center for Transitional Justice (www.ictj.org): Has conducted trainings for journalists on international criminal law and other transitional justice issues.

International Committee of the Red Cross (www.icrc.org): Conducts trainings for journalists on international humanitarian law.

International Criminal Court (www.icc-cpi.int): Through its outreach section, conducts trainings on the Rome Statute for journalists, primarily in ICC situation countries.

No Peace Without Justice (www.npwj.org): Has conducted trainings on international criminal law for journalists.

Public International Law & Policy Group (www.publicinternationallaw.org): Has conducted trainings on international criminal law for journalists.

Search for Common Ground (www.sfcg.org): Has supported media trainings for journalists on transitional justice issues.

Various other organizations, including regional or local organizations, may have expertise. Where possible, donors should seek to involve well regarded local organizations.

Further Reading

Julia Crawford (ed.), *Reporting Transitional Justice: A Handbook for Journalists*, BBC World Service Trust and the International Center for Transitional Justice, 2007, available at: <http://www.communicatingjustice.org/en/handbook>.

Civil Society Advocacy and Court Monitoring

Why

- ▶ Building political will for genuine proceedings for international crimes.
- ▶ Increasing public trust in the judicial process.
- ▶ Countering misinformation about the judicial process.
- ▶ Increasing transparency in the judicial process, and checks on abuses.
- ▶ Giving a voice to underrepresented segments of the population.
- ▶ Increasing access to justice.
- ▶ Identifying entry points for advocacy through court monitoring.
- ▶ Building constituencies for political and institutional reform.

What

- ▶ Lobbying the government and international community.
- ▶ Developing substantive proposals to address challenges.
- ▶ Observing trials, reporting on the substance and process, and highlighting successes and problems.

Who

- ▶ National and local non-governmental organizations.
- ▶ Bar associations.
- ▶ Regional civil society networks.
- ▶ International civil society organizations and networks.

Civil society organizations can be indispensable partners in all aspects of the justice sector, as has been noted throughout the preceding chapters. The international development community has extensive experience in working with these organizations on various justice issues. Beyond the areas already discussed, civil society organizations can play a vital role through advocacy for justice reform and in monitoring criminal trials as a check on abuse or shortcomings in the judicial process.

In most respects, donor support for civil society in the area of international criminal justice is no different than it would be for NGO capacity building related to other aspects of the justice sector. Many of the challenges in a conflict or post-conflict setting are also the same, including the identification of NGOs that are willing to undertake meaningful activities, and supporting these NGOs by boosting skills and resources while attempting to make support sustainable.

Linkages to existing rule-of-law priorities. Boosting civil society's capacity to effectively advocate for genuine proceedings for international crime inherently advances efforts to further overall rule-of-law development. Likewise, trial monitoring is also institution monitoring. Observing and reporting on trials for international crimes, visiting detention facilities, and interviewing trial participants can help to pinpoint problems in the criminal justice system and identify entry points for reform advocacy.

How Proceedings for International Crimes Are Different

Technical knowledge. Local organizations are likely to have a good understanding of the conflict, may have good government and media contacts, and should be well placed to communicate effectively with those populations that have the most at stake in the justice mechanism. But successful engagement in advocacy and court monitoring activities related to proceedings involving international crimes require a strong grasp of a large body of technical knowledge. As in other types of criminal justice advocacy and trial monitoring, this begins with a good understanding of the judicial process, including the roles of the judges and parties, and the rights of suspects and the accused. It also includes the structures and concepts of international criminal law: the jurisdiction of the ICC; the Rome Statute's principle of complementarity; what constitutes genuine investigations and prosecutions under the Rome Statute; knowledge of how an international criminal case is structured; definitions of war crimes, crimes against humanity, and genocide; and an overview of the different modes of liability. In light of the amount of information an organization must understand in order to be able to undertake effective policy advocacy and court monitoring, it is not surprising that it is easier to interest civil society organizations in learning about international criminal law in countries

where an international tribunal is already active or a domestic justice mechanism has already been established.

Including affected communities. In many conflicts, victim communities and other highly affected populations are not primarily located in the capital, but often in remote regions. Community members often speak minority languages or dialects, and frequently have lower levels of education than counterparts in the capital. In building NGO advocacy and court-monitoring capacity related to proceedings involving international crimes, these additional challenges must be confronted if the effort is to include those who have the greatest stake in the process.

Political sensitivities and security. In many locations, legal restrictions on NGOs and pressure from the state represent general problems for policy advocates. The often sensitive nature of international criminal cases can mean that civil society organizations conducting advocacy or court monitoring related to the process could be singled out for scrutiny and repression. Sensitivities can also introduce grave security risks for those involved in advocacy and court monitoring, with threats possible from state actors or other partisans of the underlying conflict. Some civil society leaders, especially those engaged in advocacy of unpopular positions or against powerful figures, may be at serious risk. Through its support and interventions, the international community can serve as a lifeline.

Examples of Donor Support

In **Sierra Leone**, donors backed international NGOs to engage with domestic civil society in the wake of the conflict. As mentioned in the chapter on outreach, No Peace Without Justice launched the effort in 2001, before the official end of the war, and helped to create an umbrella organization to continue addressing the outreach need. It expanded its activities to include a court monitoring function once the Special Court opened its own outreach section. Through a partnership with the International Center for Transitional Justice, which provided training and guidance, the effort later launched a “Special Court Monitoring Program,” which drew on local NGO activists and attorneys to monitor and report on the unfolding trials. The program became an organization, today called the Centre for Accountability and Rule of Law, and is directed by a former Special Court outreach officer. While still following and commenting on the final Special Court trial of Charles Taylor in The Hague, the organization now also monitors domestic trials of various kinds and the work of the Anti-Corruption Commission. It has become a leading advocate for justice sector and human rights reform.¹⁵²

The Coalition for the International Criminal Court, with 64 national coalitions and over 2,500 NGO members, has provided an important platform for various advocacy initiatives related to the Rome Statute. In **Honduras**, the CICC offered training on the Rome Statute for NGOs and journalists after the ICC prosecutor announced that the country was a situation “under analysis.” In the **Philippines**, national CICC member organizations successfully advocated for the domestication of several Rome Statute crimes in December 2009.

The International Crime in Africa Programme at the Institute for Security Studies in South Africa, Human Rights Watch, and the International Center for Transitional Justice successfully coordinate an informal network of civil society organizations across the continent that prepares for, and responds to, key developments on international justice and the ICC in **Africa**. For example, the three organizations worked with African civil society partners to help them prepare for the ICC Review Conference, lobby their governments on key issues on the conference agenda, and shape actual proceedings with regard to the crime of aggression. The fact sheet that was prepared on the conference was the only publicly available document of its kind distributed on the continent. Letters (signed by more than 60 African groups) were also prepared that called for robust engagement at the conference by African states parties and emphasized the importance of high-level government representation in Kampala. This network action helped to ensure that African governments were well represented (largely at the ministerial level) at the conference.

In April 2011, Human Rights Watch facilitated a workshop in eastern **DRC** for civil society organizations from across the country. The group was able to produce a joint statement identifying common concerns about the DRC government’s proposed specialized mixed court for international crimes.¹⁵³ The document laid the groundwork for a concerted and coordinated advocacy effort.

Guidelines for Supporting Civil Society Advocacy and Court Monitoring

Assess

► relevant civil society organizations:

- Do they have a track record of advocacy or court monitoring in the area?
- Are the organizations respected by the public, and do they have a broad following, or an important specific following among affected communities?
- Are the organizations well connected to media outlets or national and international officials?

- Do the organizations have a track record of forming coalitions to bring justice issues to a broader audience, for example by partnering with schools, labor unions, or cultural organizations?
- ▶ **potential bias among interested organizations;**
- ▶ **the climate for advocacy related to international criminal justice:**
 - Does the government have a legal framework conducive to robust advocacy activities by domestic civil society organizations?
 - Are local civil society organizations allowed access to criminal proceedings, and are they able to freely publish critiques of the proceedings?
 - Apart from the legal framework, does the government harass or otherwise discourage independent civil society activity?
 - Do civil society activists engaged on issues of international justice face threats from any governmental or non-state segments of society?
- ▶ **knowledge and technical skills:**
 - Do civil society activists have a strong understanding of the judicial process?
 - Do they have a strong understanding of the institutions and concepts of international criminal justice?
 - Do they have good written and verbal skills? Do they speak the languages of the most affected communities and those most used by national policymakers?
 - Are the organizations able to participate effectively in national and international civil society networks on international criminal justice?
 - Do civil society staff have the skills to use information technology?
- ▶ **available resources:**
 - Are civil society organizations able to provide appropriate compensation to staff?
 - Do civil society activists have the capacity to travel as needed (ranging from taxi fare to vehicles and fuel, airfare, and per diem payments)?
 - Do civil society organizations have adequate basic office equipment (including desks, chairs, telephones, copy machines)?
 - Is information technology available?

Plan

- ▶ **identifying civil society organizations for support:**
 - Take account of their motivation and skill.
 - Ensure that victims' organizations are well represented.
- ▶ **confronting issues of bias among civil society organizations:**
 - Urge the strengthening or creation of a national coalition to work on justice advocacy, court monitoring, and convening organizations from different identity groups.
 - Make support contingent on the diversification of staff and the curtailment of bias.
 - Refuse to support organizations with chauvinistic bents.
- ▶ **fostering national ownership:**
 - Conduct broad consultations with civil society organizations, including victim organizations, to solicit local views before drafting grant guidelines.
- ▶ **leverage donor status for civil society's effectiveness and credibility:**
 - Urge supported organizations to cooperate and form effective advocacy networks, making this a condition for support if necessary.
 - Facilitate supported organizations in gaining access to relevant international officials.
 - Convene forums on international criminal justice to which both government officials and civil society representatives are invited, and make it clear to governments that civil society views weigh heavily on donor considerations.
- ▶ **provision of resources and skills:**
 - Identify where gaps in technical capacity and resourcing exist, and how severe they are.
 - Determine which gaps present the greatest obstacles, and thus which measures should have the highest priority.
 - Identify whether existing rule-of-law programming, by any donor, already addresses similar gaps. If so, explore whether this could be modified to directly address the need to improve civil society's advocacy and court monitoring capacity.
 - Determine how the success of capacity-building activities can best be measured.

- Identify which donors are best suited to address which needs.
- Identify technical assistance and training providers.
- Ensure that donors coordinate their assistance on an ongoing basis in order to fill all priority gaps and avoid duplication.

Resources

Avocats sans Frontières (Lawyers without Borders, www.asf.be): Trains, mentors and supports victims' NGOs, and advises local NGOs in the monitoring of domestic trials for international crimes.

Coalition for the International Criminal Court (www.iccnw.org): A network of over 2,500 NGOs in 150 countries, which provides international, regional, and national organizations with a larger advocacy platform and access to technical and institutional expertise.

Human Rights Watch (www.hrw.org): Facilitates civil society advocacy coalitions and works with local NGO partners on court monitoring.

Institute for International Criminal Investigation (www.iici.info): Conducts workshops for civil society officials to familiarize them with basic concepts of investigations of international crimes.

International Center for Transitional Justice (www.ictj.org): Provides training for NGO advocacy and court monitoring activities relating to international criminal justice.

International Crime in Africa Programme at the Institute for Security Studies (<http://www.issafrica.org/pgcontent.php?UID=18893>): Conducts awareness raising workshops on international criminal law, policy advocacy, and relevant litigation for African civil society organizations, and helps to coordinate an informal African network of over 30 NGOs concerned with international criminal justice in Africa.

No Peace Without Justice (www.npwj.org): Provides training on international criminal law for civil society organizations.

Public International Law and Policy Group (www.publicinternationallaw.org): Organizes assessments and conducts trainings on international criminal law for civil society organizations.

Redress (www.redress.org): Trains victims' organizations in policy advocacy related to national justice mechanisms.

UN Office of the High Commissioner for Human Rights (www.ohchr.org): Offers trainings on court monitoring.

Women's Initiatives for Gender Justice (www.iccwomen.org): Offers trainings on justice issues for women's organizations in ICC situation countries.

Various other organizations, including regional or local organizations, may have expertise. Where possible, donors should seek to involve well regarded local organizations.

Further Reading

Roger Duthie, *Building Trust and Capacity: Civil Society and Transitional Justice from a Development Perspective*, International Center for Transitional Justice, November 2009, available at: http://www.ictj.org/static/Publications/Devt_CivilSociety_Full.pdf.

Organization for Security and Cooperation in Europe, Office for Democratic Institutions and Human Rights (ODIHR), *Trial-Monitoring: A Reference Manual for Practitioners*, 2008, available at: <http://www.osce.org/odihr/31636>.

Sierra Leone Court Monitoring Programme, *Court Monitoring Training Manual*, 2009, available at: http://www.carl-sl.org/home/images/stories/docs/SLCMPTraining_manual.pdf.

Physical Infrastructure and Equipment

Why

- ▶ Ensuring secure and functional facilities for international crimes proceedings.

What

- ▶ Courtrooms and courtroom technology.
- ▶ Detention centers and prisons.
- ▶ Archive facilities.

Who

- ▶ Government officials and parliamentarians.
- ▶ Building contractors.
- ▶ Expert advisors.

Justice sector infrastructure principally comprises courtrooms and legal offices, as well as detention, prison, and archive facilities. Beyond basic office equipment mentioned in the preceding sections, these facilities may require various other tools and technologies.

Linkages to existing rule-of-law priorities. The types of infrastructure and equipment required for proceedings related to international crimes are the same as those needed for

other criminal proceedings. Investments arising from the prioritization of international criminal justice will leave a legacy of improved infrastructure and equipment for the overall criminal justice and penal systems.

How Proceedings for International Crimes Are Different

Courtroom security. Where judges and other court officers or staff face danger (as at the Iraqi High Tribunal) due to the sensitive nature of proceedings involving international crimes, courtroom construction or refurbishment will need to take security into account, for example through the installation of metal detectors to screen those entering the courthouse, and bulletproof glass to separate court officers from the public. However, it should not be assumed that such measures will be required for all proceedings involving international crimes. They should be determined through risk assessments.

In-court protective measures. Similarly, there is often a requirement for heightened witness protection measures in proceedings involving international crimes. Where general risk assessments demonstrate that this is the case, courtrooms may need equipment to allow for witness voice distortion or testimony through video link. Courts should also have the option of screening witnesses from view of the public gallery, but this is something that can be achieved inexpensively, for example with simple hospital screens. There should be a private space that serves as a witness waiting room, and separate entrances to the courtroom for witnesses and the accused.

Court management systems. Complex international cases may require more robust equipment for the recording and organization of court records. Yet this equipment needn't necessarily be state-of-the-art. (Despite extensive investment by states parties, e-court technologies have been difficult to maintain at the ICC itself.) In some domestic contexts, courts will be operating in areas with intermittent electricity, if any, and staff that may have little or no experience with modern information technology. In such situations, a lower-tech approach would be advantageous. Assessments are vital to gauging which court management systems will make the most sense in the immediate term and prove sustainable over the longer term. Where a significant number of complex cases are anticipated and local staff can develop the capacity to use high-tech systems, the additional investment can increase judicial efficiency. For example, electronic databases can track evidence and exhibits presented in court and software can keep electronic transcripts organized for easy reference. Court reporters and interpreters will need microphones and recording equipment. Where donors deliver equipment, they should also ensure training in its proper use.¹⁵⁴ Where this is successfully done, the equipment

and skills can contribute to more transparent and just proceedings in other criminal cases too.

Location of detention facilities and prisons. In their basic construction and equipping, there is nothing unique about the requirements for detention and prison facilities used in relation to proceedings involving international crimes. But the sensitive nature of these proceedings can lend greater importance to the location of detention and prison facilities. Where proceedings are particularly contentious or where detainees or convicts arouse fierce loyalty or animus among elements of the population, the location of refurbished or newly built detention and prison facilities is more likely to have ramifications for security. If the location of these facilities also closely correlates to areas where particular identity groups dominate, there may be heightened concern for the safety of the detainee or convict from perceived rival identity groups. The same danger could extend to defense counsel, family members, and other visitors to the incarcerated person.

Location and security of archives. With regard to archives, there are few requirements for infrastructure and equipment that are particular to proceedings involving international crimes. As in other areas, the sensitive nature of the crimes may heighten security concerns. This should be taken into account in deciding where to locate archive facilities and what security systems these will need. Because international cases are likely to be of interest to a greater number of stakeholders than usual in criminal proceedings (as discussed in the chapter on archive management), construction or refurbishment plans should include provisions for greater public access, both in terms of physical space available and equipment that might allow for remote access to records.

Examples of Donor Support

Mobile courts in the **DRC** administered by the American Bar Association Rule of Law Initiative and *Avocats sans Frontières* have taken a successful approach to infrastructure by largely making do with existing structures, and taking a low-tech approach in the running of trials. Congolese law allows courts to sit in any locality within their jurisdiction. With international assistance, some courts have done so. And among these, some are military benches, which currently have sole jurisdiction over international crimes. Hearings scheduled in remote locations take place in existing buildings, or even under trees, with little in the way of advanced courtroom technology beyond laptop computers and microphones. For the duration of criminal proceedings, detainees are housed in ad hoc detention facilities guarded by Congolese police or UN peacekeepers. Mobile courts have been able to send convicts to refurbished prisons in various eastern districts,

where penal infrastructure represents one of the greatest areas of need along the entire judicial chain.

At the other end of the spectrum is the Special Court for **Sierra Leone**, where proceedings involving international crimes were planned for a period of years, but no adequate physical infrastructure or equipment was in place. Donors supported the development of an entire court complex, including offices, a court building that could accommodate two simultaneous trials, a detention center, and a security perimeter, as well as all of the office furniture and equipment necessary to make it run. As part of its legacy program, the Special Court will hand over all infrastructure and equipment to the government of Sierra Leone. In this way, donor support for proceedings involving international crimes will directly benefit the national justice system.

Guidelines for Investing in Physical Infrastructure and Equipment

Assess

▶ **security:**

- What are the potential threats to court officers and infrastructure?
- How extensive is the need for in-court protective measures for witnesses?

▶ **factors in the choice of court management equipment:**

- What number, scale, and complexity of international criminal trials are expected?
- Is the power supply reliable?
- Do court management staff already have basic information technology skills?

▶ **anticipated demand for access to archives:**

- (For background and assessment questions, see the chapter on archival management.)

Plan

▶ **scaling assistance to genuine need:**

- If the anticipated caseload does not justify a large investment in specialized infrastructure, attempt to identify simpler alternatives.
- Consider proceeding with more robust options where these can also be used for other sensitive justice needs (such as anti-corruption courts).

- Consider proceeding with more robust options where assistance related to proceedings for international crimes overlaps with existing development initiatives.
- ▶ **making the provision of equipment effective:**
 - Ensure that adequate training accompanies the donation of all equipment.
 - Ensure that prior consultations on courtroom construction or refurbishment are conducted with courtroom users, including judges, prosecutors, defense counsel, witness protection officials, detention officials, court reporters, and interpreters.
 - Ensure that the equipment can be operated, both in terms of infrastructure (including electrical supply), and the skills necessary to use it.
- ▶ **meeting common courtroom needs, including:**
 - A witness waiting room.
 - An entrance through which witnesses and participating victims can discreetly come and go.
 - A secure room in which the accused can meet with defense counsel.
 - A holding cell for the accused if the detention facility is far from the courtroom.
- ▶ **addressing security concerns:**
 - Ensure that courtroom security is adequate for the given conditions.
 - Ensure that locations selected for refurbished or newly constructed detention facilities and prisons are secure, and also provide for the security of detainees and convicts.
 - Ensure that archives are located in a secure location and have adequate security.
- ▶ **Addressing archiving issues:**
 - Ensure that refurbished or newly constructed archive facilities have adequate access and space for expected users.

Resources

Public International Law and Policy Group (www.publicinternationallaw.org): Organizes assessments and offers advice on infrastructure and equipment needs for proceedings involving international crimes.

International Center for Transitional Justice (www.ictj.org): Organizes assessments and offers advice on infrastructure and equipment needs for proceedings involving international crimes.

Various other organizations, including regional or local organizations, may have expertise. Where possible, donors should seek to involve well regarded local organizations.

Further Reading

Robin Vincent, *An Administrative Practices Manual for Internationally Assisted Criminal Justice Institutions*, International Center for Transitional Justice, 2007, available at: <http://www.ictj.org/images/content/9/3/931.pdf>.

Conclusion

Building domestic will and capacity to conduct genuine proceedings for international crimes is, unquestionably, a major undertaking. It requires confronting political obstacles and the integration of a large body of technical information. It can raise security concerns in the short run, and adds one more priority to the international development community's burgeoning to-do list.

Yet it is also a task to which key international organizations and most significant bilateral aid donors have already committed. These commitments stem from the belief that crimes that shock the human conscience cannot go unpunished. These commitments are also grounded in indications that impunity for international crimes breeds conflict and economic misery, while international criminal justice serves the causes of peace and economic development.

As the chapters of this handbook make clear, the international development community already knows how to do most of the things necessary to make international justice work at the national level. Where development policymakers and implementers need to be aware of particular considerations pertaining to proceedings for international crimes, this handbook has attempted to highlight the issues involved. It has also attempted to provide guidance that can be applied flexibly in diverse contexts, and references to resource organizations and further reading.

As policymakers, development agencies, embassy staff, officials at international organizations, civil society representatives, contractors, and others in the international development community peruse this handbook, they will recognize multiple entry

points for its application at political and technical levels. Whether engaging with parliamentarians regarding the legal framework, with justice sector officials on technical matters across the judicial chain, or with civil society activists working to build domestic political will, they have the opportunity to multiply efforts and gain experience. The field of international criminal justice is young, and many more lessons are sure to emerge from new attempts to support its domestic application.

Glossary

Assembly of States Parties: the oversight and legislative body for the International Criminal Court.

Chapeau: (see “contextual elements” entry, below).

Command responsibility: a mode of liability whereby a person is responsible for a criminal act he ordered a subordinate to commit, or if the person knew or should have known about the crime committed by a subordinate but failed to prevent or punish the act.

Complementarity: a limitation on the jurisdiction of the International Criminal Court where national governments fulfill their obligations to conduct genuine investigations and prosecutions of international crimes.

Contextual elements: elements that must be proved to successfully charge a crime as a war crime, crime against humanity, or genocide (see entries for each below).

Crime against humanity: a variety of criminal acts committed on a widespread or systematic basis.

Crime base: criminal acts committed by direct perpetrators.

Genocide: a variety of criminal acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group.

International crimes: war crimes, crimes against humanity, and genocide (see entries for each).

International humanitarian law: the law of armed conflict, established through treaty law (including the Geneva Conventions and their Additional Protocols) and the national codification of customary law. IHL is a narrower term than international criminal law, and does not include crimes against humanity or genocide (which need not necessarily be committed during a state of armed conflict).

Legacy: the lasting benefits of proceedings for international crimes, comprising institution building and capacity gains, but also the fostering of common historical memory in torn societies, reconciliation, respect for the rule of law, and peace.

Linkage: the connections that must be proved between the direct perpetrators of crimes and alleged indirect perpetrators if these are to be held criminally responsible.

Modes of liability: the legal means by which a person can be charged as the perpetrator of a crime. Common modes of liability for international crimes include: direct perpetration, command responsibility, and joint criminal enterprise.

Outreach: two-way communication between the justice mechanism and the public. Outreach involves circulating information about legal mandates, processes and activities, while also listening to community views and expectations.

Positive complementarity: supporting states in fulfilling their obligation under the Rome Statute to conduct genuine investigations and prosecutions for international crimes.

Principle of complementarity: see the “complementarity” entry.

Principle of legality: the idea that one cannot be charged with a crime for an act that was not illegal at the time it was committed.

Principle of proportionality: the idea that witness protection and support measures should be granted only in proportion to real threats and needs

War crime: a violation of international humanitarian law (see separate “international humanitarian law” entry).

Notes

1. The UN Security Council can also refer situations in non-states parties to the ICC, as has happened in the cases of Libya and Darfur, Sudan.
2. The list of resource organizations is not comprehensive and does not necessarily connote an endorsement. For space reasons, numerous organizations focused on individual countries or regions have been omitted.
3. The Democratic Republic of Congo presents an extreme case, with large capacity deficits across the board. See Eric A. Witte: *Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda, and Kenya*, Open Society Foundations, January 2011, pp. 18–57, available at: http://www.soros.org/initiatives/justice/articles_publications/publications/complementarity-in-practice-20110119/putting-complementarity-into-practice-20110120.pdf [hereinafter: “Witte: *Putting Complementarity into Practice*”].
4. Conducting these assessments may seem like a daunting task, but there is extensive overlap with aspects of the justice system that will likely have undergone assessment for other purposes, and there is no need to start from the beginning when considering proceedings for international crimes. The UN Rule of Law Indicators Project, for example, is seeking to develop a template for the assessment of legislation and criminal justice institutions in countries receiving assistance; see <http://www.unrol.org/doc.aspx?d=2880>. Similarly, the UN Office on Drugs and Crime has produced the *Criminal Justice Assessment Toolkit* (<http://www.unodc.org/unodc/en/justice-and-prison-reform/Criminal-Justice-Toolkit.html>) and collaborated with the US Institute of Peace to produce the guide *Criminal Justice Reform in Post-Conflict States* (http://www.unodc.org/documents/justice-and-prison-reform/11-83015_Ebook.pdf), both of which provide guidance on assessing criminal justice systems.
5. The Soviet Union and its satellites also tried numerous individuals for World War II atrocities, but many of these trials had deep procedural flaws.

6. The ICC's direct roots extend back to a UN General Assembly resolution in December 1948. Planning for a permanent international criminal court was shelved during the cold war.
7. Preamble, Rome Statute of the International Criminal Court (hereinafter "Rome Statute"), U.N. Doc A/CONF.183/9, adopted July 17, 1998, available at: http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf.
8. Rome Statute, Article 17(1)(a).
9. Rome Statute, Article 17(1)(b).
10. See, for example, Informal Expert Paper: *The Principle of Complementarity in Practice*, ICC Doc ICC-01/04-01/07-1008-AnxA, March 30, 2003, (hereinafter "Expert Paper"), available at <http://www.icc-cpi.int/iccdocs/doc/doc654724.PDF>.
11. The ICC has no jurisdiction over crimes committed before it came into force in July 2002.
12. For a detailed look at complementarity in the DRC, Uganda, and Kenya, see Witte, *Putting Complementarity into Practice*.
13. See Assembly of States Parties, Report of the Bureau on Stocktaking: Complementarity—Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap, ('Bridging the Impunity Gap') ASP Doc ICCASP/8/51, March 18, 2010, especially paragraphs 30, 32, 34–35, and 39, available at: http://www.icc-cpi.int/iccdocs/asp_docs/ASP8R/ICC-ASP-8-51-ENG.pdf. South Africa and Denmark were the focal points designated to develop materials and design discussions on complementarity as one of the four stocktaking topics slated for the Review Conference (the other topics were cooperation, the impact of the Rome Statute system on victims and affected communities, and peace and justice).
14. See ICC Assembly of States Parties, Resolution on Complementarity (Advance copy), ASP Doc. RC/Res.1, adopted by consensus June 8, 2010, available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.1-ENG.pdf, para 3.
15. See RC/9, Pledges, Review Conference of the Rome Statute, July 15, 2010, available at: <http://www.icc-cpi.int/NR/rdonlyres/18B88265-BC63-4DFF-BE56-903F2062B797/0/RC9ENGFRASPA.pdf>.
16. In the DRC, for example, where some international crimes are being pursued through the military justice system, the highest ranking military officers are immune from prosecution due to a requirement that at least one judge on the panel hearing the case be of superior rank. See Witte, *Putting Complementarity into Practice*, p. 20.
17. The International Center for Transitional Justice organized the conference. See ICTJ, *Meeting Summary of the Retreat on "Complementarity after Kampala: The Way Forward,"* October 2010, available at: http://www.ictj.org/static/Publications/ICTJ_Complementarity_GreentreeSummary_Nov2010.pdf.
18. Rome Statute, Preamble.
19. *Ibid.*
20. For example, the agreement initialed by the Ugandan government and the Lord's Resistance Army in June 2007, laying the groundwork for subsequent proceedings before the country's International Crimes Division, notes "the serious crimes, human rights violations and adverse socio-economic and political impacts of the conflict, and the need to honour the suffering of victims by promoting lasting peace with justice." See "Agreement on Accountability and Reconciliation," Juba, Sudan, June 29, 2007, Preamble, available at: <http://www.icc-cpi.int/iccdocs/doc/doc589232.pdf>.

21. Human Rights Watch, *Selling Justice Short: Why Accountability Matters for Peace*, July 2009, pp. 76–77, available at: <http://www.hrw.org/node/84264> [hereinafter: Human Rights Watch, *Selling Justice Short*]. See also Diane Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia*, Open Society Justice Initiative and International Center for Transitional Justice, July 2010, [hereinafter: Orentlicher, *That Someone Guilty Be Punished*], pp. 40–41, available at: http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/that-someone-guilty-20100707.
22. Human Rights Watch, *Selling Justice Short*, pp. 77–81.
23. Human Rights Watch, *Selling Justice Short*, pp. 82–86. The post-genocide failure of domestic and international judicial accountability for atrocities committed by Tutsis and the RPA in Rwanda could spur resentment and future destabilization.
24. Witte, *Putting Complementarity into Practice*, pp. 58–59.
25. Laura Davis and Priscilla Hayner, *Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC*, International Center for Transitional Justice, March 2009, pp. 31–32, available at: <http://www.ictj.org/sites/default/files/ICTJ-DRC-Difficult-Peace-2009-English.pdf>. See also Human Rights Watch, *Selling Justice Short*, pp. 125–126.
26. Human Rights Watch, *Selling Justice Short*, pp. 126–127.
27. “Batting Warlords Try Civility,” *The Christian Science Monitor*, May 9, 2002, available at: <http://www.csmonitor.com/2002/0509/p01s03-wosc.html>. See also Human Rights Watch, *Selling Justice Short*, pp. 123–124.
28. “UN reports improvement in Côte d’Ivoire conflict with hate messages ending,” *UN News Service*, November 16, 2004, available at: <http://reliefweb.int/node/158368>.
29. See International Crisis Group, *War Criminals in Bosnia’s Republika Srpska: Who Are the People in Your Neighborhood?* Balkans Report 103, November 2, 2000, available at: [http://www.crisisgroup.org/~media/Files/europe/Bosnia%2039.ashx](http://www.crisisgroup.org/~/media/Files/europe/Bosnia%2039.ashx).
30. See Diane Orentlicher, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia*, Open Society Justice Initiative, May 2008, [hereinafter: Orentlicher, *Shrinking the Space for Denial*], pp. 31–32, available at: http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/serbia_20080520/serbia_20080501.pdf.
31. See Eric A. Witte, “Beyond ‘Peace vs. Justice’: Understanding the Relationship between DDR Programs and the Prosecution of International Crimes,” in Patel, De Greiff, and Waldorf (eds.): *Disarming the Past: Transitional Justice and Ex-combatants*, Social Science Research Council, New York, 2009, [hereinafter: Witte, *Beyond “Peace vs. Justice”*], available at: http://www.ssrc.org/workspace/images/crm/new_publication_3/%7B465ede38-ocod-df11-9d32-001cc477ec70%7D.pdf.
32. Beyond the reasons discussed here, in some circumstances there are additional technical advantages to charging acts as international rather than ordinary crimes. For discussion of these, see the section “domestic vs. international crimes” in the chapter on prosecutions, below.
33. Human Rights Watch, *Selling Justice Short*, pp. 117–122.
34. For a discussion of issues surrounding the application of traditional justice as a complement to international criminal justice in the Ugandan context, see Beyond Juba, *Tradition in Transition: Drawing on the Old to Develop a New Jurisprudence for Dealing with Uganda’s Legacy of Violence*, July 2009, (Working Paper No. 1), available at: www.beyondjuba.org/working_papers/BJP.WP1.pdf.

35. Human Rights Watch, *Selling Justice Short*, pp. 93–100. For additional information on the ICTY’s impact on Bosnian legal reform, see Orentlicher, *That Someone Guilty Be Punished* and Fidelma Donlon, “Justice: From the International Criminal Tribunal for the Former Yugoslavia to the War Crimes Chamber of Bosnia,” in Dina Haynes (ed.), *Deconstructing the Reconstruction of Bosnia*, Ashgate Publishing, 2008. For more on the ICTY’s impact on Serbian legal reform, see Orentlicher, *Shrinking the Space for Denial*. For information on how the development of specialized chambers for international crimes have affected the criminal justice systems of Bosnia and Serbia, see Bogdan Ivanišević, “Power of Persuasion: Impact of Special War Crimes Prosecutions on Criminal Justice in Bosnia and Serbia,” in Michael Reed Hurtado and Amanda Lyons (eds.), *Contested Transitions: Dilemmas of Transitional Justice in Colombia and Comparative Experience*, International Center for Transitional Justice, 2010, pp. 300–321, available at: <http://es.ictj.org/images/content/2/4/2485.pdf>.

36. Under article 50(2)(n) of the new constitution, approved by voters in August 2010, acts that were crimes under international law (but not necessarily domestic law) at the time of their commission can still be prosecuted. In article 2(5), the new constitution incorporates customary international law by stating that “the general rules of international law shall form part of the laws of Kenya.”

37. Witte, *Putting Complementarity into Practice*, pp. 83–114. On May 30, 2011, the ICC’s Pre-Trial Chamber II rejected the Kenyan government’s complementarity-based challenge to the admissibility of the two cases (against three individuals each) before the ICC on the basis that Kenya had not launched an investigation into the six suspects named by the ICC prosecutor. Kenya appealed the decision to the ICC’s Appeals Chamber and as of this writing it had not yet rendered a decision.

38. Witte, *Putting Complementarity into Practice*, p. 21.

39. The draft legislation adopts individual criminal responsibility as defined in Article 25 of the Rome Statute. Interview with David Donat-Cattin, Parliamentarians for Global Action.

40. The World Bank, *World Development Report 2011: Conflict, Security, and Development*, available at: <http://wdr2011.worldbank.org/>.

41. Witte, *Putting Complementarity into Practice*, p. 44.

42. Interview with Caitlin Reiger, ICTJ. For more information on CCJAP, see <http://www.ccjap.org.kh/index.asp>.

43. Testimony from one insider witness in the trial of former Liberian President Charles Taylor at the Special Court for Sierra Leone indicated that there had been a coordinated effort to undermine the SCSL investigation in Liberia through deliberate spreading of misinformation that greatly exaggerated the court’s mandate. Rumors swirled that the Special Court was also going to prosecute crimes committed in Liberia, or even that all Liberian ex-combatants would be arrested. Where programs of disarmament, demobilization and reintegration (DDR) are underway or being planned, outreach about international justice mechanisms is vital to ensuring that the two initiatives don’t run afoul of each other. See Witte, *Beyond “Peace vs. Justice”*, pp. 99–100 and esp. endnote 60.

44. Interview with three former ECCC officials. For more information on the Documentation Center of Cambodia (DC-Cam), see www.dccam.org. See also Clara Ramírez-Barat, *Making an Impact: Guidelines on Designing and Implementing Outreach Programs for Transitional Justice*, International Center for Transitional Justice, January 2011, p. 22, available at: http://www.ictj.org/static/Publications/ICTJ_MakingAnImpact_pb2011.pdf.

45. Interview with Michael Reed Hurtado, ICTJ.
46. This is the case for Ugandan High Court's International Crimes Division, for example.
47. This may be particularly relevant where cases being pursued through national systems are related to cases tried in international tribunals. See Fidelma Donlon, "Complementarity in Practice: ICTY Rule 11 *bis* and the Use of the Tribunal's Evidence in the Srebrenica Trials before the Bosnian War Crimes Chamber," in Dr. Carsten Stahn (ed.), *The International Criminal Court and Complementarity: From Theory to Practice*, (Cambridge University Press, 2011).
48. With regard to the DRC, see Witte, *Putting Complementarity into Practice*, p. 29.
49. S/RES/1960 (2010), available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/698/34/PDF/N1069834.pdf?OpenElement>.
50. Witte, *Putting Complementarity into Practice*, pp. 60–61.
51. The definitions of international crimes may vary, depending on specific domestic legislation.
52. For example, the Southern African Development Community has protocols for mutual legal assistance among its member states. See: www.sadc.int/index/browse/page/121. The Commonwealth Secretariat facilitates three informal schemes of mutual legal assistance to which Commonwealth member states can voluntarily adhere. See http://www.thecommonwealth.org/Internal/190714/190928/international_agreement_between_countries/.
53. In the DRC, the international community has effectively supported the drafting of a mostly sound bill on implementation of the Rome Statute. There is a large measure of domestic ownership over the draft legislation, which has been characteristic of most successful efforts. And yet there appear to be political obstacles that are preventing passage of the bill in the National Assembly. The International Center for Criminal Justice, *Avocats sans Frontières*, and the Coalition for the International Criminal Court have all offered advice on the draft. Through its members in the National Assembly, Parliamentarians for Global Action has played a pivotal role in building support for the bill across various political parties. See Witte, *Putting Complementarity into Practice*, pp. 22 and 37–38.
54. For example, draft implementing legislation on the Rome Statute in Ghana and Lesotho, drawn up with technical advice from the NGO No Peace Without Justice hasn't been sent to the parliament of either country. Interview with Alison Smith, No Peace Without Justice. See also Max du Plessis and Jolyon Ford (eds.), *Unable or unwilling? Case studies on domestic implementation of the ICC statute in selected African countries*, ISS Monograph Series no 141, March 2008, Pretoria, available at: <http://www.iss.co.za/uploads/MONO141FULL.PDF>.
55. Kenya and several other African countries have also used South Africa's legislation on domestication of the Rome Statute as a reference. Interview with David Donat-Cattin, Parliamentarians for Global Action.
56. See Edward H. Warner and Davis Jeffery, "Reaching Beyond the State: Judicial Independence, the Inter-American Court of Human Rights and Accountability in Guatemala," *Journal of Human Rights* 6, no. 2 (2007), pp. 233–255, available at: http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1033&context=stusch_lawrev.
57. These assessment questions often will already have been answered in the course of designing other aspects of support to the criminal justice system.

58. See also UN Basic Principles on the Independence of the Judiciary, available at: <http://www2.ohchr.org/english/law/indjudiciary.htm>, and UN Guidelines on the Role of Prosecutors, available at: <http://www2.ohchr.org/english/law/prosecutors.htm>.

59. See *United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)*, UN General Assembly Resolution 45/110, December 14, 1990, available at: <http://www2.ohchr.org/english/law/tokyorules.htm>.

60. See Procedure Five of the UN Economic Council Resolution 1989/60, *Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary*: “States shall pay particular attention to the need for adequate resources for the functioning of the judicial system, including appointing a sufficient number of judges in relation to case-loads, providing the courts with necessary support staff and equipment, and offering judges appropriate personal security, remuneration and emoluments.”

61. Customary international law is evolving in a direction that military proceedings for such cases are increasingly considered problematic.

62. These areas of law include a number of important treaties, some of which are regional in scope. For a core list of relevant treaties, see: <http://www2.ohchr.org/english/law/>.

63. For example, the DRC’s military justice system and the Congolese draft implementing legislation on the Rome Statute contain provisions that a military or police officer can only be tried if the panel of judges hearing the case includes an officer of superior rank. This provides indirect immunity for senior ranking officers. See Witte, *Putting Complementarity into Practice*, pp. 20, 22.

64. See the “Countering political obstruction” text box in this book’s Introduction for more options.

65. Referral to the ICC is only possible if the alleged crimes were committed after July 2002.

66. For more on this topic, please see the “Witness protection and support” chapter.

67. Interview with a former official of the Extraordinary Chambers in the Courts of Cambodia. In Cambodia, prior to establishment of the ECCC, extensive relevant documentation had been gathered and organized by the Documentation Center of Cambodia (DC-Cam).

68. Interview with Trudy Huskamp Peterson, a certified archivist and chair of the International Council on Archives’ Human Rights Working Group. See also: Trudy Huskamp Peterson, *Archives against Amnesia, Politorbis, Dealing with the Past* (Nr. 50), issue 3/2010, available at: http://www.eda.admin.ch/etc/medialib/downloads/edazen/doc/publi/publi2.Par.0099.File.tmp/Politorbis%2050%20-%20Dealing%20with%20the%20Past_3%20.pdf

69. This practice is all too common. In East Timor, investigators received chemicals for a toxicology lab that didn’t exist. Interview with Luis Fondebrider, Argentine Forensic Anthropology Team.

70. In Colombia, investigators accumulated 40,000 hand-written victim and witness statements before an effort was made to digitize and organize these. Interview with an international prosecutor.

71. Judicial protection orders issued in international tribunals can offer useful guidance on how national procedures can be tailored to ensure witness protection.

72. These forms of cooperation are provided for in Article 93(10) of the Rome Statute.

73. See *OTP Weekly Briefing #65*, November 23-29, 2010, available at: <http://www.icc-cpi.int/NR/rdonlyres/7105B39A-2F30-43FF-9222-D7349BF15502/282732/OTPWBENG.pdf>.

74. See Witte, *Putting Complementarity into Practice*, p. 26.
75. Interview with John Ralston, executive director of the Institute for International Criminal Investigations, chief investigator of the Darfur Inquiry and former chief of investigations at the ICTY. IICI has also conducted trainings for investigators in Uganda, Rwanda, and Cambodia, as well as regular training courses in The Hague that draw investigators from around the world.
76. Interviews with John Ralston, IICI, and Alison Smith, NPWJ.
77. Domestic criminal investigations into the post-election violence were extremely limited in ambition but there is new impetus to launch domestic proceedings. See Witte: *International Crimes, Local Justice*, pp. 83–114.
78. Interview with Alison Smith, NPWJ. For more information on the Afghanistan Independent Human Rights Commission, see www.aihrc.org.af.
79. See Office of the High Commissioner for Human Rights, *Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003*, August 2010, available at: http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf.
80. Interviews with John Ralston, IICI, who also serves on the JRR board of directors, and Alison Smith of No Peace Without Justice, which served as the temporary secretariat for JRR.
81. In accordance with article 17 of the Rome Statute, the ICC only has jurisdiction where states are unwilling or unable to conduct “genuine” investigations and prosecutions into allegations of war crimes, crimes against humanity, and genocide. Governments of states under potential ICC jurisdiction that seek to dodge accountability by establishing sham domestic investigations and prosecutions can run afoul of the requirement that their efforts be “genuine,” but they may make the attempt in any case, either out of ignorance or to buy time and have a plausible-sounding rationale for their refusal to cooperate with the ICC.
82. The government of East Timor often displayed unease with the prosecution of international crimes in the Serious Crimes Unit, and then issued pardons for some of those who had been convicted.
83. See “African Union still wants Habre tried in Senegal,” Agence France Presse, January 29, 2011, and “Chad says it favours Habre extradition to Belgium,” Reuters, July 22, 2011.
84. See *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: June 2011*, Open Society Justice Initiative, available at: http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/cambodia-eccc-20110614.
85. See Witte, *Putting Complementarity into Practice*, pp. 83–114.
86. The definitions of international crimes can potentially vary from the descriptions here, depending on how international criminal law has been domesticated in the state in question.
87. For further consideration on the prosecution of complex “system crimes,” see OHCHR, *Rule-of-Law Tools for Post-Conflict States*, [hereinafter: OHCHR, *Rule-of-Law Tools for Post-Conflict States*] available at: <http://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf>, pp. 11–17.
88. For an in-depth look at issues surrounding case selection for international crimes, including how it has been handled in different jurisdictions, see Morten Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, International Peace Research Institute, 2009, available

at: [http://www.prio.no/upload/FICHL/090326%20FICHL%20Publication%20Series%20No.%204%20\(2009\)%20\(criteria\).pdf](http://www.prio.no/upload/FICHL/090326%20FICHL%20Publication%20Series%20No.%204%20(2009)%20(criteria).pdf).

89. For more on conflict mapping, see OHCHR, *Rule-of-Law Tools for Post-Conflict States*] available at: <http://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf>.

90. See the earlier chapter on outreach.

91. For more information, see David Tolbert and Aleksander Kontic, “The International Criminal Tribunal for the former Yugoslavia: Transitional Justice, the Transfer of Cases to National Courts, and Lessons for the ICC,” in Carsten Stahn and Goran Sluiter (eds.): *The Emerging Practice of the International Criminal Court*, Brill N.V., 2009.

92. Interview with an experienced international war crimes investigator and prosecutor. Prosecutions and trials for international crimes in Iraq have been deeply flawed, perhaps in part because of a paucity of trainings available. Many donors shied from offering assistance because of the highly controversial political circumstances surrounding the international occupation of Iraq and due to the applicability of the death penalty. The issue of joinder can also raise concerns. The ICTR, in contrast to the ICTY, has found that joinder can prolong trials rather than shorten them. Joining cases by events and then trying them consecutively can also cause problems. For example, in Iraq, Saddam Hussein was tried, convicted, and hanged for crimes related to one joined case before evidence could be heard regarding other criminal charges against him.

93. Interview with Caitlin Reiger, ICTJ.

94. Interviews with Caitlin Reiger and Michael Reed Hurtado, both of ICTJ. For more background on prosecutions in Argentina, see: Leonardo Filippini: *Criminal Prosecutions for Human Rights Violations in Argentina* (ICTJ Briefing), November 2009, available at: http://www.ictj.org/static/Publications/briefing_Argentina_prosecutions.pdf.

95. Please see the “Countering political obstruction” text box in the Introduction for additional information.

96. For further discussion, see the separate chapter on provision of international personnel.

97. See the separate chapter on civil society advocacy and court monitoring.

98. This presents one challenge to the idea of a mixed chamber for international crimes in the DRC. See Witte, *Putting Complementarity into Practice*, p. 54.

99. For further discussion, see the separate chapter on support through the provision of international personnel.

100. The definitions of international crimes can potentially vary from the descriptions here, depending on how international criminal law has been domesticated in the state in question.

101. See also the separate chapter on victim representation.

102. See OHCHR, *Rule-of-Law Tools for Post-Conflict States*, pp. 24–25.

103. This was a problem in the lengthy trial of Slobodan Milosevic at the ICTY when Presiding Judge Richard May died. In the wake of this, the SCSL added an alternate judge to the bench for its trial of Charles Taylor.

104. Pretrial detention should be restricted to situations in which there are reasonable grounds to believe that the individual has committed the alleged offenses and may abscond, commit further

serious offenses, or interfere with the judicial process. See *United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)*, UN General Assembly Resolution 45/110, December 14, 1990, Rules 5 and 6, available at: <http://www2.ohchr.org/english/law/tokyorules.htm>.

105. See David Tolbert and Aleksandar Kontić, *Final Report of the International Criminal Law Services (ICLS) Experts on the Sustainable Transition of the Registry and International Donor Support to the Court of Bosnia and Herzegovina and the Prosecutor's Office of Bosnia and Herzegovina in 2009*, ICLS, December 15, 2008, available at: <http://www.iclsfoundation.org/wp-content/uploads/2009/05/icls-bih-finalreportwebsitecorrected.pdf>.

106. For more information see Review Conference of the Rome Statute, document RC/ST/CM/INF.2, *Focal points' compilation of examples of projects aimed at strengthening domestic jurisdictions to deal with Rome Statute crimes*, Example H, May 30, 2010, available at: http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/RC-ST-CM-INF.2-ENG.pdf.

107. This may seem very basic, but without this knowledge, some judges may be prone to ask interpreters what a witness meant, or frequently interrupt interpreters, which can cause chaos in the proceedings and transcripts. These were problems in East Timor. Judges should also ensure that prosecutors, defense counsel, and witnesses work well with courtroom interpreters.

108. International Covenant on Civil and Political Rights, Article 14(3)(d).

109. Interview with Caitlin Reiger, ICTJ.

110. Human Rights Watch, *Judging Dujail: The First Trial before the Iraqi High Tribunal*, November 2006, pp. 20–21, available at: <http://www.hrw.org/sites/default/files/reports/iraq1106webcover.pdf>.

111. Witte, *Putting Complementarity into Practice*, pp. 65–66.

112. Rome Statute, Article 55.

113. The following is based on an internal report for the Open Society Justice Initiative from October 2006.

114. See the chapter on support through provision of international personnel.

115. In Rwanda, many defense witnesses refused to return to the country to give evidence. The ICTR Appeals Chamber cited this among its reasons for refusing to transfer cases back to Rwandan jurisdiction.

116. See the separate chapter on outreach for more information.

117. Stjepan Gluščić, et al., *Procedural protective measures for witnesses—Training manual for law-enforcement agencies and the judiciary*, Council of Europe, 2006, p. 30, available (for purchase) at: http://book.coe.int/EN/ficheouvrage.php?PAGEID=36&lang=EN&produit_aliasid=2130.

118. See Article 6(d) of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by UN General Assembly resolution 40/34 of 29 November 1985, available at: <http://www2.ohchr.org/english/law/victims.htm>.

119. See the *Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime*, adopted by the UN Economic and Social Council resolution 2005/20 of 22 July 2005, available at: <http://www.un.org/docs/ecosoc/documents/2005/resolutions/Resolution%202005-20.pdf>. For a model law on its implementation, developed by UNODC and UNICEF, see http://www.unodc.org/documents/justice-and-prison-reform/Justice_in_matters...pdf.

120. See Witte, *Putting Complementarity into Practice*, pp. 96–103.
121. See “Special Court Launches Witness Protection Training Programme” (press release), November 6, 2009, available at: <http://www.sc-sl.org/LinkClick.aspx?fileticket=kJu0OgoLU2E%3d&tabid=214>. The Residual Special Court for Sierra Leone will also have a small number of staff that will manage witness protection issues after the completion of the Special Court’s mandate.
122. OHCHR, *Rule-of-Law Tools for Post-Conflict States*, pp. 18–19.
123. Interview with two former ECCC officials.
124. Interview with Michael Reed Hurtado, ICTJ.
125. See Office of the United Nations High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Reparations Programmes*, 2008, pp. 5–8, available at: [http://www.unrol.org/files/ReparationsProgrammes\[1\].pdf](http://www.unrol.org/files/ReparationsProgrammes[1].pdf).
126. UN Doc. E/CN.4/2005/102/Add 1, 8 February 2005, Report of the Independent Expert to Update the Set of Principles To Combat Impunity, Diane Orentlicher, available at <http://daccess-ods.un.org/TMP/7819111.34719849.html>.
127. General Assembly resolution 60/147 of 16 December 2005, available at: <http://www2.ohchr.org/english/law/remedy.htm>.
128. See <http://www.trustfundforvictims.org/projects>.
129. Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: December 2010 Update*, pp. 16–17, available at: http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/cambodia-report-20101207/cambodia-khmer-rouge-report-20101207.pdf.
130. International Covenant on Civil and Political Rights, Article 14(3)(f).
131. Interview with Caitlin Reiger, ICTJ.
132. International Covenant on Civil and Political Rights, Article 14(1).
133. Information taken from an internal report for the Open Society Justice Initiative from October 2006.
134. Interviews with ICC officials.
135. See Principles of Conduct for Court Personnel, Report of the Fourth Meeting of the Judicial Integrity Group, UNODC, Annex A, pp. 18–21, available at http://www.unodc.org/pdf/corruption/publication_jig4.pdf.
136. For detailed assessment questions on whether the introduction of automated court management systems make sense, see USAID Center for Democracy and Governance, *Case Tracking and Management Guide* (Technical Publication Series), September 2001, available at: http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacm001.pdf.
137. Except as otherwise noted, this section is largely based on an interview with Trudy Peterson, a certified archivist and chair of the International Council on Archives’ Human Rights Working Group.
138. UN Commission on Human Rights, *Report of the independent expert to update the Set of principles to combat impunity*, Diane Orentlicher, Addendum: Updated Set of principles for the protection and promotion of human rights through action to combat impunity. E/CN.4/2005/102/Add.1, February 8, 2005, principles 2 and 5.

139. One example is the case of Sierra Leone. The trials at the Special Court for Sierra Leone, and in particular the trial of former Liberian President Charles Taylor, have brought to light a tremendous amount of information not only on Liberian involvement in Sierra Leone, but also on Liberia's own civil war.

140. For more information on DC-Cam, see www.dccam.org.

141. See also the separate chapter on physical infrastructure and equipment.

142. Detention center and prison infrastructure are discussed in the separate chapter on physical infrastructure and equipment.

143. See Witte, *Putting Complementarity into Practice*, p.32.

144. For the trial of former Liberian President Charles Taylor in The Hague, the SCSL has been able to detain the accused in the same Dutch facility used for this purpose by the International Criminal Tribunal for the former Yugoslavia.

145. Robin Vincent, *An Administrative Practices Manual for Internationally Assisted Criminal Justice Institutions*, International Center for Transitional Justice, 2007, p. 70.

146. ICCPR, Article 7.

147. ICCPR, Article 10(1).

148. ICCPR, Article 10(2).

149. A full list of the standards is available at: <http://www2.ohchr.org/english/law/treatmentprisoners.htm>.

150. Issues of coordination within the international community are discussed separately in the Introduction of this handbook.

151. For more information on JLOS, the DPG and their handling of transitional justice issues, see Witte, *Putting Complementarity into Practice*, pp. 76–80. See also Amanda Sserumaga, “Sector Wide Approaches in the Administration of Justice and Promoting the Rule of Law: The Uganda Experience”, paper presented at the Seminar on the Rule of Law European Initiative for Democracy and Human Rights, July 2003, available at: <http://www.gsdr.org/docs/open/SSA107.pdf>.

152. See Mohamed Gibril Sesay and Mohamed Suma, *Transitional Justice and DDR: The Case of Sierra Leone*, June 2009, pp. 26–27, available at: http://www.ictj.org/static/Publications/Sesay_Suma_SL_DDR_SierraLeoneFCS_2009.pdf. For more information on the Centre for Accountability and Rule of Law, see <http://www.carl-sl.org>.

153. *Establishment of a Specialized Mixed Court for the Prosecution of Serious International Crimes: Common Position Resulting from the Workshop Held in Goma on April 6–8, 2011*, April 15, 2011, available at: <http://www.hrw.org/en/news/2011/04/15/dr-congo-establishment-specialized-mixed-court-prosecution-serious-international-cri>.

154. This was a problem in East Timor, where USAID donated video cameras to the courts but court staff received no training. Unlabeled tapes without any corresponding written log of the proceedings piled up in filing cabinets, making any use of the tapes for appeals or other purposes unwieldy at best. Interview with Caitlin Reiger, ICTJ.

Open Society Justice Initiative

The Open Society Justice Initiative uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies. We foster accountability for international crimes, combat racial discrimination and statelessness, support criminal justice reform, address abuses related to national security and counterterrorism, expand freedom of information and expression, and stem corruption linked to the exploitation of natural resources. Our staff are based in Abuja, Amsterdam, Bishkek, Brussels, Budapest, Freetown, The Hague, London, Mexico City, New York, Paris, Phnom Penh, Santo Domingo, and Washington, D.C.

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The Open Society Foundations work to build vibrant and tolerant democracies whose governments are accountable to their citizens. Working with local communities in more than 70 countries, the Open Society Foundations support justice and human rights, freedom of expression, and access to public health and education.

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For victims of international crimes—war crimes, crimes against humanity, and genocide—the best hope for justice can be found locally, in their national jurisdictions. But national criminal justice systems are not always willing and able to take on such an imposing task. Increasingly, the international community has committed to assisting states in doing so. As the international community takes up the many challenges that this entails, there is a need for guidance in how policymakers, donors, and implementers should best support states in providing local justice for international crimes.

This handbook is part of an ongoing effort to provide just such guidance. It is meant as a practical aid and a reference work that covers large policy questions of interest to policymakers as well as more technical issues encountered by rule-of-law programmers and implementers.

In examining needs, assessing pressing issues, and providing examples of past successes, *International Crimes, Local Justice* is intended to inform policymakers, donors, and implementers as they help states develop the will and capacity to deliver justice for victims of the worst crimes.