

Handbook  
for Judicial Affairs Officers  
in United Nations Peacekeeping Operations

The background features a large, light blue watermark of the United Nations logo, which includes a world map and a laurel wreath.

# JUS TICE

Handbook  
for Judicial Affairs Officers  
in United Nations Peacekeeping Operations

Criminal Law and Judicial Advisory Service  
Office of Rule of Law and Security Institutions  
Department of Peacekeeping Operations

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# JUS TICE

## Foreword

Strengthening the rule of law in countries emerging from conflict is essential for the consolidation of peace and security. This cannot be achieved unless the population is confident in legitimate structures for the peaceful settlement of disputes and the fair administration of justice. The work undertaken by the Department of Peacekeeping Operations (DPKO), together with its many partners, in strengthening the justice sector in host countries of peace operations is therefore a critical priority for achieving sustainable peace.

United Nations peacekeepers are generally the international community's first responders in post-conflict countries. The scope and importance of their role is reflected in the number of international peacekeeping personnel authorized to assist host countries to strengthen the rule of law. As of September 2012, DPKO, in support of United Nations efforts to strengthen legal and judicial institutions, prisons and police in host countries of peacekeeping operations, has authorized personnel that include over 14,000 United Nations Police, over 300 judicial affairs officers and 400 corrections officers. Fundamental to the DPKO approach is the ability to provide holistic support in relation to all dimensions of the criminal justice chain (police, justice and corrections), strengthening support networks and drawing upon all available partners. To further enhance the predictability, coherence, accountability and effectiveness of this approach, DPKO and the United Nations Development Programme (UNDP) have jointly assumed the responsibility of Global Focal Point for the police, justice and corrections areas in the rule of law in post-conflict and other crisis situations. This new arrangement presents a unique and exciting opportunity for the United Nations.

Actively supported by a network of Member States, and United Nations and non-United Nations partners, DPKO, through its Criminal Law and Judicial Advisory Service, has taken significant steps to develop a platform of tools, materials and training programmes which will guide and support the work of its justice and corrections components in the field and also be of utility for the entire United Nations system.

This Handbook serves as an essential "textbook" for judicial affairs officers working in post-conflict environments. It does not seek to prescribe the strategic and programmatic decisions of individual missions, which operate with differing mandates and under unique circumstances. Rather, it provides an invaluable reference guide for use prior to, and during, deployment in the field.

I wish to express my deepest gratitude and appreciation to those who have contributed to this Handbook, in particular DPKO judicial affairs officers in the field, who have shared their views, experiences and insights to ensure that this is a user-friendly and practical tool. The Handbook has been developed with the input and engagement of a range of United Nations departments, agencies, funds and programmes, and it is a guidance document of value beyond the peacekeeping context.

Hervé Ladsous

United Nations Under-Secretary-General for Peacekeeping Operations

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The following United Nations entities provided valuable expertise and support: Office of the High Commissioner for Human Rights (OHCHR), Office of Legal Affairs (OLA), United Nations Development Programme (UNDP), Office of the United Nations High Commissioner for Refugees (UNHCR), United Nations Children’s Fund (UNICEF), United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), Department of Political Affairs (DPA) and the Rule of Law Unit in the Executive Office of the Secretary-General. In addition, CLJAS wishes to thank colleagues in the justice components of United Nations peacekeeping missions as well as representatives of DPKO offices (the Integrated Training Service, the Office of Operations, OROLSI, and the Peacekeeping Best Practices Section) for their input.

Finally, special thanks are due to the Government of Canada, whose generous support enabled CLJAS to develop this Handbook.

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## List of Abbreviations

ACABQ	Advisory Committee on Administrative and Budgetary Questions
ASEAN	Association of Southeast Asian States
AU	African Union
CCA	Common Country Assessment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CLJAS	Criminal Law and Judicial Advisory Service, DPKO
CRC	Convention on the Rights of the Child
DAW	Division for the Advancement of Women
DDR	disarmament, demobilization and reintegration
DESA	Department of Economic and Social Affairs
DFS	Department of Field Support
DPA	Department of Political Affairs
DPET	Division of Policy, Evaluation and Training, DPKO
DPI	Department of Public Information
DPKO	Department of Peacekeeping Operations
DSRSG	Deputy Special Representative of the Secretary-General
ECOMOG	Economic Community of West African States Monitoring Group
ECOWAS	Economic Community of West African States
FAO	Food and Agricultural Organization
GFP	Global Focal Point
IANWGE	Inter-Agency Network on Women and Gender Equality
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICL	international criminal law
ICNA	Independent Comprehensive Needs Assessment
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDP	internally displaced person
IHL	international humanitarian law

IHRL	international human rights law
ILO	International Labour Organization
IMA	In-Mission Assessment
IMPP	Integrated Mission Planning Process
IMTF	Integrated Mission Task Force, DPKO
IMU	Information Management Unit
INSTRAW	International Research and Training Institute for the Advancement of Women
IOM	International Organization for Migration
IOT	Integrated Operational Team, DPKO
ISF	Integrated Strategic Framework
ITF	Integrated Task Force
ITS	Integrated Training Service, DPKO
JCSC	Justice and Corrections Standing Capacity
KFOR	Kosovo Force
MARA	monitoring, analysis and reporting arrangements
NGO	non-governmental organization
NJP	National Justice Programme
NPO	National Professional Officer
OAS	Organization for American States
ODIHR	Organization for Democratic Institutions and Human Rights
OHCHR	Office of the High Commissioner for Human Rights
OLA	Office of Legal Affairs
OMA	Office of Military Affairs, DPKO
OO	Office of Operations, DPKO
OROLSI	Office of Rule of Law and Security Institutions, DPKO
OSAGI	Office of the Special Adviser on Gender Issues and Advancement of Women
OSCE	Organization for Security and Cooperation in Europe
PBC	Peacebuilding Commission
PBF	Peacebuilding Fund
PBPS	Peacekeeping Best Practices Section, DPKO
PBSO	Peacebuilding Support Office
PCNA	Post-conflict Needs Assessment
PCWG	Protection Cluster Working Group
PD	Police Division
PJCM	Provincial Justice Coordination Mechanism

POC	protection of civilians
POC	Programme Oversight Committee
PRSP	Poverty Reduction Strategy Papers
PSC	Prosecution Support Cell
QIP	Quick Impact Project
RLU	Research and Liaison Unit
RoLCRG	Rule of Law Coordination and Resource Group
ROLSISO	Rule of Law Security Institutions Support Office
SA	Strategic Assessment
SPC	Standing Police Capacity
SPM	special political mission
SRSO	Special Representative of the Secretary-General
SSR	security sector reform
TAM	Technical Assessment Mission
TOR	terms of reference
UDHR	Universal Declaration of Human Rights
UNCT	United Nations Country Team
UNDEF	United Nations Democracy Fund
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFPA	United Nations Population Fund
UNGSC	United Nations Global Service Center
UNHCR	Office of the United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNIFEM	United Nations Development Fund for Women
UNMAS	Mine Action Service, DPKO
UNODC	United Nations Office on Drugs and Crime
UNPOL	United Nations Police
UN WOMEN	United Nations Entity for Gender Equality and the Empowerment of Women
UPR	Universal Periodic Review
WHO	World Health Organization
WPA	women protection adviser

## List of United Nations Peacekeeping Operations and Special Political Missions with Judicial Affairs Officers

BINUB	United Nations Integrated Office in Burundi (renamed BNUB January 2011)
BINUCA	United Nations Integrated Peace-building Office in the Central African Republic
BNUB	United Nations Office in Burundi
MINURCAT	United Nations Mission in the Central African Republic and Chad
MINUSTAH	United Nations Stabilization Mission in Haiti
MONUC	United Nations Organization Mission in the Democratic Republic of the Congo (renamed MONUSCO in July 2010)
MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of the Congo
UNAMA	United Nations Assistance Mission in Afghanistan
UNAMID	African-Union United Nations Hybrid Operation in Darfur
UNAMSIL	United Nations Mission in Sierra Leone (ended December 2005)
UNIOGBIS	United Nations Integrated Peacebuilding Office in Guinea-Bissau
UNIPSIL	United Nations Integrated Peacebuilding Office in Sierra Leone
UNMIK	United Nations Interim Administration Mission in Kosovo
UNMIL	United Nations Mission in Liberia
UNMIS	United Nations Mission in the Sudan (ended July 2011)
UNMISS	United Nations Mission in the Republic of South Sudan
UNMIT	United Nations Integrated Mission in Timor-Leste
UNOCI	United Nations Operation in Côte d'Ivoire
UNPOS	United Nations Political Office for Somalia
UNSMIL	United Nations Support Mission in Libya
UNSMIS	United Nations Supervision Mission in Syria
UNTAET	United Nations Transitional Administration in East Timor (ended May 2002)

## Introduction

This Handbook was developed by the Criminal Law and Judicial Advisory Service (CLJAS) of the Office of Rule of Law and Security Institutions (OROLSI) in the United Nations Department of Peacekeeping Operations (DPKO).

The aim of the Handbook is to provide guidance to judicial affairs officers in United Nations peacekeeping operations and at DPKO Headquarters on various substantive and operational aspects of their work, and to ensure coherence across missions as well as between the field and Headquarters. The Handbook will be widely distributed, particularly to colleagues working on the rule of law in the DPKO and throughout the United Nations. In addition, the Handbook will serve as an essential component of the Rule of Law Training Programme for Judicial Affairs Officers in United Nations Peacekeeping Operations, by capturing and providing further information on topics covered in the programme, identifying key points and recommending additional reference materials.

The Handbook emphasizes the importance of coordination between the various elements of the justice chain, particularly the police, justice and corrections. Such coordination is a fundamental principle that applies throughout a judicial affairs officer's work. Support and guidance specifically addressing corrections issues are provided by CLJAS through a variety of other tools. Support and guidance for police components are provided by the Police Division in OROLSI.

The Handbook is divided into three sections: Background Knowledge and Skills, Functions, and Substantive Areas. The Background Knowledge and Skills section reviews basic tenets of rule of law, the United Nations structure, international law, domestic justice systems, and diplomatic skills. The Functions section provides guidance on the activities in which judicial affairs officers regularly engage, such as advising mission leadership and national stakeholders, coordinating partners, and reporting. The Substantive Areas section includes specific substantive areas in which judicial affairs officers should actively assist national counterparts, such as the immediate effectiveness of the justice system, legislative reform and constitution-making, legal education and gender justice.

The Handbook is designed to be a practical and easy-to-use guide, addressing a broad range of topics and drawing on specific examples from the field. At the same time, it does not cover all of the issues on which judicial affairs officers may be engaged, and instead focuses on those which are often likely to be encountered by justice components.

The chapters of this Handbook correspond, for the most part, to the Instructor's Manual for the Rule of Law Training Programme for Judicial Affairs Officers in United Nations Peacekeeping Operations, also developed by CLJAS. The Instructor's Manual was endorsed by members of the United Nations Rule of Law and Coordination Resource Group in April 2011.

At the time of writing, this Handbook was awaiting translation into French. The Handbook is available on USB flash drive as well as on the DPKO internet and intranet sites.

# SECTION ONE

C'est un grand honneur de  
visiter le court Constitutionnel  
Teyère que, sous la présidence  
de Mme. Présidente Mborantsoo,  
le court fera un bon travail  
dans le domaine de  
Constitutionnel.

Kimpo  
Sébastien Gend  
Watson Amos  
1er Juillet, 2010

## BACKGROUND KNOWLEDGE AND SKILLS

This section provides an overview of core background knowledge and skills that a judicial affairs officer will rely on or refer to in the course of his or her daily work, starting from the principles that govern the work of justice components, as set out in the DPKO/DFS Policy on Justice Components in United Nations Peace Operations.



## CHAPTER 1

# RULE OF LAW IN PEACEKEEPING AND PRINCIPLES OF UNITED NATIONS RULE OF LAW ASSISTANCE

This chapter sets out the United Nations approach to rule of law, explains the principles that should guide the work of justice components, and articulates the link between rule of law and United Nations doctrine on other closely related concepts, such as protection of civilians. This chapter also describes many of the significant challenges to post-conflict rule of law development.

PRESIDENT OF THE INTERNATIONAL  
COURT OF JUSTICE

## 1. Introduction

A strong justice system can facilitate the maintenance of law and order and serve as a peaceful mechanism for resolving disputes, while preventing impunity for crimes committed during, as well as after, a conflict. As United Nations Secretary-General Ban Ki-Moon stated, “justice is the cornerstone of the rule of law, underpinning all efforts to achieve international peace and security”.<sup>1</sup> For this reason, the Security Council has mandated virtually all new peacekeeping operations established since 1999 to assist national actors in strengthening the rule of law. Within peace operations, such assistance is provided primarily by justice components working together with corrections, police, human rights and other mission components. Judicial affairs officers in justice components help host countries to strengthen or rebuild essential rule of law institutions, including courts, prosecutors’ offices and legal aid systems, as well as their legal and constitutional framework.

This chapter explores the nexus between the rule of law and the maintenance of peace and security; provides an overview of the common challenges to the rule of law in conflict and post-conflict contexts; and examines the implementation of the justice-related mandates of United Nations peacekeeping operations. This chapter also sets out the main principles governing United Nations peacekeeping operations as well as United Nations rule of law assistance, and the relevance of these principles to the work of judicial affairs officers in United Nations peacekeeping operations.

## 2. Definitions of Rule of Law and Justice

The definition of “rule of law” has been the subject of much debate. However, most people interpret the rule of law to mean that everyone is accountable under the law. In 2004, the Secretary-General defined the “rule of law” as follows:

A principle of governance, in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.<sup>2</sup>

While this definition is used by the United Nations Secretariat, it has not been endorsed by other principal organs of the United Nations, notably the General Assembly and the Security Council. The concept of the “rule of law” continues to be a topic of discussion among Member States in the Sixth Committee of the General Assembly.

In 2004, the Secretary-General also defined “justice” as follows:

<sup>1</sup> DPKO, *Justice Update*, Vol. 2 (2011), page 1.

<sup>2</sup> *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies* (2004), S/2004/616, para. 6.

An ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large. It is a concept rooted in all national cultures and traditions and, while its administration usually implies formal judicial mechanisms, traditional dispute resolution mechanisms are equally relevant.<sup>3</sup>

This definition reflects the notions of both substantive justice (i.e. the aims and outcomes of justice) and procedural justice (i.e. the process by which those aims and outcomes are achieved). With regard to substantive justice, the definition above suggests that the outcome or aims of justice are the protection and vindication of rights and the punishment and prevention of wrongs. With regard to procedural justice, the definition focuses not only on the outcome but the process by which the outcome came about. This definition requires not only “fairness” in the administration of justice vis-à-vis the accused person in criminal proceedings, but also an overall sense of procedural justice for all who come into contact with the justice system. Moreover, the definition requires that the “rights of the accused” be regarded as well as the “interests of victims” and the “well-being of society at large”. The rights of the accused include fair trial and due process rights as reflected in international human rights norms and standards. Finally, the definition recognizes that “justice” may be administered by formal judicial mechanisms (e.g. the courts) or traditional dispute resolution mechanisms.

## 3. Challenges to Rule of Law in Conflict and Post-conflict Contexts

In many conflict and post-conflict settings, the rule of law has been weakened by conflict or was weak even before the conflict. In such circumstances, national actors face numerous challenges and obstacles to strengthening the rule of law. Although each situation is different, common challenges include the following:<sup>4</sup>

- **Loss of material, institutional and human capacity**

Courts, police stations, prisons and other public institutions may have been destroyed during the conflict. In addition, legal records and legal publications such as official gazettes may have been damaged or lost. Legal and judicial personnel may also have fled or died in the conflict and legal education and training institutes may be non-existent. As a result of the conflict, there may be no financial or other resources in the country to support the courts, police, prisons and other institutions involved in the implementation of rule of law activities. Even where a substantial human resource base remains after the conflict, there may be little incentive to engage in public sector work, and the judicial and legal professions may be perceived to be dominated by members of an oppressive group.

<sup>3</sup> *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies* (2004), S/2004/616, para. 7.

<sup>4</sup> DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), pages 1–4.

- **Inadequate legal framework**

The legal framework may contain gaps and contradictions, and may be inconsistent with international human rights standards. After years of conflict, there may be confusion regarding the applicable law, and misconceptions as to what the law provides. Confusion may also exist as to the State's obligations under international law, including compliance with international humanitarian law during the emergence from conflict.

- **Insecure environment**

Even after the general cessation of hostilities, residual fighting and political power struggles may continue, leading to ongoing violence and criminality. Organized crime and illicit "war economies" may have flourished during the conflict, and sophisticated criminal networks may operate within and outside the country. The capacity of host-state police and other law enforcement authorities to ensure law and order is likely to be highly limited, while military or security forces exercising police powers may do so without judicial or civilian oversight.

- **Human rights violations and a culture of impunity**

Serious and massive violations of international human rights and humanitarian law may have been committed during the conflict, and ongoing violations may continue even after the signing of the peace agreement. Large segments of the population may have been displaced, leading to unresolved property disputes. A sustainable peace will often require that perpetrators of crimes be held accountable. At the same time, investigating and prosecuting perpetrators can be a delicate and complex endeavour, particularly where alleged perpetrators are in positions of power. All parties to the conflict may be responsible for violations, and may block criminal justice reform.

- **Threats to judicial independence and impartiality**

In conflict and post-conflict settings, members of the executive branch, other powerful social actors or persons involved in organized crime may exercise undue influence over judges and prosecutors. Furthermore, low or unpaid salaries may encourage corruption and bribery. If the conflict was linked to ethnic, religious, political or other affiliations, the post-conflict justice system may suffer from bias and revenge along similar lines. Disciplinary and oversight mechanisms for legal and judicial actors may be non-existent.

- **Distrust in existing structures and root causes of conflict**

Given the climate of impunity, corruption and nepotism, there may be little or no public confidence in the justice system. This may be compounded by perceptions that the judiciary is dominated by members of an oppressive group. Legislative, judicial and law enforcement officials may have committed human rights violations, and the failure of the justice system to address those violations may have been a root cause of the conflict. As a result, "mob justice" and reliance on physical vio-

lence or other means rather than on legal mechanisms for dispute resolution may be common.

- **Absence of a "rule of law culture"**

As reflected in its definition, the "rule of law" requires accountability to the law, confidence in state institutions and adherence to international human rights norms and standards. However, societies emerging from conflict may be accustomed to violence and have little experience with non-violent mechanisms for resolving disputes. There may also be cultural or social factors that impede the establishment of democratic institutions that protect human rights. Finally, local actors may believe that strong rule of law institutions will threaten their own interests and status. They may thus lack the necessary political will for justice reform, and may even obstruct efforts aimed at establishing independent rule of law institutions.

## 4. Rule of Law and Peacekeeping

### Rule of Law and "Peace and Security"

Under the United Nations Charter, the United Nations Security Council has primary responsibility for the maintenance of international peace and security. In fulfilling this responsibility, the Security Council may adopt a range of measures including the establishment of a United Nations peacekeeping operation based on Chapters VI, VII and/or VIII of the United Nations Charter.<sup>5</sup> While Chapter VI deals with the "Pacific Settlement of Disputes", Chapter VII contains provisions related to "Action with Respect to the Peace, Breaches of the Peace and Acts of Aggression". Chapter VIII of the Charter also provides for the involvement of regional arrangements and agencies in the maintenance of international peace and security.

The first United Nations peacekeeping operation was established in 1948 when United Nations military observers were deployed to the Middle East to monitor the Armistice Agreement between Israel and its Arab neighbours. As of July 2011, there have been a total of 66 United Nations peacekeeping operations around the world. Over the years, the strategic context for United Nations peacekeeping has changed dramatically, and peacekeeping operations have transformed from missions involving strictly military tasks, to complex "multidimensional" missions. According to the *United Nations Peacekeeping Operations Principles and Guidelines* ("Capstone Doctrine"), the core functions of a multidimensional peacekeeping operation are to:

- create a secure and stable environment while strengthening the State's ability to provide security, with full respect for the rule of law and human rights;
- facilitate the political process by promoting dialogue and reconciliation and supporting the establishment of legitimate and effective institutions of governance; and

<sup>5</sup> DPKO, *United Nations Peacekeeping Operations Principles and Guidelines* ("Capstone Doctrine") (2008), page 13.

- provide a framework for ensuring that all United Nations and other international actors pursue their activities at the country-level in a coherent and coordinated manner.<sup>6</sup>



Q & A: What are the principles of United Nations peacekeeping?

There are three key principles which underlie United Nations peacekeeping:<sup>7</sup>

- **Consent**  
United Nations peacekeeping operations are deployed with the consent of the main parties to the conflict. This requires a commitment by the parties to a political process and their acceptance of a peacekeeping operation mandated to support that process. In the implementation of its mandate, a United Nations peacekeeping operation must work continuously to ensure that it does not lose the consent of the main parties, while ensuring that the peace process moves forward. This requires that all peacekeeping personnel have a thorough understanding of the history and prevailing customs and culture in the mission area, as well as the capacity to assess the evolving interests and motivation of the parties.
- **Impartiality**  
United Nations peacekeeping operations must implement their mandates without favour or prejudice to any party. Impartiality is crucial to maintaining the consent and cooperation of the main parties, but should not be confused with neutrality or inactivity. United Nations peacekeepers should be impartial in their dealings with the parties to the conflict, but not neutral in the execution of their mandate. The need for even-handedness towards the parties should not become an excuse for inaction in the face of behaviour that clearly works against the peace process.
- **Minimum use of force**  
United Nations peacekeeping operations may use force to defend themselves and their mandate. They may also use force to preserve the peace process and protect civilians. The use of force should always be calibrated in a precise, proportional and appropriate manner.

Peacekeeping operations now undertake a wide variety of complex tasks, from helping to build sustainable institutions of governance, to human rights monitoring, security

<sup>6</sup> DPKO, *United Nations Peacekeeping Operations Principles and Guidelines* ("Capstone Doctrine") (2008), page 23.

<sup>7</sup> DPKO, *United Nations Peacekeeping Operations Principles and Guidelines* ("Capstone Doctrine") (2008), pages 31–43. See also DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), pages 5–6.

sector reform, the disarmament, demobilization and reintegration of former combatants, as well as strengthening law enforcement, justice and corrections institutions and the rule of law more broadly. Since 1999, the United Nations Security Council has mandated virtually all new peacekeeping operations to support host-country authorities in strengthening the rule of law, including through support to their justice systems.

As stated by the Secretary-General, "the consolidation of peace in the immediate post-conflict period, as well as the maintenance of peace in the long term cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice."<sup>8</sup> The Secretary-General has also stated that security (and security sector reform) can only be achieved within a broader framework of the rule of law and respect for human rights.<sup>9</sup>

Because a functioning criminal justice system is critical for ensuring law and order, preventing impunity and encouraging national recovery, the justice-related work carried out by most missions will be focused primarily (although not exclusively) on criminal law issues. In addition, United Nations peacekeeping operations will engage in justice-related issues that were highlighted in peace agreements and/or that were underlying causes of the conflict, or that are otherwise essential to the successful implementation of the peace process.

### Rule of Law and Peacebuilding

The work of United Nations peacekeeping operations in strengthening the rule of law in the immediate aftermath of conflict is an important part of "early peacebuilding" efforts and a basis for long-term peacebuilding efforts, including economic development. The Secretary-General has stated that "the most urgent and important peacebuilding objectives" in the early post-conflict period are "establishing security, building confidence in a political process, delivering initial peace dividends and expanding core national capacity".<sup>10</sup> Related to these "core objectives", the Secretary-General has identified several priority areas, including the strengthening of the rule of law.<sup>11</sup>

United Nations peacekeeping operations, particularly integrated missions, undertake critical "early peacebuilding" tasks as part of the United Nations system's broad support to peacebuilding. However, peacekeepers are not long-term peacebuilders. It is necessary to plan and implement sustainable and effective transitions from peacekeepers engaged in early peacebuilding tasks to national and development partners responsible for long-term peacebuilding.<sup>12</sup>

<sup>8</sup> *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies* (2004), S/2004/616, para. 2.

<sup>9</sup> *Report of the Secretary-General on Securing Peace and Development: The Role of the United Nations in Supporting Security Sector Reform* (2008), A/62/659 – S/2008/39, paras. 1–2.

<sup>10</sup> *Report of the Secretary-General on Peacebuilding in the Immediate Aftermath of Conflict* (2009), A/63/881 – S/2009/304, para. 15.

<sup>11</sup> *Report of the Secretary-General on Peacebuilding in the Immediate Aftermath of Conflict* (2009), A/63/881 – S/2009/304, para. 17.

<sup>12</sup> *Report of the Secretary-General on the Implementation of the Recommendations of the Special Committee on Peacekeeping Operations* (2009), A/64/573, paras. 29–35.



### Q & A: What is the “Early Peacebuilding Strategy”?

In 2011, DPKO (Department of Peacekeeping Operations) and DFS (Department of Field Support) adopted the “Early Peacebuilding Strategy”.<sup>13</sup> This strategy provides guidance to United Nations peacekeepers on prioritizing, sequencing and planning critical early peacebuilding tasks. Priority initiatives are activities that: 1) advance the peace process or political objectives of a mission; and 2) ensure security (Track I) and/or lay the foundation for longer term institution building (Track II).<sup>14</sup>

‘Judicial affairs officers can assist national actors through such Track I activities as the establishment of appropriate formal and/or informal justice mechanisms to resolve disputes that could significantly hinder the peace process; the immediate functioning of the criminal justice system, particularly with regards to serious crimes; the establishment of special chambers to adjudicate serious crimes; the deployment of emergency mobile courts to areas where justice institutions are absent; and the standardization of basic procedures and practices (for example, for recording arrests; serving court documents; and executing judicial decisions).’<sup>15</sup>

Judicial affairs officers may also undertake Track II activities such as assisting in ‘amending or drafting laws to ensure compatibility with international norms and standards or to enable the justice system to address serious crimes’. They may also ‘support the constitution-making process as indicated in the peace agreement; help to establish or develop law schools; ensure appropriate linkages between informal or customary justice systems and the formal system; enhance the independence of the judiciary ...; and promote the integrity and accountability of the legal profession’.<sup>16</sup>

### Rule of Law and “Protection of Civilians”

In 1999, the Security Council authorized the first “protection of civilians” (POC) mandate when it tasked the United Nations Mission in Sierra Leone (UNAMSIL) to “take necessary action ... within its capabilities and areas of deployment to afford protection to civilians under imminent threat of physical violence, taking into account the responsibilities of the Government of Sierra Leone and ECOMOG [Economic Community of West African States Monitoring Group]”.<sup>17</sup> Since then, the Security Council has mandated ten peacekeeping operations with POC-related responsibilities.

<sup>13</sup> DPKO/DFS, *The Contribution of United Nations Peacekeeping to Early Peacebuilding: A DPKO/DFS Strategy for Peacekeepers* (2011).

<sup>14</sup> For further guidance, see the OROLSI *Planning Toolkit* (2011).

<sup>15</sup> DPKO/DFS, *The Contribution of United Nations Peacekeeping to Early Peacebuilding: A DPKO/DFS Strategy for Peacekeepers* (2011), pages 16–17.

<sup>16</sup> DPKO/DFS, *The Contribution of United Nations Peacekeeping to Early Peacebuilding: A DPKO/DFS Strategy for Peacekeepers* (2011), pages 16–17.

<sup>17</sup> Security Council resolution 1270 (1999), operative para. 14.

DPKO and DFS are in the process of developing a conceptual framework for POC.<sup>18</sup> As currently envisioned, this framework includes three “tiers”:

- **Protection through political process**

This is the overarching mandate to support the implementation of a peace agreement, or an existing political process, in the country in which it is deployed;

- **Providing protection from physical violence**

This is the efforts to prevent, deter, and if necessary, respond to situations in which civilians are under imminent threat of physical violence, including through increased police and military activities and heightened political engagement;

- **Establishing a protective environment**

This is the support for an environment which enhances the safety and protects the rights of civilians, through the promotion of legal protection; facilitation of humanitarian assistance and advocacy; and support to national institutions.

The work of judicial affairs officers is most relevant and crucial to the third tier of the POC framework. This tier builds on international human rights, humanitarian and refugee law to support national authorities in their efforts to provide a protective environment. In this context, judicial affairs officers can help ensure that security sector and other actors operate within the law and that host-state police and other criminal justice actors have the capacity to support POC efforts.



### Q & A: What is the difference between a “United Nations peace operation” and a “United Nations peacekeeping operation”?

The 2008 Capstone Doctrine defines the nature, scope and core business of contemporary peacekeeping operations.

- **“Peace operations” are defined by the Capstone Doctrine as “field operations deployed to prevent, manage and/or resolve violent conflicts or reduce the risk of their recurrence”.**<sup>19</sup>
- **“United Nations peace operations” are defined by the Capstone Doctrine as “peace operations authorized by the United Nations Security Council and conducted under the direction of the United Nations Secretary-General”.**<sup>20</sup> This would

<sup>18</sup> DPKO/DFS, *Operational Concept on the Protection of Civilians in United Nations Peacekeeping Operations* (2010).

<sup>19</sup> DPKO, *United Nations Peacekeeping Operations Principles and Guidelines* (“Capstone Doctrine”) (2008), page 98.

<sup>20</sup> DPKO, *United Nations Peacekeeping Operations Principles and Guidelines* (“Capstone Doctrine”) (2008), page 99. It should be noted that the DPKO/DFS *Policy on Justice Components in United Nations Peace Operations* (2009) defines United Nations peace operations as “peacekeeping operations and special political missions managed by DPKO” ( para. 1).

include peacekeeping operations as well as special political missions (SPMs) and peacebuilding offices.

- “United Nations peacekeeping operations” are defined by the Capstone Doctrine as peace operations “authorized by the Security Council, conducted under the direction of the United Nations Secretary-General, and planned, managed, directed and supported by DPKO and DFS”.<sup>21</sup> Not all DPKO-led operations are peacekeeping operations. DPKO has been called upon to manage special political missions (including UNAMA).<sup>22</sup>

## 5. Justice Mandates of Peacekeeping Operations

The mandate of a peacekeeping operation is set out in the relevant Security Council resolution. With regard to the rule of law, peacekeeping operations are typically given broad mandates to assist the host country in rebuilding and strengthening their justice institutions. In some cases, mandates include more specific responsibilities. For example, the mandate for the United Nations Stabilization Mission in Haiti (MINUSTAH) includes assisting in reducing pre-trial detention rates, while the mandate for the African Union–United Nations Hybrid Operation in Darfur (UNAMID) includes assisting in addressing property and land disputes.

There are two broad categories of peacekeeping mandates: 1) executive mandates, in which the peacekeeping operation is authorized to undertake executive (including legislative, executive and judicial) functions; and 2) non-executive mandates, in which the peacekeeping operation is tasked with supporting national authorities to strengthen their judicial and legal systems.

### Executive Mandates

To date, there have only been two peacekeeping operations which have had executive mandates with respect to justice. Acting under Chapter VII of the United Nations Charter, the Security Council established transitional administration missions in Kosovo and Timor-Leste (East Timor).<sup>23</sup> In the “emergency phase” of the United Nations Interim Administration Mission in Kosovo (UNMIK), which was established under Security Council resolution 1244 (1999), rule of law functions were carried out primarily by the international security presence, the Kosovo Force (KFOR). As the civilian presence in Kosovo, UNMIK was mandated to perform an array of complex tasks including “performing basic civilian administrative functions where and as long as required” and “organizing and overseeing the development of provisional institutions for democratic and

<sup>21</sup> DPKO, *United Nations Peacekeeping Operations Principles and Guidelines* (“Capstone Doctrine”) (2008), page 8.

<sup>22</sup> UNAMA: United Nations Assistance Mission in Afghanistan.

<sup>23</sup> In addition to UNMIK and the United Nations Transitional Administration in East Timor (UNTAET) (and the subsequent United Nations Integrated Mission in Timor-Leste, UNMIT), the United Nations Transitional Authority in Cambodia (UNTAC) also had some executive powers as it was delegated “the powers necessary” to ensure the implementation of the Paris Peace Agreements. Its mandate included human rights, maintenance of law and order and civil administration. See Final Act of the Paris Conference on Cambodia (1991), annex 1.

autonomous self-government pending a political settlement”. With regard to the rule of law, the United Nations passed new laws; deployed international judges and prosecutors to work in the domestic justice system; created a system for judicial appointments; built detention facilities; and addressed prison staffing.

Four months after the establishment of UNMIK, the Security Council established a similar transitional administration mission in Timor-Leste (UNTAET). Like UNMIK, UNTAET was empowered to exercise all executive and legislative powers in the territory pursuant to Security Council resolution 1272 (1999). The resolution mandated UNTAET to “provide security and maintain law and order, throughout the territory” and “establish an effective administration”. In furtherance of that mandate, UNTAET created new laws; recruited judges, prosecutors and defence counsel; carried out institutional reforms; established mobile courts; deployed international judges, prosecutors and defence counsel; led efforts to prosecute serious crimes through the creation of Special Panels; and built prisons. The United Nations Police (UNPOL) assumed the full functions of the national police force.

### Non-executive Mandates

Unlike UNMIK and UNTAET, most peacekeeping operations have non-executive mandates. Examples of the rule of law components of mandates include:

- Under Security Council resolution 1925 (2010), MONUSCO (United Nations Organization Stabilization Mission in the Democratic Republic of the Congo) is mandated to “develop and implement, in close consultation with the Congolese authorities and in accordance with the Congolese strategy for justice reform, a multi-year joint United Nations justice support programme in order to develop the criminal justice chain, the police, the judiciary and prisons in conflict-affected areas and a strategic programmatic support at the central level in Kinshasa”.
- Under Security Council resolution 1739 (2007), UNOCI (United Nations Operation in Côte d’Ivoire) is mandated to “assist the Government of Côte d’Ivoire in conjunction with the African Union, ECOWAS<sup>24</sup> and other international organizations in re-establishing the authority of the judiciary and the rule of law throughout Côte d’Ivoire”.
- Under Security Council resolution 1927 (2010), MINUSTAH is mandated to “provide logistical support and technical expertise, within available means, to assist the Government of Haiti, as requested, to continue operations to build the capacity of its rule of law institutions at the national and local level”.
- Under Security Council resolution 1769 (2007), the mandate of UNAMID is to “assist all stakeholders in promoting the rule of law, including through support to the strengthening of an independent judiciary and professional corrections system and combating impunity, working in close cooperation with the United Nations Country Team ... to assist in addressing property and land disputes and compensation related to the Darfur Peace Agreement and any subsequent agreement”.

<sup>24</sup> The Economic Community of West African States.

In comparison to other United Nations entities engaged in rule of law assistance, United Nations peacekeeping operations have a number of comparative advantages in providing rule of law assistance to host countries emerging from conflict. These include: 1) legitimacy derived from a Security Council mandate; 2) access to host-country authorities at the highest levels; 3) the ability to deploy rapidly to the host country, including through the Justice and Corrections Standing Capacity and the Standing Police Capacity (discussed in Chapter 2); 4) large numbers of personnel; 5) security support, primarily through military and police personnel; and 6) logistical capacity (including air transport) and access to remote areas.

## 6. Principles of United Nations Rule of Law Assistance

When providing rule of law assistance, the United Nations should base its efforts on certain key principles. These principles are grounded in the fundamental values and objectives of the United Nations and are aimed at improving the efficiency and effectiveness of rule of law assistance; enabling the United Nations to respond to the needs of countries in a flexible manner, instead of providing one-size-fits-all formulas and imposing foreign models of justice; and addressing some of the challenges of implementing justice mandates, such as the need to deliver assistance in a coordinated manner.

The principles of United Nations rule of law assistance are elaborated in the *Guidance Note of the Secretary-General on the United Nations Approach to Rule of Law Assistance* (2008);<sup>25</sup> the *Policy on Justice Components in United Nations Peace Operations* (2009);<sup>26</sup> the *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006);<sup>27</sup> and the *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies* (2004).<sup>28</sup>

### Principle 1: Base assistance on international norms and standards

Justice components should ensure that their efforts to help strengthen justice systems are based on international standards which reflect international human rights law, international humanitarian law, international criminal law and international refugee law.<sup>29</sup> United Nations treaties, declarations, guidelines and bodies of principles represent universally applicable and accepted standards. In contrast, exported justice models might reflect the individual interests or experience of donors and assistance providers rather than the best interests or needs of host countries.

<sup>25</sup> *Guidance Note of the Secretary-General on the United Nations Approach to Rule of Law Assistance* (2008), pages 2–4.

<sup>26</sup> DPKO/DFS, *Policy on Justice Components in United Nations Peace Operations* (2009), para. 8.

<sup>27</sup> DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), pages 6–8.

<sup>28</sup> *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies* (2004), S/2004/616.

<sup>29</sup> *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies* (2004), S/2004/616, para. 9.

Examples of steps judicial affairs officers can take to base assistance on international norms and standards include:

- conducting assessments of the rule of law in the host country and determining whether legislation and activities have been drafted and implemented in conformity with applicable international standards;
- refraining from establishing or participating in any tribunal that allows for capital punishment; and
- refraining from endorsing peace agreements that allow for amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights.

### Principle 2: Advance gender justice and human rights

Judicial affairs officers should ensure that the different experiences, needs and priorities of women, men, girls and boys are taken into account when developing and implementing a rule of law approach. Particular efforts are needed in contexts where sexual and gender-based violence is (or was) wide-spread, systematic and/or perpetrated as a tactic of war. In addition, the United Nations must not overlook the entitlements that have been established under international law for groups that may be subjected to marginalization and discrimination in the country, such as minorities, refugees and displaced persons.

Examples of steps judicial affairs officers can take to advance gender justice and human rights include:

- avoiding solutions to rule of law challenges that serve to advance the rights of dominant social groups while leaving others behind;
- assessing whether legislation and activities have been drafted and implemented to advance gender justice and human rights; and
- promoting the enactment of laws and policies to protect victims of sexual and gender-based violence, and building capacity to enable the prosecution of alleged perpetrators.

### Principle 3: Ensure a coordinated, coherent and comprehensive approach with effective partnerships

United Nations rule of law assistance is most effective if it draws on a wide range of expertise and perspectives from within the United Nations system and outside it. Experience and best practices confirm that a comprehensive approach that supports all aspects of rule of law is necessary, as a piecemeal or donor-driven approach to rule of law may bring results that are superficial or short term, but cannot be sustained in a post-conflict environment. Furthermore, without coordination, initiatives may be developed which are duplicative rather than complementary. At the same time, rule of law assistance should be provided in a measured, realistic and phased manner.

Judicial affairs officers should therefore work closely with relevant actors within and outside the United Nations in order to develop and implement a coordinated, coherent

and comprehensive strategy for strengthening the rule of law. These actors include other mission components (particularly the political, corrections, police, human rights, security sector reform (SSR), civil affairs, gender, child protection and military components); United Nations agencies and programmes; and national and international stakeholders.

Examples of steps judicial affairs officers can take to ensure a coordinated, coherent and comprehensive approach with effective partnerships include:

- conducting joint and thorough assessments with the full and meaningful participation of international and national stakeholders to determine rule of law needs and challenges;
- supporting the development of a comprehensive rule of law strategy based upon the results of the assessment;
- developing joint United Nations rule of law programmes;
- assigning accountabilities and implementation responsibilities among partners;
- building partnerships with United Nations and non-United Nations stakeholders;
- implementing projects together with national counterparts; and
- playing a support role to national actors.

#### **Principle 4: Ensure national ownership and support national reform constituencies**

Programmes which are imposed from the outside, or which are developed and executed largely by international actors are unlikely to succeed or be sustainable in the long term. International actors, including judicial affairs officers, should work with, rather than substitute for, national counterparts. This requires that judicial affairs officers identify, support and empower national reform constituencies, including governmental officials, traditional leaders, women, minorities, refugees and displaced persons, other marginalized groups and civil society. The ultimate outcome of the process is to help national actors develop their own vision, agenda and approaches to rule of law reforms and programmes.<sup>30</sup> In this regard, it is important that judicial affairs officers have the relevant language skills to communicate with national counterparts. It is also important that justice components include not only international judicial affairs officers but also National Professional Officers (NPOs).

Examples of steps judicial affairs officers can take to ensure national ownership and support national reform constituencies include:

- being aware of key legal, political, historical, cultural and social issues relevant to the host country;
- identifying reform constituencies;
- facilitating the processes which enable dialogue among national stakeholders;

<sup>30</sup> *Guidance Note of the Secretary-General on the United Nations Approach to Rule of Law Assistance* (2008), page 4, para. 6.

- meeting with national stakeholders to develop their own vision and approaches to reform; and
- supporting public consultations, and public understanding and support for reform.

#### **Principle 5: Base assistance on the unique country context**

Judicial affairs officers should carefully tailor their programmes and activities to the specific needs, traditions and cultures of the host country, as identified by national actors. Support for justice systems should take into account the nature and condition of a country's justice systems (both formal and informal). Assistance should also be sensitive to, and supportive of, transitional justice efforts. This principle emphasizes the need to thoroughly assess national needs as well as the nature and causes of conflict. In addition, this principle reflects the view that support for justice systems should avoid a one-size-fits-all approach which fails to take into account the unique issues in each host country.

Examples of steps judicial affairs officers can take to base assistance on the unique country context include:<sup>31</sup>

- conducting an assessment of the needs of the justice system in the host country;
- identifying similarities and commonalities between international law and local traditions and religions; and
- carrying out an analysis of the factors giving rise to the need for rule of law assistance and designing assistance accordingly.

#### **Principle 6: Address rule of law needs at the political level**

The successful implementation of justice reforms requires not only technical expertise, but also political will and strategic vision. When practitioners see everything exclusively as a legal problem with a corresponding legal solution, they have failed to appreciate how politics and economics overlap with law and impact legal reform. Rule of law practitioners will be most effective if they become astute at gauging how politics will affect their work. In order for rule of law assistance measures to succeed, there needs to be political support. So-called "spoilers" can greatly diminish the effectiveness of rule of law assistance, and in some cases, can bring the assistance to a halt or render it ineffective. Within the United Nations, senior United Nations representatives in the field need to understand the political nature of strengthening the rule of law, and dedicate attention to supporting both the political and institutional aspects of rule of law development.

Examples of steps judicial affairs officers can take to address rule of law needs at the political level include:

- advising the Special Representative of the Secretary-General (SRSG) and his or her deputy and other members of the mission's senior management group on a regular

<sup>31</sup> *Guidance Note of the Secretary-General on United Nations Approach to Rule of Law Assistance* (2008), page 3, para. 3.



basis about the political nature of justice reform and the implications of the mission's political strategy for strengthening justice systems;

- providing the SRSG with an analysis of the rule of law aspects of emerging political issues (e.g. the arrest of political figures, the dismissal of members of the high court); and
- ensuring that justice is discussed at the highest level of the national leadership by requesting senior mission leadership to raise justice issues with national counterparts.

### Principle 7: Manage expectations

The authorities and general population of host countries are likely to have high and often unrealistic expectations about the extent of the support that a peace operation can provide, such as financial and material resources to rebuild courts. In light of scarce resources, it is important that judicial affairs officers avoid making predictions or promises about future assistance. In addition, national counterparts may become weary of assessments, particularly when various agencies duplicate assessments and the assessments do not appear to quickly lead to support.<sup>32</sup>

Examples of steps judicial affairs officers can take to manage expectations include:

- being clear and realistic about the fact that mission resources are limited, and avoiding making promises about future assistance until it is definite; and
- explaining the mandate of the mission and the sources of funding (as projected in cost estimates and approved by United Nations legislative bodies or donors), as well as what the mission is not mandated or funded to do.

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<sup>32</sup> DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), page 7.

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## CHAPTER 2

# UNITED NATIONS STRUCTURE AND THE CRIMINAL LAW AND JUDICIAL ADVISORY SERVICE

This chapter begins with a basic overview of the United Nations system (highlighting the main entities with rule of law mandates) and, then, narrows its scope to focus on DPKO Headquarters and field justice entities that address rule of law issues. It concludes with a description of the role of the Criminal Law and Judicial Advisory Service (CLJAS), within the Office of Rule of Law and Security Institutions (OROLSI) of DPKO, which serves as the principal link at Headquarters for justice and corrections components in field missions. This chapter also outlines the main Headquarters coordination mechanisms. These mechanisms have recently undergone an intensive process of review and revision in order to improve support to the field, in particular through the establishment of the DPKO/UNDP Global Focal Point arrangement. CLJAS will provide regular updates to judicial affairs officers in the field on these developments as and when they occur.

## 1. Introduction

The United Nations is a large and complex organization, comprising many components and sub-components. While judicial affairs officers are more likely to engage with some United Nations entities than others, it is useful to have a basic understanding of the organizational structure of the United Nations system, particularly the Department of Peacekeeping Operations (DPKO).

This chapter provides a brief overview of the United Nations structure, including the mandates of the key United Nations entities working on the rule of law. It also introduces several core concepts and mechanisms relating to the coordination of United Nations rule of law assistance, including the “lead entity” concept, the Rule of Law Coordination and Resource Group and the joint DPKO/UNDP Global Focal Point for the police, justice and corrections areas in the rule of law established in September 2012.

Approaches to the coordination of rule of law assistance at the United Nations will continue to evolve, both at Headquarters and in the field. Further updates on developments in coordination mechanisms at Headquarters will be provided to justice components in the field by the Criminal Law and Judicial Advisory Service (CLJAS) in the Office of Rule of Law and Security Institutions (OROLSI).

Finally, the chapter explains the role and functions of CLJAS and its relationship to justice components of United Nations peacekeeping operations.

## 2. Structure of the United Nations System

Note: See chart on page 35. To view this chart in greater magnification, go to [www.un.org/en/aboutun/structure/pdfs/un\\_system\\_chart\\_colour\\_sm.pdf](http://www.un.org/en/aboutun/structure/pdfs/un_system_chart_colour_sm.pdf).

### Principal Organs

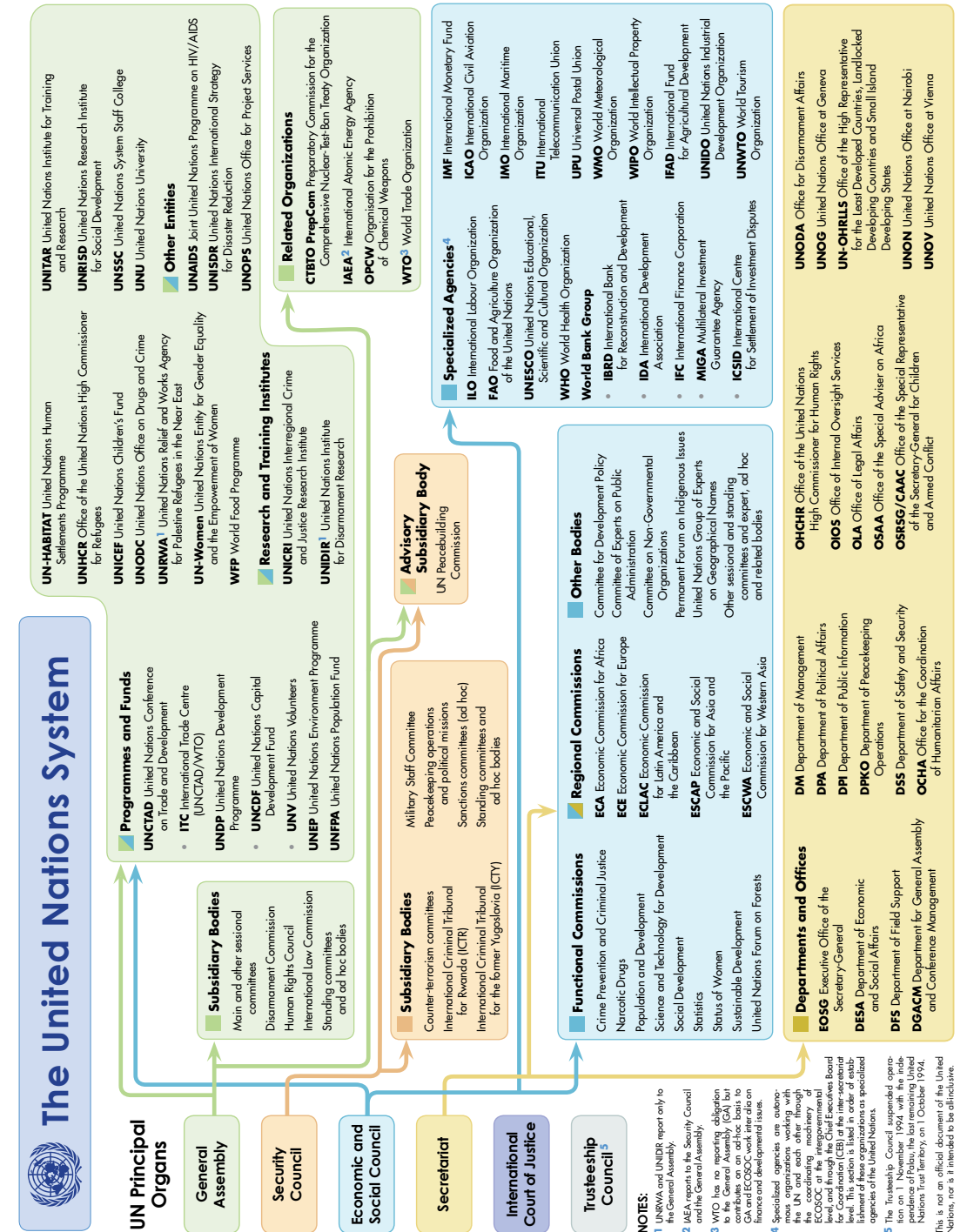
The United Nations is made up of the following six principal organs:

- Trusteeship Council**

The Trusteeship Council suspended operations in November 1994, with the independence of Palau, the last remaining United Nations trust territory.

- Security Council**

The Security Council is composed of five permanent members (China, France, Russia, United Kingdom and the United States) and ten non-permanent members elected for two years by the General Assembly. Each member has a vote and each permanent member can veto any proposed resolution. Decisions need the affirmative votes of nine members. The Security Council is primarily responsible for the maintenance of international peace and security. It may investigate any dispute, or situation that might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security. The mandates of United Nations peace operations are determined by the Security Council (though the General As-



sembly also has the authority to do this, invoked only once in UN peacekeeping history). Subsidiary bodies of the Security Council include peacekeeping operations as well as the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda (covered in Chapter 3 on international law).

- **General Assembly**

The General Assembly is the main deliberative, policymaking and representative organ of the United Nations established under the United Nations Charter. It comprises representatives of all Member States, each with one vote. The General Assembly plays a significant role in the process of standard-setting and the codification of international law and assists in the realization of human rights and fundamental freedoms. Subsidiary bodies of the General Assembly include six Main Committees, the Special Committee on Peacekeeping Operations (C34), the Advisory Committee on Administrative and Budgetary Questions (ACABQ) and the Human Rights Council, as well as programmes and funds such as the United Nations Children's Fund (UNICEF) and United Nations Development Programme (UNDP), and other entities such as the Office of the United Nations High Commissioner for Refugees (UNHCR).

- The Main Committees include the First Committee (Disarmament and International Security Committee), the Second Committee (Economic and Financial Committee), the Third Committee (Social, Humanitarian and Cultural Committee), the Fourth Committee (Special Political and Decolonization Committee), the Fifth Committee (Administrative and Budgetary Committee) and the Sixth Committee (Legal Committee).
- The C34 reports to the General Assembly through the Fourth Committee. The C34 comprises 144 Member States, mostly past or current contributors of peacekeeping operations. Thirteen other Member States, intergovernmental organizations and entities, including the European Community, the International Committee of the Red Cross (ICRC) and the International Criminal Police Organization (Interpol), participate as observers.
- The ACABQ consists of 16 members appointed by the General Assembly in their individual capacity. The major functions of the ACABQ include examining and reporting on the budget submitted by the Secretary-General to the General Assembly and advising the General Assembly (through the Fifth Committee) concerning any administrative and budgetary matters referred to it.
- The Human Rights Council, covered in greater detail in Chapter 3 on international law, is an intergovernmental body within the United Nations system made up of 47 Member States responsible for strengthening the promotion and protection of human rights around the globe. The Council was created by the General Assembly in 2006 with the main purpose of addressing situations of human rights violations and making recommendations on them.

- **Economic and Social Council**

The Economic and Social Council coordinates the economic, social and related work of the United Nations, including specialized agencies and functional and regional

commissions. It serves as the central forum for discussing these issues, and for formulating policy recommendations addressed to Member States and the United Nations system. It is responsible for: 1) promoting higher standards of living, full employment, and economic and social progress; 2) identifying solutions to international economic, social and health problems; 3) facilitating international cultural and educational cooperation; and 4) encouraging universal respect for human rights and fundamental freedoms. It is also empowered to call international conferences and prepare draft conventions for submission to the General Assembly on matters falling within its competence. Like the General Assembly, the Economic and Social Council can pass resolutions and adopt non-binding principles including on matters relating to criminal justice (e.g. Procedures for the Effective Implementation of the Standard Minimum Rules for the Treatment of Prisoners). The Economic and Social Council also has a number of subsidiary bodies including the Commission on Crime Prevention and Criminal Justice, the Commission on the Status of Women and the Commission on Narcotic Drugs.

- Specialized agencies and related organizations are autonomous bodies linked to the United Nations by agreement concluded pursuant to the United Nations Charter. Among these are the World Health Organization (WHO), United Nations Educational, Scientific and Cultural Organization (UNESCO), Food and Agricultural Organization (FAO) and International Labour Organization (ILO).

- **International Court of Justice**

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. Its role is to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies. The Court's cases cover a wide range of issues of international law, including territorial and maritime delimitation, environmental concerns, immunities of States, human rights violations, the non-use of force, the non-interference in the internal affairs of States, consular relations, diplomatic relations, hostage-taking, the right of asylum, nationality and economic rights. The ICJ is an indispensable element of the system of peaceful settlement of disputes established by the Charter. It also has considerable influence on the development of international law. The Statute of the ICJ is annexed to the United Nations Charter.



Q & A: What is the difference between the International Court of Justice and the International Criminal Court?

**The International Court of Justice (ICJ), which is also called the "World Court", is often confused with the International Criminal Court (ICC). Both judicial bodies are located in The Hague in the Netherlands. However, the ICJ is an organ of the United Nations, while the ICC is not part of the United Nations system. With respect to jurisdiction, the ICJ adjudicates disputes between States and gives advisory opi-**

nions on legal questions posed by United Nations organs and specialized agencies. In contrast, the ICC adjudicates cases involving individuals accused of war crimes, crimes against humanity and genocide. See Chapter 3 on international law for further information on the ICC.

• **Secretariat**

The Secretariat, headed by the Secretary-General, is the sixth principal organ of the United Nations. The Secretariat, comprising international staff working in duty stations around the world, services the other principal organs and administers the programmes and policies they set out.<sup>33</sup> The various departments and offices of the Secretariat include but are not limited to the following: Office of the Secretary-General, Office of Legal Affairs (OLA), Department of Political Affairs (DPA), DPKO, Department of Field Support (DFS), Office of the High Commissioner for Human Rights (OHCHR) and United Nations Office on Drugs and Crime (UNODC).

**Peacebuilding Commission**

Among other UN bodies, the Peacebuilding Commission (PBC) can be particularly relevant to the work of justice components, due to its focus on post-conflict countries that have come onto its agenda. The PBC is an intergovernmental advisory body to both the General Assembly and the Security Council. The PBC comprises 31 Member States and was established pursuant to General Assembly resolution 60/180 (2005) and Security Council resolution 1645 (2005). The PBC’s mandate includes convening all relevant actors to marshal resources and to advise on the proposed integrated strategies for post-conflict peacebuilding and recovery; helping to ensure predictable financing for early recovery activities and sustained financial investment over the medium to long term; and developing best practices on issues in collaboration with political, security, humanitarian and development actors. The General Assembly and Security Council resolutions establishing the PBC also established the United Nations Peacebuilding Fund (PBF) and the Peacebuilding Support Office (PBSO):

• **PBF**

The PBF (also covered in Chapter 11 on mobilizing resources) is supporting, as of September 2011, nearly 200 projects in 22 countries by delivering fast, flexible and relevant funding. Countries on the agenda of the PBC receive PBF funding. Countries that are not on the PBC agenda may also receive funding, following a declaration of eligibility by the Secretary-General. The PBF funds initiatives that meet one or more of the following four criteria: 1) they respond to imminent threats to the peace process and support peace agreements and political dialogue; 2) they build or strengthen national capacities to promote coexistence and peaceful resolution of conflict; 3) they stimulate economic revitalization to general peace dividends; and/or 4) they re-establish essential administrative services. The PBF relies upon voluntary contributions from Member States, organizations and individuals.<sup>34</sup>

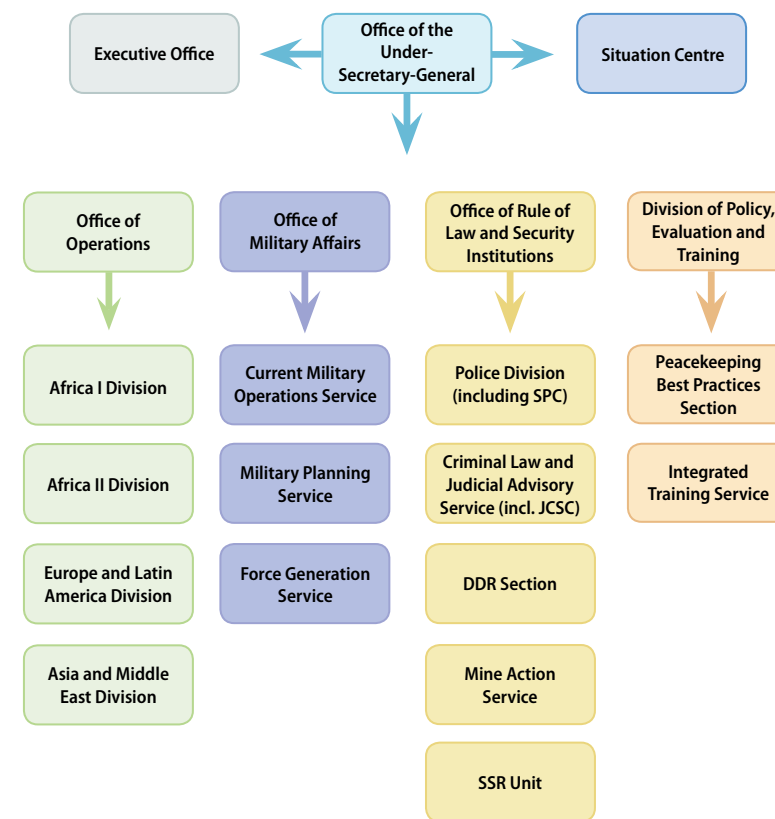
<sup>33</sup> See [www.un.org/en/mainbodies/secretariat/index.shtml](http://www.un.org/en/mainbodies/secretariat/index.shtml).  
<sup>34</sup> See [www.undp.org/factsheet/fund/PB000](http://www.undp.org/factsheet/fund/PB000).

• **PBSO**

The PBSO was established to assist and support the PBC, administer the PBF and serve the Secretary-General in coordinating United Nations agencies in their peacebuilding efforts. The PBSO helps to sustain peace in conflict-affected countries by garnering international support for nationally owned and led peacebuilding efforts. This includes providing support to the work of the Peacebuilding Commission and catalysing the United Nations system, on behalf of the Secretary-General, and partnering with external actors to develop peacebuilding strategies, marshal resources and enhance international coordination. This support is firmly based on the PBSO’s function as a knowledge centre for lessons learned and good practices on peacebuilding. The PBSO is headed by an Assistant Secretary-General.

**3. Structure of the Department of Peacekeeping Operations**

Organizational Structure of DPKO



DPKO was formally established in 1992 as part of the Secretariat, but has roots extending back to the first United Nations peacekeeping operation in 1948. The primary function of DPKO is to provide political and executive direction to United Nations peacekeeping operations by planning, preparing, managing and directing peacekeeping operations in order to effectively fulfil their mandates under the overall authority of the Security Council and General Assembly, under the command of the Secretary-General. DPKO is headed by the Under-Secretary-General for Peacekeeping Operations and is made up of the following:

- **Situation Centre (SitCen)**

The SitCen gathers and processes information regarding all peacekeeping operations, and serves as the peacekeeping information hub. It consists of an Operations Room, a Research and Liaison Unit (RLU) and an Information Management Unit (IMU). The Operations Room contains three regional desks and monitors the situation in the field around the clock. It provides daily integrated reporting and maintains the situational awareness of the DPKO/DFS senior management. The RLU enhances the SitCen's ability to provide background analysis and assessments that inform senior decision-makers of the situation in areas of DPKO/DFS current or future operations. The IMU facilitates the effective use of information systems and tools within the SitCen.

- **Office of Operations**

The Office of Operations (OO), including the Integrated Operational Teams (IOTs), is responsible for providing strategic, political and operational guidance and support to DPKO-led field operations. Its core functions include – but are not limited to – developing overarching integrated strategies and providing strategic direction on cross-cutting, mission-specific and political issues and day-to-day operational support to DPKO-led operations; coordinating with other offices within DPKO/DFS and other United Nations system partners to advance the implementation of mandates and political objectives set by the Security Council; devising and promoting agreement on and implementing integrated solutions to the political and operational challenges of DPKO-led operations; leading the integrated planning process for new DPKO-led operations and coordinating transition, consolidation and exit strategies in existing operations; and fulfilling the reporting obligations of the Secretary-General to the Security Council for DPKO-led operations. The Office comprises four regional divisions, covering, as of September 2012, 16 peacekeeping operations, one special political mission, peacekeeping support to the African Union and a Somalia planning and coordination team. The regional divisions contain a total of eight IOTs. The IOT serves as a principal entry point for political issues, as well as integrated planning and integrated operational issues of a mission-specific, cross-cutting nature for the peacekeeping missions and special political missions under the direction of DPKO, and for troop- and police-contributing countries, Member States and other relevant partners on mission-specific issues. IOTs consist of co-located political affairs, military, police and support/administrative officers. IOTs are supplemented with expertise available within other DPKO offices in areas not currently represented on the IOT on a residential basis such as justice, corrections,

DDR, SSR or gender, in line with the specific needs emanating from the mandate of the mission(s) under their purview. OO is headed by an Assistant Secretary-General for Peacekeeping Operations who is accountable to, and serves as deputy to, the Under-Secretary-General for Peacekeeping Operations.

- **Office of Military Affairs (OMA)**

This is DPKO's principal arm for military matters. OMA provides support to military personnel deployed on DPKO-led peace operations. It is headed by the Military Adviser, who has the rank of Assistant Secretary-General.

- **Office of Rule of Law and Security Institutions (OROLSI)**

OROLSI was established in 2007 to provide an integrated and forward-looking approach to United Nations assistance in rule of law and security entities. OROLSI unifies police, justice, corrections, mine action and disarmament, demobilization and reintegration, as well as new security sector reform functions, primarily in support of United Nations peacekeeping operations, as well as globally with regard to police and corrections in the context of countries without peacekeeping missions. OROLSI is headed by an Assistant Secretary-General, who reports to the Under-Secretary-General for Peacekeeping Operations. OROLSI comprises the following components:

- **Criminal Law and Judicial Advisory Service (CLJAS)**

This serves as the principal Headquarters focal point in support of justice and corrections components in United Nations peace operations, and is discussed later in this chapter.

- **Disarmament, Demobilization and Reintegration (DDR) Section**

This Section contributes to security and stability in post-conflict environments. Through a process of removing weapons from the hands of combatants, taking the combatants out of military structures and helping them to integrate socially and economically into society, the DDR Section seeks to support ex-combatants so that they can become active participants in the peace process. The DDR Section plans and supports new and ongoing DDR programmes; provides operational advice and support to DDR in special political missions; develops and updates guidance for the implementation of DDR; and captures and disseminates lessons learned and best practices in DDR programmes.

- **Mine Action Service (UNMAS)**

UNMAS is the focal point for mine action in the United Nations system. It is responsible for ensuring an effective, proactive and coordinated United Nations response to landmines and explosive remnants of war through collaboration with 13 other United Nations departments, agencies, funds and programmes. In peacekeeping and emergency settings, UNMAS establishes and manages mine action coordination centres in mine-affected countries, plans and manages operations, mobilizes resources and sets mine-action priorities in the countries and territories it serves.

- **Police Division (PD)**

This Division supports the police components of peace operations in all aspects of their work, including through the preparation of mandate implementation plans, concept of operations as well as other policy documents, such as guidelines, directives and other issuances, as well as the selection and recruitment of the highest qualified police officers for service in peace operations. PD also maintains direct contacts with Member States and police-contributing countries on strategic policy and development issues pertaining to police and other law enforcement matters. PD includes the rapidly deployable Standing Police Capacity, based in Brindisi, Italy, which assists United Nations field operations and other United Nations agencies and programmes around the world.

- **Security Sector Reform (SSR) Unit**

This Unit is a focal point and technical resource for DPKO and its peacekeeping operations, other United Nations actors, and for national and international partners on security sector reform. The SSR Unit's support lies primarily at the political-strategic level, including by facilitating national SSR dialogues after conflict; providing support for processes leading to reform of national security policies and architectures; providing specialist advice and strategic guidance on SSR programmes and projects; facilitating the provision of holistic and coherent United Nations support; and assisting in the mobilization of resources for SSR (both human and financial).

- **Policy, Evaluation and Training Division (DPET)**

This Division comprises the Integrated Training Section (ITS) and the Peacekeeping Best Practices Section (PBPS). ITS is responsible for strategic-level direction of peacekeeping training and focuses on priority training needs that cut across or affect large areas of United Nations peacekeeping. ITS oversees and, as appropriate, supports specific substantive or technical training carried out by other offices in DPKO, DFS and DPKO-led peacekeeping operations. PBPS assists in the planning, conduct, management and support of peacekeeping operations by learning from experience, problem solving and transferring best practices in United Nations peacekeeping. To this end, the Section undertakes a broad range of activities and work, including knowledge management; policy analysis and development; and lessons learned. DPET is headed by a Director.

## 4. Structure of United Nations Peacekeeping Operations

Peacekeeping operations typically include the Office of the Special Representative of the Secretary-General (SRSG) and the Office of the Deputy SRSG, as well as the following components: justice, corrections, police, military, human rights, legal affairs, SSR, child protection, gender, civil affairs, political affairs, humanitarian affairs, DDR, electoral, conduct and discipline, security, and mission support. Detailed descriptions of these components can be found in the DPKO's *Handbook on United Nations Multidimensional Peace Operations* (2003).

Justice components have primary responsibility for carrying out a mission's mandate to assist national authorities in strengthening justice systems. Justice components are typically named "justice units/sections", "judicial advisory units/sections" or "rule of law units/sections". Other designations for justice components have included the Administration of Justice Support Unit (UNMIT)<sup>35</sup> and the Legal and Judicial System Support Division (UNMIL).<sup>36</sup>

The organizational structure of a justice component varies from mission to mission. In some peacekeeping operations, the justice and corrections components are located within the same office; in other peacekeeping operations, they operate as two separate offices. Justice components may also be part of a mission's joint human rights and justice component. The heads of justice components usually report to the SRSR of the mission or the Deputy SRSR (DSRSR) for rule of law, who oversees the justice, corrections, human rights and/or other components.

In Burundi, staff from DPKO, OHCHR and UNDP were integrated into a single justice component in BINUB (United Nations Integrated Office in Burundi). Integration increased the impact and coherence of the justice component's interventions under a single human rights and justice programme.

In a typical peacekeeping operation, there are a number of components and offices which work directly or indirectly on rule of law issues. These include the justice component, the corrections component, the police component, the human rights component, the SSR component, the child protection component and the gender component.

In South Sudan, four teams (justice, corrections, SSR and military justice) function under the Rule of Law Security Institutions Support Office (ROLSISO) of UNMISS<sup>37</sup> with a view to ensuring more coherent and integrated coordination within the UN and among international assistance providers in the area of rule of law and SSR.



Q & A: What is an "integrated mission"?

**"Integrated missions" refer to integrated field missions that have a double or triple-hatted Deputy SRSR/Resident Coordinator/Humanitarian Coordinator (DSRSR/RC/HC) who reports to the SRSR/Head of Mission.<sup>38</sup> The DSRSR/RC/HC serves as the bridge between the mission and the United Nations Country Team (UNCT). Integration refers**

<sup>35</sup> UNMIT: United Nations Integrated Mission in Timor-Leste.

<sup>36</sup> UNMIL: United Nations Mission in Liberia.

<sup>37</sup> UNMISS: United Nations Mission in the Republic of South Sudan.

<sup>38</sup> United Nations, *IMPP Guidelines: Role of Headquarters: Integrated Planning for Field Presences* (2010), page 18.

both to internal civil and military integration within the field mission as well as the strategic partnership between the field mission and the UNCT.

A justice component cannot work in isolation from the rest of the mission. On an ongoing basis, it must coordinate closely with other relevant components so as to ensure coherence and effectiveness, and avoid duplication. In particular, justice components must work closely with the police and corrections components of the mission to ensure the synchronization of all parts of the criminal justice chain. Likewise, close cooperation with human rights components is important to promote accountability for violations of international humanitarian law and human rights law, and to map and assess the justice system. Such coordination is also necessary to inform and tailor capacity-building activities on the basis of human rights monitoring. For example, the justice component may be carrying out a capacity-building project to enhance the skills of local prosecutors, and through such efforts may help to address the human rights component's concerns about how some prosecutors perform their duties.

## 5. United Nations Rule of Law Entities

There are 40 United Nations entities that are engaged in the rule of law.<sup>39</sup> These include, in addition to DPKO, the following:

- **Office of Legal Affairs (OLA)**

The OLA is part of the Secretariat. It provides a unified central legal service for the Secretariat and the principal and other organs of the United Nations on questions of international public and private law of a constitutional, procedural, criminal, humanitarian, treaty, commercial and administrative nature. It ensures and promotes the rule of law in and through the United Nations and the proper and orderly conduct of business by its organs. It also provides trainings, fellowships, technical assistance and capacity-building seminars on international law, treaty law, commercial law and law of the sea at Headquarters and at the regional and country levels, in order to promote greater awareness and understanding of international law and uniform legal standards, as well as facilitate the enactment and harmonized application of international law and standards by States.

- **The Office of the High Commissioner for Human Rights (OHCHR)**

OHCHR has its Headquarters in Geneva and is part of the Secretariat. Its aims are to work for the protection of all human rights for all people; to help empower people to realize their rights; and to assist those responsible for upholding such rights in ensuring they are implemented. Its activities include: 1) supporting human rights bodies (e.g. Human Rights Council and the treaty bodies); 2) supporting human rights thematic fact-finding procedures (e.g. Special Rapporteurs and Working Groups); 3) ensuring human rights mainstreaming, research and analysis, methodology and training; 4) providing advisory services, technical cooperation and field

<sup>39</sup> Report of the Secretary-General on the Rule of Law at the National and International Levels (2008), A/63/64.

activities; and 5) supporting regional and country offices, peace operations and United Nations country teams.

- **United Nations Development Programme (UNDP)**

UNDP is a subsidiary organ of the General Assembly, advocating for change and connecting countries to knowledge, experience and resources, in order to help people build a better life. It is on the ground in 177 countries, as of June 2012. UNDP's areas of focus include: 1) human development issues and the Millennium Development Goals; 2) poverty reduction; 3) democratic governance (including elections, strengthening of democratic institutions, and decentralization); 4) crisis prevention and recovery (including disaster risk reduction; conflict prevention; transitional governance and rule of law; DDR; armed violence reduction; and mine action); 5) energy and environment; 6) HIV/AIDS; 7) gender mainstreaming (with special partnerships with UN Women – which includes the former United Nations Development Fund for Women or UNIFEM); and 8) coordination (managing the Resident Coordinator system). UNDP's Global Programme on Strengthening the Rule of Law in Crisis-affected and Fragile Situations forms the blueprint for UNDP's engagement on rule of law, justice and security in crisis contexts, supporting programmes in approximately 37 crisis-affected countries and 21 priority countries. These include joint programmes with DPKO, UNHCR, UNODC and UN Women.

- **United Nations High Commissioner for Refugees (UNHCR)**

UNHCR falls under the General Assembly's Programmes and Funds. It has received a mandate by the international community to protect refugees, asylum seekers and stateless persons, ensuring that international norms are respected, particularly the prohibition of refoulement, that is the involuntary return of refugees to countries where they would face persecution. UNHCR also ensures that adequate and well-coordinated assistance is available for persons of concern, and that durable solutions are found to their plight. The international community has gradually conferred new responsibilities on the agency. UNHCR has increasingly been called upon to involve itself with reintegration of returnees in their countries of origin. At the same time, UNHCR has increased its support to the collaborative effort to address the protection, assistance and durable solutions needs of internally displaced persons. Within the context of the Humanitarian Reform and the Cluster system devised in 2005 to clarify agency responsibilities in emergencies, the Inter-Agency Standing Committee has conferred onto the agency the responsibility to lead the sectors (or clusters) of protection, emergency shelter, and camp coordination and camp management in complex emergencies where there is significant internal displacement.

- **United Nations Office on Drugs and Crime (UNODC)**

UNODC, which is part of the Secretariat, is mandated to fight against illicit drugs and serious crimes (including terrorism), and to assist countries in developing strategies to prevent crime and build the capacity of their justice systems to operate more effectively within the framework of the rule of law. It conducts a combination of normative, operational and research work, including: 1) assisting States in the



reform of their criminal justice system in line with international instruments, standards and norms; 2) assisting States in the ratification and implementation of international treaties and developing domestic legislation on drugs, crime and terrorism as well as providing secretariat and substantive services to treaty-based and governing bodies; 3) carrying out research and analytical work to increase knowledge and understanding of drugs and crime issues and expand the evidence base for policy and operational decisions; and 4) implementing field-based technical co-operation projects to enhance the criminal justice capacities of Member States to counteract illicit drugs, crimes and terrorism.

- **Department of Political Affairs (DPA)**

DPA is part of the Secretariat. Its aims include: 1) providing advice and support to the Secretary-General in the discharge of his global responsibilities related to the prevention, control and resolution of conflicts, including post-conflict peacebuilding; 2) providing the Secretary-General with advice and support in the political aspects of his relations with Member States and other international governmental bodies; 3) providing the Secretary-General with advice and support on electoral assistance matters and ensuring appropriate consideration of and response to Member States' requests for such assistance; 4) providing substantive support and secretariat services to the Security Council and its subsidiary bodies; and 5) providing substantive support to the General Assembly and its relevant subsidiary organs.

- **UN Women**

The United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) was created by the United Nations General Assembly in July 2010. UN Women merges and builds on the important work of four previously distinct parts of the United Nations system, which focused exclusively on gender equality and women's empowerment: the Division for the Advancement of Women (DAW); the International Research and Training Institute for the Advancement of Women (INSTRAW); the Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI); and the United Nations Development Fund for Women (UNIFEM). The main roles of UN Women are to: 1) support intergovernmental bodies, such as the Commission on the Status of Women, in their formulation of policies, global standards and norms; 2) help Member States to implement these standards, standing ready to provide suitable technical and financial support to those countries that request it, and to forge effective partnerships with civil society; and 3) hold the United Nations system accountable for its own commitments on gender equality, including regular monitoring of system-wide progress. Grounded in the vision of equality enshrined in the United Nations Charter, UN Women works on issues including the elimination of discrimination against women and girls; the empowerment of women; and the achievement of equality between women and men as partners and beneficiaries of development, human rights, humanitarian action and peace and security.

- **United Nations Children's Fund (UNICEF)**

UNICEF is a subsidiary organ of the General Assembly and is mandated to advocate for the protection of children's rights, to help meet their basic needs and to expand their opportunities to reach their full potential. It is guided by the Convention on the Rights of the Child and strives to establish children's rights as ensuring ethical principles and international standards of behaviour towards children. Its areas of focus include: 1) young child survival and development; 2) basic education and gender equality; 3) HIV/AIDS and children; 4) child protection: prevention and response to violence, exploitation and abuse; and 5) policy advocacy and partnerships for children's rights.

## 6. Roles and Responsibilities: New United Nations Rule of Law Arrangements

Ensuring a coordinated, coherent and comprehensive approach is a core principle of the United Nations rule of law assistance. In recent years, the United Nations has launched several initiatives to improve the coordination of rule of law assistance at both the Headquarters and field levels. This sub-chapter describes Decision No. 2012/13 of the Secretary-General on Rule of Law Arrangements, including new country-level arrangements and the establishment of the joint (DPKO/UNDP) Global Focal Point for the Police, Justice and Corrections Areas in the Rule of Law in Post-conflict and other Crisis Situations. This Decision has replaced the "lead entity" arrangements, established in 2006 by the Decision No. 2006/47 of the Secretary-General.<sup>40</sup> The following sub-chapter addresses the Rule of Law Coordination and Resource Group, which was established in 2006 and its mandate reviewed by Decision No. 2012/13.

This Handbook does not seek to provide a complete description of coordination mechanisms and processes of United Nations rule of law assistance. Indeed, there are a number of processes, at both Headquarters and in the field, through which coordination occurs, including the Integrated Mission Planning Process (IMPP), Technical Assessment Missions (TAMs) and joint programmes. Efforts to enhance coordination are constantly evolving. Accordingly, judicial affairs officers should seek the latest information on coordination mechanisms from CLJAS, as well as from the head of their component.

### Country-level Arrangements

Decision No. 2012/13 sets out country-level arrangements, where the senior United Nations official in-country – the Special Representative or Executive Representative of the Secretary-General or, in non-mission settings, Resident Coordinator – is responsible and accountable for guiding and overseeing United Nations rule of law strategies, for resolving political obstacles and for coordinating United Nations country support in

<sup>40</sup> Under the now-superseded Decision No. 2006/47, a division of labour was established among these United Nations entities in which designated lead entities assumed certain responsibilities for specific rule of law areas or "baskets".

the rule of law, without prejudice to the specialized roles and mandates of United Nations entities in-country. The Decision states that the senior official should focus on effectiveness and results.

In addition, Decision No. 2012/13 also indicates that United Nations entities working at the country level should be responsible and accountable for the provision of technical advice related to the rule of law and the technical design and implementation of rule of law-related programmes, including continuing a dialogue with relevant national authorities on issues related to their mandate.

### Joint Global Focal Point

In support of these country-level arrangements, Decision No. 2012/13 also designates DPKO and UNDP as the joint Global Focal Point for the Police, Justice and Corrections Areas in the Rule of Law in Post-conflict and other Crisis Situations (GFP). The concept for the GFP arises from the United Nations system-wide Civilian Capacities initiative (CivCap), which aims at filling the gaps in the provision of civilian capacities in countries emerging from conflict, through diverse partnerships that deliver real results on the ground.

Under the GFP arrangement, DPKO and UNDP, working with other United Nations rule of law actors, are jointly responsible and accountable for responding to country-level requests with timely and quality police, justice and corrections assistance in terms of global knowledge, human resources and substantive advice on assessments, planning, funding and partnerships. The GFP can call upon and convene meetings of United Nations entities to address country-level requests of system-wide relevance.

The GFP will enable DPKO, UNDP and other parts of the United Nations system to draw upon each others' comparative strengths and networks of expertise. The aim is to enhance the predictability, coherence, accountability and effectiveness of delivery by the United Nations in the rule of law area. In furtherance of these objectives, DPKO and UNDP plan to co-locate staff at New York Headquarters and develop a joint workplan. The GFP arrangement will work through existing mechanisms for the delivery of support to address needs identified and articulated by the leadership and relevant staff at the country level.

As the GFP was in an early implementation phase as of October 2012, when this Handbook was being finalized, judicial affairs officers should, nonetheless, feel free to consult CLJAS as well as the head of their component to obtain the latest information on the activities of the GFP.

## 7. The Rule of Law Coordination and Resource Group

Decision No. 2012/13 reaffirms the Rule of Law Coordination and Resource Group (RoLCRG), with some adjustments to its mandate. The RoLCRG is chaired by the Deputy Secretary-General and consists of DPA, DPKO, OHCHR, OLA, UNDP, UNHCR, UNICEF, UN Women and UNODC. This membership is currently being reviewed. The aim of RoLCRG is to ensure strategic coherence within the United Nations system on rule of

law matters. Unlike the Global Focal Point arrangement, RoLCRG has no responsibility for operational/country-level support and assistance. It is a strategic forum. RoLCRG is supported by its secretariat, the Rule of Law Unit in the Executive Office of the Secretary-General.

The Deputy Secretary-General and RoLCRG serve as United Nations focal points for ensuring the development and mainstreaming of a strategic vision for the Organization on the rule of law, and for translating this vision into United Nations-wide policies.<sup>41</sup> The Group's role is to ensure coherence and minimize fragmentation across all thematic rule of law areas, including international law and Charter-related issues, civil and criminal justice, security, prison and penal reform, parliaments and legislative reform, constitution-making and transitional justice.

In the past years, RoLCRG has worked collectively to develop the Guidance Notes of the Secretary-General on: the *United Nations Approach to Rule of Law Assistance* (2008); the *United Nations Approach to Justice for Children* (2008); the *United Nations Assistance to Constitution-making Processes* (2009); the *United Nations Approach to Transitional Justice* (2010); the *United Nations Approach to Assistance for Strengthening the Rule of Law at the International Level* (2011); and the *United Nations and Statelessness* (2011).

## 8. The Criminal Law and Judicial Advisory Service

CLJAS was established at United Nations Headquarters in 2003 to support the implementation of rule of law, justice and corrections mandates of United Nations peace operations managed by DPKO. It serves as the Headquarters counterpart for the justice and corrections components of United Nations peacekeeping operations. As of September 2012, there were approximately 300 judicial affairs officers and 400 corrections officers authorized for nine DPKO-led peace operations in Afghanistan, Côte d'Ivoire, Darfur, the Democratic Republic of the Congo, Haiti, Kosovo, Liberia, South Sudan and Timor-Leste. CLJAS supported the mission in Syria in 2012. CLJAS also provides, in varying degrees and upon request, support to special political missions managed by DPA. These include the missions in Burundi, Central African Republic, Guinea-Bissau, Sierra Leone, Somalia and Libya.

In support of field missions with mandates in the justice and corrections areas, CLJAS has four key functions:

- planning the justice and corrections components in new United Nations peacekeeping operations and conducting reviews of existing components;
- advising and supporting the justice and corrections components in field missions;
- developing guidance tools and training materials to support the justice and corrections components in the field; and
- engaging partners within and beyond the United Nations system on rule of law matters, and ensuring synergies and coherence of programmes and activities in the rule of law area.

<sup>41</sup> Decision No. 2012/13 of the Secretary-General on Rule of Law Arrangements, Annex 2.

Until 2005, CLJAS was staffed with just one judicial officer and one corrections officer. In 2007, CLJAS became a part of DPKO's OROLSI. As of October 2012, CLJAS comprises the chief, deputy chief, one senior policy officer, five corrections officers, five judicial affairs officers and two administrative assistants. The Service also includes several additional staff, including staff members serving on a temporary basis, Junior Professional Officers and interns.

The Service is organized into three teams:

- **Corrections Team**

Members of the Corrections Team serve as focal points for three to four operations each. In addition to backstopping mission components, these officers also develop policy, guidance and training materials on corrections issues.

- **Justice Team**

Members of the Justice Team serve as focal points for three to four operations each. While they primarily backstop mission components, these officers also develop policy, guidance and training materials. The Team also includes an expert on Islamic law.

- **Policy Cell**

The Policy Cell is responsible for undertaking and coordinating the Service's policy, guidance and training efforts in the justice areas, and in cross-cutting areas of the Service's work (i.e. matters that involve both the justice and corrections professional areas). The Policy Cell is also called upon to represent OROLSI and DPKO on numerous matters related to the rule of law, human rights and good governance, and to provide technical advice on behalf of the Department in these areas. The Policy Cell includes an expert on sexual violence in conflict, who also serves as the DPKO member of the Team of Experts on Sexual Violence – Rule of Law.

CLJAS also includes the Justice and Corrections Standing Capacity (JCSC), which along with the Standing Police Capacity (SPC) is located in Brindisi, Italy at the United Nations Global Service Center (UNGSC). The JCSC, which was approved by the General Assembly in 2010, comprises the team leader, two judicial affairs officers, two corrections officers and one administrative assistant. The JCSC has two core functions: 1) to start up justice and corrections components in new United Nations operations; and 2) to reinforce existing United Nations operations in providing assistance and support to national authorities in the area of justice and corrections.

For each DPKO-led and DPA-led mission that it supports, CLJAS has two mission focal points, one on justice and one on corrections. Such support is provided in coordination with the relevant IOT (covered earlier in this chapter) and in collaboration with other OROLSI, DFS, DPA, DPKO and United Nations entities.

The responsibilities of CLJAS mission focal points are set out in the Annex to the DPKO/DFS *Policy on Justice Components in United Nations Peace Operations* (2009). These responsibilities fall into the following areas:

- Mission planning and evaluation, including through: 1) participation in TAMs, IMPP visits and other mission visits (at least once every 12 months); 2) contribution to

TAM reports and completion of periodic mission review/evaluation reports, based on the DPKO/DFS *Guidelines on the Methodology for Review of Justice and Corrections Components in United Nations Peace Operations*; 3) development of operational plans for mission components; and 4) ensuring the implementation of recommendations resulting from mission visits.

- Strategic guidance through: 1) participation in IOTs under the overall leadership of the IOT Team Leader, and providing guidance on justice and corrections issues (including with respect to the Mission Concept, Integrated Strategic Framework, budgets and benchmarks); 2) review of draft Secretary-General's reports, ensuring that mission challenges, priorities and achievements are adequately reflected; 3) review of Security Council resolutions and striving to ensure that mission mandates appropriately address judicial and corrections matters; 4) provision of strategic information, advice and support to DPKO/DFS and Member States relating to justice and corrections matters in peacekeeping; and 5) provision of advice to United Nations budgetary bodies on mission budgetary submissions.
- Mission support and advice through: 1) maintenance of regular contact with missions by code cable, e-mail, phone and VTC; 2) provision of substantive guidance to missions; 3) provision of responses and feedback to periodic reports and code cables from missions; 4) provision of assistance to missions in developing sub-programme plans (workplans) and budgets; and 5) provision of assistance to missions in mobilizing extra-budgetary resources.
- Recruitment through: 1) liaison with DFS regarding recruitment matters; 2) participation in outreach efforts led by DFS to attract qualified candidates; 3) provision of assistance for the technical clearance of candidates; 4) organization of induction briefings at Headquarters for new mission staff; and 5) preparation of resource packages for new staff being deployed to missions.
- Knowledge management through: 1) promotion of best practices tools, such as policies, standard operating procedures, guidelines and after action reports; 2) maintenance and updating of the electronic DPKO Rule of Law Community of Practice; and 3) collection of lessons learned and best practices from missions for inclusion in new and updated policies, standard operating procedures and guidelines.

The activities and achievements of justice and corrections components and CLJAS are highlighted in the annual DPKO Justice Review and the annual DPKO Corrections Update which are produced by CLJAS. In addition, CLJAS maintains a regularly updated overview of all its activities. Examples of CLJAS activities include:

- planning the justice and corrections components of missions such as the African Union–United Nations Hybrid Operation in Darfur (UNAMID), United Nations Support Mission in Libya (UNSMIL) and UNMISS, and for a possible mission in Somalia;
- supporting the United Nations Supervision Mission in Syria (UNSMIS) through the rapid deployment of three members of staff;
- undertaking visits to missions to carry out reviews of justice and corrections components pursuant to the DPKO/DFS *Guidelines on the Methodology for Review of Justice and Corrections Components of United Nations Peace Operations*;

- providing special support to the justice and corrections components of the United Nations Stabilization Mission in Haiti (MINUSTAH) after the January 2010 earthquake which destroyed much of the justice infrastructure in Haiti;
- establishing the JCSC in Brindisi to work alongside the SPC;
- establishing a rapidly deployable rule of law team of experts on sexual violence and armed conflict (jointly with OHCHR and UNDP), pursuant to Security Council resolution 1888 (2009);
- working with DFS to create rosters of judicial affairs officers and corrections officers for field posts (jointly with DFS), including through the administration of written exams and the conduct of interviews through the expert panel process;
- developing and delivering specialized training programmes for corrections officers and judicial affairs officers;
- organizing annual meetings of heads of justice and corrections components;
- developing and implementing the United Nations Rule of Law Indicators (jointly with OHCHR);
- developing guidance materials, including the *Policy on Justice Components in United Nations Peace Operations*, the *Interim Standard Operating Procedures on Detention in United Nations Peace Operations* and the *Instructor's Manual for the Rule of Law Training for Judicial Affairs Officers in United Nations Peacekeeping Operations*;
- developing lessons learned studies, such as a study on potential responses to prolonged pre-trial and arbitrary detention;
- developing and maintaining the electronic DPKO Rule of Law Community of Practice;
- representing DPKO in RoLCRG; and
- coordinating the pre-assessment for Libya on justice matters.

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- [www.un.org/en/mainbodies/secretariat/](http://www.un.org/en/mainbodies/secretariat/) [organizational chart of the United Nations Secretariat]
- [www.unrol.org](http://www.unrol.org) [including links to United Nations entities engaged in rule of law]

### Websites on DPKO

- [www.un.org/en/peacekeeping](http://www.un.org/en/peacekeeping) [website of DPKO]
- [www.un.org/en/peacekeeping/documents/dpkodfs\\_org\\_chart.pdf](http://www.un.org/en/peacekeeping/documents/dpkodfs_org_chart.pdf) [organizational chart of DPKO]
- [www.un.org/en/peacekeeping/issues/ruleoflaw.shtml](http://www.un.org/en/peacekeeping/issues/ruleoflaw.shtml) [rule of law within DPKO]

## CHAPTER 3

# INTERNATIONAL LAW

This chapter provides an overview of fundamental international law concepts, and outlines core principles in key areas of international law that will bear on the daily work of a justice component: international human rights law, international humanitarian law, international criminal law and international refugee law.

UN Photo - Eskinder-Debebe

## 1. Introduction

A key task of judicial affairs officers in United Nations peacekeeping operations is to assist national actors in implementing their obligations under international law. Judicial affairs officers must also ensure that they themselves adhere to international law when providing assistance to national actors. As stated by the Secretary-General, the normative foundation of the United Nations rule of law work is the United Nations Charter and the “four pillars of the modern international system – international human rights law; international humanitarian law; international criminal law and international refugee law”.<sup>42</sup>

This chapter provides an overview of international law, including the basic features of international human rights law, international humanitarian law, international criminal law and international refugee law. It also considers the ways in which the implementation of international law is promoted, monitored and enforced. Finally, this chapter provides examples of ways in which judicial affairs officers can incorporate international law into their work.

This chapter does not examine other areas of international law, such as international trade law and the law of the sea, which are less relevant to judicial affairs officers working in peacekeeping contexts.

## 2. International Law

International law is the body of norms that regulates the relations between States, the relations between States and international organizations, and the relations between international organizations. Increasingly, international law also regulates relations between States and individuals, including obligations on States concerning the treatment of persons under their jurisdiction or effective control.

International law comprises binding (“hard”) law and non-binding (“soft”) law. Binding law refers to rules that are legally binding and that States *must* therefore apply, such as treaty law (i.e. conventions, agreements and protocols) and customary law. Non-binding law refers to standards, principles, resolutions, declarations, guidelines or statements that are not legally binding on States but which nevertheless represent broad consensus by States and have strong moral and persuasive value. Some of these principles may have attained the status of customary law, and some of these resolutions may be legally binding on States (e.g. Security Council resolutions adopted under Chapter VII of the United Nations Charter).

### Treaties

Under the Vienna Convention on the Law of Treaties, a treaty is defined as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instru-

ments and whatever its particular designation”.<sup>43</sup> Treaties are also concluded between States and international organizations or between international organizations.<sup>44</sup> This chapter will focus on treaties between States.

Treaties ultimately become binding through a process in which two or more States create the treaty and thereafter accept the obligations created in the treaty. The main steps in the treaty-making process are treaty negotiation, adoption and signature, followed by ratification, acceptance, approval or accession.

After a negotiation phase and adoption of a text, States can sign and then express their consent to be bound in accordance with the final clauses of the treaty.<sup>45</sup> Simple signature does not mean that a treaty is immediately binding on them; however, they should refrain from acts which would defeat the object and purpose of the treaty.<sup>46</sup>

Following signature, treaties are subject to ratification. States that have signed may become parties by depositing an instrument of ratification provided that the conditions for entry into force are fulfilled. States that have not signed the treaty during the provided timeframe (if such a timeframe is provided by the treaty) may become a party to it by depositing an instrument of accession which indicates its consent to be bound by the treaty at the international level. Treaties may indicate the specific ratification procedure to be followed. Treaty formalities (e.g. signature, ratification, etc.) are undertaken with the depositary, which, in the case of multilateral treaties concluded under the auspices of the United Nations, is the United Nations Secretary-General. A State that has deposited its instrument of consent to be bound by a treaty is considered a “State Party” once the requirements for entry into force set up in the treaty have been fulfilled.

Provided that it is not prohibited by a treaty, a State can make reservations to its provisions, if such reservations are not against the object and purpose of the treaty. Reservations are also deposited with the depositary, at the time the State expresses its consent to be bound. When looking at a State’s treaty obligations, judicial affairs officers should check if there are any reservations that limit the State’s consent to be bound by the treaty in question.

Multilateral treaties provide, as one of the requirements for their entry into force, that a certain number of States deposit their instruments of consent to be bound. Multilateral treaties also normally stipulate that a certain period of time must elapse between the date on which the required number of instruments is deposited and the date of entry into force (e.g. the Rome Statute of the International Criminal Court provides that it shall enter into force on the first day of the month after the 60th day following the date of the deposit of the required 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations). Once the treaty has ente-

<sup>42</sup> Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies (2004), S/2004/616, para. 9.

<sup>43</sup> Vienna Convention on the Law of Treaties (1969), Art. 2(a).

<sup>44</sup> Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations (1986), Art. 2(1).

<sup>45</sup> *United Nations Treaty Handbook* (2006); *United Nations Handbook on Final Clauses of Multilateral Treaties* (2003).

<sup>46</sup> Vienna Convention on the Law of Treaties (1969), Art. 18.

red into force, it is binding upon the parties to it and must be implemented by them in good faith.



Q & A: Why is it important to know whether the host country is bound by a particular treaty?

When planning and implementing rule of law assistance activities, it is important that judicial affairs officers are aware whether the host country is bound by relevant treaties. For example, if the host country is not a State Party to the Convention on the Elimination of All Forms of Discrimination against Women, judicial affairs officers could consider supporting civil society and women's groups in advocating for the ratification of the treaty and encouraging the senior leadership of the mission to raise this issue with senior government officials. If the host country is already a State Party, judicial affairs officers could consider carrying out an assessment of the country's compliance with the treaty and/or identifying ways to assist the host country in meeting its obligations under the treaty.



Q & A: How do you determine whether a country is bound by a particular treaty?

When looking at a State's treaty obligations, judicial affairs officers should check if the State is a party to the treaty (i.e. if the treaty has been signed and ratified, or accepted, approved or acceded to) and if the conditions for the entry into force for that State have been fulfilled. It is also important for judicial affairs officers to be aware of any reservations that the State may have made that limit its consent to be bound by the treaty in question.

A quick way to determine whether a State is party to a treaty is to check the United Nations database of multilateral treaties deposited with the Secretary-General, at <http://treaties.un.org>. This database provides information on the status of over 500 major multilateral instruments, including the texts of reservations, declarations and objections.

### Customary Law

Like treaties, customary law is also considered binding or "hard" law. Customary law is defined as "general practice accepted as law"<sup>47</sup> and binds States even without their express consent. For customary international law to be created, two requirements must be met: the first element requires a sufficient number of States to pursue conduct in a general and consistent manner, and the second element (also referred to as *opinio juris*) requires States to follow the rule because of a sense of legal obligation. Frequently,

<sup>47</sup> Statute of the International Court of Justice (1945), Article 38(1)(b).

however, there is no easy way to measure whether a standard has reached the status of an international custom, or whether it is simply accepted by States, especially in view of many States' resistance to being legally bound to follow a certain conduct.

Customary law plays a particularly important role in ensuring the universal applicability of certain international human rights norms which have been recognized as having attained the status of customary law. Such norms include: the prohibition of genocide; the prohibition of enforced disappearance; the prohibition of torture and other cruel, inhuman or degrading treatment; the prohibition of prolonged arbitrary detention; the prohibition of discrimination; and the prohibition of war crimes, crimes against humanity and gross violations of human rights.<sup>48</sup> States are bound by these norms even in the absence of treaties or even if they are not parties to treaties which incorporate such norms.<sup>49</sup> Furthermore, some customary norms have reached the status of a peremptory norm (*jus cogens*) from which no derogation is ever permitted. It is generally accepted that *jus cogens* crimes include genocide, crimes against humanity, war crimes, piracy, slavery and torture.<sup>50</sup> Derogation is covered in further detail below under International Human Rights Law.

### Non-binding Law

By definition, non-binding ("soft") law is not legally binding. Non-binding law includes declarations (such as the Declaration on the Elimination of Violence against Women), principles (such as the Basic *Principles on the Role of Lawyers*) and "minimum standards" (such as the *Standard Minimum Rules for the Treatment of Prisoners*). Many non-binding instruments have been adopted by United Nations legislative bodies such as the General Assembly and the Economic and Social Council. Because such instruments usually represent broad consensus by States, they have strong moral and persuasive force.<sup>51</sup>

Non-binding law can develop and become binding law. This is usually done by turning the non-binding legal standards into a treaty. For example, the Declaration on the Protection of All Persons from Enforced Disappearances later became the basis for the International Convention for the Protection of All Persons from Enforced Disappearance. Norms contained in non-binding instruments can also be recognized as rules of customary international law.

### Implementation of International Law

The way in which international law becomes part of national law will depend on whether the country is monist or dualist. In monist countries, international law and municipal law are seen as forming a unified system of law. In dualist countries, international law and national law are treated as separate legal frameworks based on their different origins and usually require some act of legislation to import international law into na-

<sup>48</sup> UNDP, *Programming for Justice: Access for All* (2005), pages 48–9.

<sup>49</sup> Ibid.

<sup>50</sup> M. Cherif Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*', *Law and Contemporary Problems*, Vol. 59, No. 4 (1996), page 68.

<sup>51</sup> UNDP, *Programming for Justice: Access for All* (2005), page 50.

tional law. The relationship between national law and international law is usually addressed in the constitution of the country concerned. Most countries that have adopted a civil law model are monist, and most countries that have adopted a common law model are dualist.

In monist countries, international law is applicable at the national level once they have become a party to a treaty. When the treaty is sufficiently specific, it can be directly applied without further legislative action, i.e. rights and obligations can be relied upon by individuals and/or courts. If the nature of the provision is not self-executing (e.g. the adoption of criminal laws may be required to implement a treaty provision), implementing legislation will be required. However, even when a provision is self-executing, monist States often adopt implementing legislation to give full domestic effect to a treaty. Implementing legislation is covered in greater detail in the Chapter 13 on legislative reform and constitution-making.

In dualist countries, international law and domestic law are seen as separate legal frameworks by reason of their differing origins. Domestic law is considered supreme in the domestic setting, while international law is considered supreme between States in the international setting. Furthermore, international law obligations need to be implemented through domestic legislation. This process of legitimization is known as “transformation” and occurs in accordance with the domestic legal framework.



Q & A: As a judicial affairs officer, how would you use non-binding “soft” law?

Unlike “hard law”, “soft law” is not generally binding. However, most “soft law” instruments have been adopted by the General Assembly or the Economic and Social Council, and are therefore widely recognized and accepted. Moreover, some “soft law” norms have attained the status of customary law. Judicial affairs officers should therefore encourage and assist host countries to incorporate “soft law” into relevant legislation and practices in order for the host country to surpass minimum requirements and move to a more progressive implementation of rights.

### 3. International Human Rights Law

#### Definition of International Human Rights Law

It is important to make a distinction between the concept of human rights, and international human rights law (IHRL). Human rights are rights inherent to all human beings, whatever their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. All persons are equally entitled to human rights without discrimination.

The concept of human rights is expressed and guaranteed by IHRL, in the form of treaties, customary international law, general principles and other sources of internatio-

nal law. IHRL sets out the obligations of States to respect, promote, protect and fulfil human rights and fundamental freedoms of individuals or groups.

Under IHRL, States have both positive and negative obligations. Positive obligations require States to protect rights and to act against those who violate the rights of others, as well as to fulfil certain rights. States also have negative obligations, which are obligations to refrain from taking certain actions.



Q & A: What are examples of positive obligations and negative obligations under IHRL?

**States have a negative obligation not to torture individuals. However, if an individual is tortured, the State also has some positive obligations. The State should have legal mechanisms to prevent and punish acts of torture and should investigate, prosecute and provide redress for the harm resulting from such acts. The State should also adopt legislative, judicial, administrative, educative and other appropriate measures to prevent and respond to acts of torture.<sup>52</sup>**

#### Key International Human Rights Instruments

The foundation of IHRL is the Universal Declaration of Human Rights (UDHR), which was adopted by the United Nations General Assembly in 1948. The UDHR was followed by the adoption in 1966 (and entry into force in 1976) of the two main international human rights treaties: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICCPR includes the rights to liberty; life; fair trial; freedom of religion, thought and conscience; freedom of expression; freedom of assembly; and freedom of association. The ICESCR includes the rights to work, health and education.

Other key international human rights instruments include the following:

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Convention on the Elimination of All Forms of Discrimination against Women;
- Convention on the Rights of Persons with Disabilities;
- Convention on the Rights of the Child;
- International Convention for the Protection of All Persons from Enforced Disappearance;
- International Convention on the Elimination of All Forms of Racial Discrimination; and
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

<sup>52</sup> Human Rights Committee, General Comment No. 31 (2004), para. 7.



Regional human rights instruments include the African Charter on Human and Peoples' Rights, the American Convention on Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

In addition to treaties, there are a number of non-binding human rights instruments concerning a range of matters. These include, for example, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; the Declaration on the Elimination of Violence against Women; and the *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care*.



Q & A: What is the difference between "human rights violations" and "human rights abuses"?

**"Human rights violations" refers to governmental transgressions of rights guaranteed by national, regional and international human rights law, whereas "human rights abuses" is a broader term which includes violative conduct committed by non-State actors.<sup>53</sup>**

### Reservations and Derogability

In understanding the human rights obligations of States, it is important to consider the notions of reservations and derogability. A reservation is "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State".<sup>54</sup> If the reservation is permitted by the treaty, and is compatible with the object and purpose of the treaty, the State is not required to apply the part of the treaty to which it has made a reservation (unless that part comprises customary international law and therefore applies irrespective of there being a treaty or not).

States may also invoke derogation with respect to certain rights, as provided for in Article 4 of the ICCPR. There is no blanket right to derogate under international law, and derogations are strictly limited by multiple factors. First, in order to invoke derogation of the ICCPR, Article 4 requires that two fundamental conditions are met: first, the situation must amount to a public emergency<sup>55</sup> which threatens the life of the nation, and second, the State party must have officially proclaimed a state of emergency. Article 4 further limits derogation "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obliga-

<sup>53</sup> OHCHR, *Training Manual on Human Rights Monitoring* (2001), page 10.

<sup>54</sup> Vienna Convention on the Law of Treaties (1969), Art. 2(d).

<sup>55</sup> Para. 39 of the *Siracusa Principles on the Limitation and Derogation Provisions of the International Covenant on Civil and Political Rights* states that a public emergency is an "exceptional and actual or imminent danger which threatens the life of a nation". Thus, not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation. The ICCPR requires that even during an armed conflict, measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation.

tions under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".

When invoking derogation, States must "inform the other States Parties to the ICCPR, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. Further communications shall be made, through the same intermediary, on the date on which it terminates such derogation."<sup>56</sup>

Derogations for some rights are never permitted. These are set out in Article 4.2 of the ICCPR, and include: the right to life; freedom from torture, cruel, inhuman and degrading treatment or punishment; freedom from slavery and servitude; freedom from imprisonment for the inability to fulfil a contract; freedom from the retroactivity of criminal law; the right to recognition as a person; and freedom of thought, conscience and religion. The Human Rights Committee has also stated that action conducted under the authority of a State that constitutes a basis for individual criminal responsibility for a crime against humanity by the persons involved in that action cannot be used as a justification for a state of emergency.<sup>57</sup> It has further stated that some core fair trial rights in Article 14 of the ICCPR are non-derogable even though the ICCPR does not explicitly state this, as some of these fair trial rights are guaranteed under international humanitarian law (i.e. during armed conflict) and a State should not be allowed to derogate from such obligations in other emergency situations.<sup>58</sup>



Q & A: Are fair trial rights derogable or non-derogable?

**There is no treaty provision that expressly prohibits derogation with respect to fair trial rights. However, the Human Rights Committee has stated that those fair trial rights that are contained in international humanitarian law cannot be derogated from because, the Committee reasoned, human rights guarantees during armed conflict should not be derogated from during other emergency situations.<sup>59</sup> While recognizing that Article 14 of the ICCPR is not included among the non-derogable rights set out in Article 4.2, the Committee has stated that "[d]eviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times".<sup>60</sup> Therefore, although derogation with respect to fair trial rights is not expressly prohibited by Article 4 of the ICCPR, judicial affairs officers should encourage States to take a more protective approach, for example by specifying in the constitution or national laws that no derogation from fair trial rights is allowed.**

<sup>56</sup> International Covenant on Civil and Political Rights (1966), Art. 4.

<sup>57</sup> Human Rights Committee, General Comment No. 29 (2001), para. 12.

<sup>58</sup> *Ibid.*, para. 16.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*, para. 6.

## Human Rights Mechanisms

There are a number of mechanisms which promote, monitor and/or enforce compliance with IHRL, including treaty bodies, the Security Council, the General Assembly, the Human Rights Council, regional human rights bodies and national human rights institutions.

Monitoring mechanisms (“treaty bodies”) established pursuant to various human rights treaties include:

- Human Rights Committee, under the ICCPR;
- Committee on Economic, Social and Cultural Rights, under the ICESCR;
- Committee on the Elimination of Racial Discrimination, under the International Convention on the Elimination of All Forms of Racial Discrimination;
- Committee against Torture, under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Committee on Enforced Disappearances, under the International Convention for the Protection of All Persons from Enforced Disappearance;
- Committee on the Elimination of All Forms of Discrimination against Women, under the Convention on the Elimination of All Forms of Discrimination against Women;
- Committee on the Rights of the Child, under the Convention on the Rights of the Child;
- Committee on Migrant Workers, under the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; and
- Committee on the Rights of Persons with Disabilities, under the Convention on the Rights of Persons with Disabilities.

These treaty bodies play a number of roles. First, they set up reporting systems that require States to report on their compliance with their treaty obligations. Specifically, the committees review the reports of States Parties, and assess the positive and negative aspects of a State’s compliance. The “concluding observations” of treaty bodies can provide judicial affairs officers with valuable information on how the State is complying or not with international human rights law. Another important source is the reports of national non-governmental organizations to the various treaty bodies, the “shadow reports”.

Second, the treaty bodies issue “General Comments” or “General Recommendations” that elaborate on treaty obligations. Judicial affairs officers should be particularly aware of the existence of General Comments of the Human Rights Committee on fair trial rights, as these provide much needed additional information on how to implement international fair trial rights. Treaty bodies serve as the most authoritative source of interpretation of the human rights treaties that they monitor.<sup>61</sup>

Third, the treaty bodies examine complaints from individuals regarding alleged human rights violations committed by States. Whether individual complaints can be made depends on the provisions of the relevant treaty and whether a State has accepted

<sup>61</sup> OHCHR, *Human Rights: A Basic Handbook for UN Staff* (undated), page 39.

the jurisdiction of this body when expressing its consent to be bound by the relevant treaty or protocol to the treaty (e.g. Protocol I to the ICCPR establishing a complaints procedure for the Human Rights Committee). Although committees are not “courts”, they can have quasi-judicial functions by making findings of compliance or non-compliance with the treaty concerned.<sup>62</sup>

The Security Council can also use its powers to address gross human rights violations through resolutions condemning them or ordering the use of force under Chapter VII of the United Nations Charter. It may also investigate situations which might lead to international friction or give rise to a dispute under Article 34 of the Charter.

The General Assembly may also play a prominent role on human rights matters. It established, for example, the Human Rights Council. As noted above, a number of binding and non-binding human rights instruments have also been adopted by the General Assembly.

The Human Rights Council, which was created by the General Assembly, can promote compliance with IHRL through its monitoring functions. It can establish monitoring mechanisms (either one person – acting as a Special Rapporteur – or a group) to monitor an issue or a country. In June 2012, there were 36 thematic and 10 country mandates. Certain States with peace operations (Haiti and Côte d’Ivoire) are on the list of country mandates. In addition, a number of areas of interest to judicial affairs officers (e.g. arbitrary detention or independence of judges and lawyers) are on the list of thematic mandates. The reports of these monitoring mechanisms can be useful to judicial affairs officers in understanding the human rights situation in a State and determining whether the State is complying with specific treaty obligations. The reports also contain recommendations for how to comply with the obligations which can be useful in providing advice to national counterparts. The Human Rights Council also conducts a Universal Periodic Review (UPR) of each State’s compliance with international human rights law. The UPR reports are good sources of information on whether a post-conflict State is or is not complying with its obligations. They can also serve generally as a resource for judicial affairs officers.

IHRL also draws on the work of regional bodies and their associated regional human rights treaties and monitoring mechanisms.

- In Europe, the Council of Europe is responsible for the adoption of the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States of the Council of Europe are party. The Convention has 12 additional protocols and is adjudicated by the European Court of Human Rights. There is also a European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and a Framework Convention for the Protection of National Minorities. Individuals from Council of Europe Member States can submit cases against their country before the Court on the basis of alleged violations of human rights. States can also bring a case or initiate proceedings against other States before the court for alleged violations of human rights, although this is rare. (Ireland filed a claim against the UK before the Court on the basis of alleged

<sup>62</sup> UNDP, *Programming for Justice: Access for All* (2005), pages 46–7.

human rights violations taking place in the UK and Northern Ireland.) The Organization for Security and Cooperation in Europe (OSCE) also deals with human rights issues (although it has no treaties). The OSCE established a High Commissioner for National Minorities (based in The Hague) that seeks to protect the human rights of minorities, and the Organization for Democratic Institutions and Human Rights (ODIHR, based in Warsaw) is a specialized institution of the OSCE dealing with human rights. ODIHR assists States in implementing the human rights commitments (called “human dimension” commitments as they are not legally binding) to the OSCE and other international obligations by providing expertise and support. The OSCE has also played a human rights monitoring function in some post-conflict States (e.g. Kosovo). The European Union adopted the Charter of Fundamental Rights of the European Union (2000), setting out applicable human rights standards (civil, political, social and economic). With the entry into force of the Lisbon Treaty, the Charter now has binding legal force, and disputes under the Charter can be adjudicated by the European Court of Justice.

- In the Americas, the Organization for American States (OAS) has adopted a number of human rights treaties and has also established human rights monitoring mechanisms. The American Convention on Human Rights is the regional analogue to the ICCPR in that it is a general human rights convention. Additionally, more specific treaties have been adopted, including the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, the Inter-American Convention to Prevent and Punish Torture and the Inter-American Convention on Forced Disappearances of Persons. There is also an Inter-American Commission on Human Rights and an Inter-American Court on Human Rights. The Commission has its roots in the American Declaration of the Rights and Duties of Man (the regional analogue to the Universal Declaration of Human Rights) and the OAS Charter. The Commission receives individual complaints and looks into allegations of human rights violations. It also monitors the human rights situation in OAS countries and has special rapporteurs on various topics (e.g. on the rights of women, the rights of children). The Inter-American Court on Human Rights has as its purpose the application and interpretation of the American Convention on Human Rights. The Court thus has an adjudicatory and an advisory function. Under the adjudicatory function, a State or citizen can bring a case against a Member State for violating the Convention. Under its advisory role, organs of the OAS or Member States can ask for the advice of the Court on the application of the Convention.
- In Africa, the African Union (AU) adopted the African Charter on Human and Peoples’ Rights (Banjul Charter). It is unique among international human rights instruments in that it gives prominent credence to group rights as well as individual rights, based on the communitarian culture of Africa. In addition to the Charter, other AU conventions have been drafted, including the African Charter on the Rights and Welfare of the Child and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa. The African Commission on Human and Peoples’ Rights was established under the African Charter to promote and protect human rights and to interpret the Charter. The Commission has

a number of special rapporteurs on topics such as extra-judicial, summary or arbitrary executions, refugees, asylum seekers, internally displaced persons (IDPs) and migrants, and the rights of women. All AU States must report to the Commission on their compliance with the African Charter. The African Court on Human and Peoples’ Rights was established in 2004 pursuant to a protocol to the African Charter. The first judges of the court were elected in 2006. The Economic Community of West African States (ECOWAS) also has a Community Court of Justice which has adjudicated rule of law issues.

- In Asia, the Association of Southeast Asian States (ASEAN) Intergovernmental Commission on Human Rights was established and held its first meeting in 2010. The Commission is still in the process of developing its roadmap of programmes and activities to be undertaken by the organization. The newly established Commission covers ASEAN Member States.

National human rights institutions also play a key role in protecting and promoting human rights.<sup>63</sup> Many national human rights institutions are part of the executive branch of government, with varying degrees of independence. *The Principles relating to the Status of National Institutions* (“Paris Principles”), adopted by the United Nations General Assembly in 1993, set out key principles for national institutions such as national human rights institutions, including those relating to jurisdictional competence, responsibilities, composition, guarantees of independence and pluralism, methods of operation and status.

National human rights institutions can be classified into three categories: human rights commissions; ombudspersons; and specialized institutions.<sup>64</sup> Human rights commissions generally function independently from other organs of government, and are composed of members from diverse backgrounds. They receive and investigate complaints from individuals and groups alleging human rights abuses, and often use conciliation and arbitration to resolve disputes. Ombudspersons often serve as an impartial mediator between individuals whose rights have allegedly been violated and the government. In some countries, ombudspersons may be able to initiate investigations on their own initiative. Specialized institutions operate similarly to human rights commissions and ombudspersons, but usually focus on investigating discrimination against vulnerable and minority groups.



Q & A: How do domestic courts apply international human rights law?

**The practice of domestic courts in the application of international human rights law varies greatly from jurisdiction to jurisdiction, but has been growing over the years.**

<sup>63</sup> OHCHR, *Fact Sheet No. 19 on National Institutions for the Promotion and Protection of Human Rights* (undated), page 3.

<sup>64</sup> OHCHR, *Fact Sheet No. 19 on National Institutions for the Promotion and Protection of Human Rights* (undated), pages 3–6.

For examples of cases in which domestic courts have applied international law, see OHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (2003), pages 22–24. See also the *Oxford Reports on International Law in Domestic Courts* at [www.oxfordlawreports.com](http://www.oxfordlawreports.com).



Q & A: As a judicial affairs officer, how would you respond to assertions that human rights are not universal?

IHRL is enshrined in instruments of a global nature (such as the UDHR) as well as in regional instruments (such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights). Furthermore, human rights institutions (such as the European Court of Human Rights, Inter-American Court on Human Rights, the African Court on Human and Peoples' Rights) exist or are under development in all regions.

### International Human Rights Law and the Administration of Justice

There is a significant and complex body of international human rights instruments – both “hard law” and “soft law” – on issues related to the administration of justice, as set out in the table below. Judicial affairs officers must be familiar with these instruments, and must ensure that they are taken into consideration when undertaking legal analysis, assessment, programming and monitoring and evaluation.<sup>65</sup> In particular, judicial affairs officers should strive to promote enhanced compliance with international human rights standards by national authorities, including improved compliance with international due process and fair trial standards, as well as greater access to effective remedies by victims and the protection of victims, witnesses and other persons of concern.<sup>66</sup>

Subject	Relevant Instruments
Arrest and detention	African Charter on Human and Peoples' Rights, Art. 6
	American Convention on Human Rights, Arts. 5, 7
	European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 5
	International Covenant on Civil and Political Rights, Arts. 9, 10
	Basic Principles for the Treatment of Prisoners

<sup>65</sup> OHCHR, DPKO, DPA and DFS, *Policy on Human Rights in United Nations Peace Operations and Political Missions* (2011), para. 103.

<sup>66</sup> *Ibid.*

	Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
	Standard Minimum Rules for the Treatment of Prisoners
	United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders
	Universal Declaration of Human Rights, Arts. 3, 9
Children	African Charter on the Rights and Welfare of the Child
	Convention on the Rights of the Child
	Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime
	United Nations Guidelines for the Prevention of Juvenile Delinquency (“Riyadh Guidelines”)
	United Nations Rules for the Protection of Juveniles Deprived of Liberty
	United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“Beijing Rules”)
Death penalty	African Charter on Human and Peoples' Rights, Art. 4
	American Convention on Human Rights, Art. 4
	European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 2
	International Covenant on Civil and Political Rights, Art. 6
	Safeguards guaranteeing the protection of the rights of those facing the death penalty
	Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty
Due process and fair trial	African Charter on Human and Peoples' Rights, Art. 7
	American Convention on Human Rights, Arts. 8, 9, 10
	European Convention for the Protection of Human Rights and Fundamental Freedoms, Arts. 5, 6, 7
	International Covenant on Civil and Political Rights, Arts. 9, 14, 15, 16
	Universal Declaration of Human Rights, Arts. 10, 11

Impunity	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
	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Arts. 4, 5
	Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity
	Convention on the Prevention and Punishment of the Crime of Genocide, Arts. 3, 4, 5, 6
	Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity
	Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity
Judicial independence/ impartiality	African Charter on Human and Peoples' Rights, Art. 7
	American Convention on Human Rights, Art. 8
	Basic Principles on the Independence of the Judiciary
	European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6
	International Covenant on Civil and Political Rights, Art. 14
	Universal Declaration of Human Rights, Art. 10
Lawyers	Basic Principles on the Role of Lawyers
Prosecutors	Guidelines on the Role of Prosecutors
Torture	African Charter on Human and Peoples' Rights, Art. 5
	American Convention on Human Rights, Art. 5
	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
	European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3

	International Covenant on Civil and Political Rights, Art. 7
	Inter-American Convention to Prevent and Punish Torture
	Universal Declaration of Human Rights, Art. 5
Victims	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
	Declaration of basic principles of justice for victims of crime and abuse of power
	Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity
Women	Convention on the Elimination of All Forms of Discrimination against Women
	Declaration on the Elimination of Violence against Women
	Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women
	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
	Updated model strategies and practical measures on the elimination of violence against women



Q & A: What tools can be used to “translate” the conceptual and broad language of many human rights instruments into concrete and specific laws, processes, actions or mechanisms?

In many instances, the elements of each of the broad rights is not very straightforward as treaties provide general statements (e.g. “no person shall be subject to arbitrary detention” or “everyone has the right to review the legality of detention”) but do not provide guidance on how rights should be realized and enforced. States have discretion in this regard, partly because legal systems differ to such an extent. If the plain language of the treaty does not provide enough detail on implementing a certain provision, the next step is to look to any General Comments that may have been issued by the relevant treaty bodies. Non-binding instruments may also be useful, as they are often far less general than treaty provisions and provide detailed

standards that can supplement broad treaty provisions. They may also fill in the gaps where treaties do not address certain issues.

Model laws are another tool that may assist in implementing international human rights obligations. For example, the Model Codes for Post-conflict Criminal Justice, developed by the United States Institute of Peace in cooperation with United Nations Office on Drugs and Crime (UNODC) and Office of the High Commissioner for Human Rights (OHCHR), comprise a model criminal code; a model code of criminal procedure; a model detention act and the model police powers act. These codes include commentaries that provide details on various rights and how they can be properly implemented.

Reference materials on international human rights, such as those published by OHCHR and the International Bar Association, should also be reviewed.

### International Human Rights and Statelessness

A stateless person is an individual who is “not considered as a national by any State under the operation of its law”.<sup>67</sup> There is no universally accepted definition of a *de facto* stateless person, but the term has been linked to the notion of ineffective nationality and traditionally referred to as “persons who possess a nationality but are outside their country of nationality and unable or, for valid reasons, unwilling to avail themselves of the protection of that country”.<sup>68</sup>

Statelessness undermines the rule of law, both because of its causes and its consequences.<sup>69</sup> Statelessness often arises from discrimination and arbitrary laws or practices, thereby negating equality before the law, a basic tenet of the rule of law. Moreover, stateless persons cannot enjoy full equality with citizens in any country, as it almost always leads to denial of political rights and restrictions on the right to enter and reside. Even where rights are to be enjoyed by citizens and non-citizens alike, stateless persons are often excluded. Generally, they are denied access to birth registration, identity documentation, education, health care, legal employment, property ownership, political participation and freedom of movement.

Rules relating to the prevention and reduction of statelessness and standards of treatment of stateless persons are set out in the Convention on the Reduction of Statelessness (1961) and the Convention relating to the Status of Stateless Persons (1954), as well as in other universal and regional human rights instruments and customary international law.<sup>70</sup>

<sup>67</sup> As defined in the Convention relating to the Status of Stateless Persons (1954) and customary international law.

<sup>68</sup> *Guidance Note of the Secretary-General on the United Nations and Statelessness* (2011), page 2.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Report of the Secretary-General on Human Rights and Arbitrary Deprivation of Nationality* (2009), A/HRC/13/34.

## 4. International Humanitarian Law

### Definition of International Humanitarian Law<sup>71</sup>

International humanitarian law (IHL) is sometimes called the “law of war” or the “law of armed conflict”. IHL seeks to limit the effects of armed conflict in two ways: by sparing those who do not or no longer directly participate in hostilities, and by regulating which weapons can or cannot be used and how to conduct military operations. IHL (*jus in bello*) is distinguished from *jus ad bellum*, which is the body of law concerning acceptable justifications to engage in war.<sup>72</sup>

IHL applies only to situations of armed conflict, which may be international or non-international in character. IHL does not cover internal tensions or disturbances such as isolated acts of violence. Further, it applies only after a conflict has begun, and applies equally to all sides regardless of who started the conflict.

IHL is based on a number of “essential rules”. These include:

- the parties to a conflict must distinguish between the civilian population and combatants in order to spare the civilian population and civilian property;
- neither the civilian population as a whole nor individual civilians may be attacked;
- attacks may be made solely against military objectives;
- persons who do not or can no longer take part in the hostilities are entitled to respect for their lives and for their physical and mental integrity;
- weapons or methods of warfare that are likely to cause unnecessary losses or excessive suffering (such as exploding bullets, chemical and biological weapons, blinding laser weapons and anti-personnel mines) are prohibited; and
- captured combatants and civilians who find themselves under the authority of the adverse party are entitled to respect for their lives, their dignity, their personal rights and their political, religious and other convictions, and must also enjoy basic judicial guarantees.<sup>73</sup>

### Key International Humanitarian Law Instruments

The main IHL treaties are the Geneva Conventions of 1949 and their Additional Protocols. Other IHL treaties include the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and Their Destruction (1997).

<sup>71</sup> This section is based on ICRC, *What is International Humanitarian Law?* (2004).

<sup>72</sup> Article 2(4) of the United Nations Charter prohibits the use of armed force with only limited exceptions (individual and collective self-defence in Article 51 of the Charter), Security Council enforcement measures (under Chapter VII of the Charter) and arguably the right to self-determination (although this is still being debated among scholars).

<sup>73</sup> ICRC, *International Humanitarian Law: Answers to your Questions* (2002), page 6.

The Geneva Conventions have received universal ratification. Further, many elements of the Geneva Conventions and the Additional Protocols have reached the status of customary law.<sup>74</sup> The first Geneva Convention regulates the protection of the wounded and sick in armed forces in the field. The second Geneva Convention regulates the protection of the wounded, sick and shipwrecked members of armed forces at sea. The third Geneva Convention regulates the protection of prisoners of war – primarily members of armed forces and affiliated forces. The fourth Geneva Convention covers the protection of civilians in times of war (including in times of occupation).

The Geneva Conventions only cover situations of international armed conflict, with the exception of common Article 3, which provides basic standards for conflicts of a non-international character. Additional rules applicable to non-international conflict are contained in Additional Protocol II of 1977.

### Implementation and Enforcement of International Humanitarian Law

The primary responsibility for implementing and enforcing IHL lies with States. Accordingly, States must train their armed forces on IHL. States must also enact laws that punish the most serious violations of the Geneva Conventions and the Additional Protocols, which constitute war crimes. International and hybrid criminal tribunals (such as the International Criminal Court (ICC), International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone) have also contributed to ensuring accountability for IHL violations, as covered in Chapter 16 on transitional justice. Finally, Additional Protocol I established the International Fact-Finding Commission, while various provisions of the Geneva Conventions and the Additional Protocols authorize the “Protecting Powers” and the International Committee of the Red Cross (ICRC) to monitor the implementation of these treaties.

The ICRC is involved in the implementation of IHL. Its role as an impartial, neutral and independent organization is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance. It also visits prisoners, organizes relief operations, re-unites separated families and carries out other humanitarian activities in international and non-international armed conflict.



Q & A: Are IHRL and IHL applicable to United Nations personnel, including judicial affairs officers?

**IHRL and IHL are applicable to United Nations personnel, as set out in various documents:**

**Under the Staff Regulations, United Nations staff members are explicitly required to uphold and respect the principles set out in the United Nations Charter, including faith in fundamental human rights.<sup>75</sup>**

<sup>74</sup> ICRC, *Customary International Humanitarian Law* (2002).

<sup>75</sup> United Nations Staff Regulations (2009), ST/SGB/2009/6, Regulation 1.2.

**Under the Secretary-General’s Bulletin on Observance by United Nations Forces of International Humanitarian Law (1999), the fundamental principles and rules of IHL are applicable to United Nations forces in situations of armed conflict when they are actively engaged therein as combatants, to the extent and for the duration of their engagement. Accordingly, IHL is applicable to United Nations personnel undertaking enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence<sup>76</sup> or in carrying out a protection of civilians (POC) mandate. The Secretary-General’s Bulletin also states that “in case of violations of international humanitarian law, members of military personnel of a United Nations force are subject to prosecution in their national courts”.<sup>77</sup>**

**Under the DPKO/DFS Interim Standard Operating Procedures on Detention in United Nations Peace Operations (2010), any detentions by United Nations peacekeeping personnel must be in compliance with IHRL and IHL as well as international refugee law.<sup>78</sup>**

**The Secretary-General has also stated that, where the United Nations is mandated to undertake executive or judicial functions, United Nations-operated facilities “must scrupulously comply with international standards for human rights in the administration of justice”.<sup>79</sup>**

## 5. International Criminal Law

### Definition of International Criminal Law

International criminal law (ICL) is the body of law designed to: 1) proscribe international crimes; 2) impose upon States the obligation to prosecute and punish those crimes; and 3) regulate international proceedings for prosecuting and trying persons accused of such crimes.<sup>80</sup> ICL comprises both substantive law and procedural law. Substantive law includes rules defining the acts which amount to international crimes, the subjective elements required for such acts to be regarded as prohibited, the possible circumstances under which persons accused of such crimes may nevertheless not be held criminally liable, as well as the conditions under which States may or must prosecute or bring to trial persons accused of such crimes.<sup>81</sup> Procedural law includes rules governing the actions by prosecuting authorities and other parties and the various stages of international proceedings.<sup>82</sup>

<sup>76</sup> *Secretary-General’s Bulletin on Observance by United Nations Forces of International Humanitarian Law* (1999), ST/SGB/1999/13, para. 1.1.

<sup>77</sup> *Ibid.*, section 4.

<sup>78</sup> DPKO/DFS, *Interim Standard Operating Procedures on Detention in United Nations Peace Operations* (2010).

<sup>79</sup> *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies* (2004), S/2004/616, para. 10.

<sup>80</sup> Antonio Cassese, *International Criminal Law* (2008), page 15.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

International crimes which may be of particular interest to judicial affairs officers are war crimes, crimes against humanity and genocide.

- **War crimes** include “grave breaches” of the Geneva Conventions (1949) and other serious violations of the laws and customs of war.<sup>83</sup>
- **Crimes against humanity** include any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: a) murder; b) extermination; c) enslavement; d) deportation or forcible transfer of population; e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; f) torture; g) rape; h) sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; i) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law; j) enforced disappearance of persons; k) the crime of apartheid; l) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.<sup>84</sup>
- **Genocide** includes any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: a) killing members of the group; b) causing serious bodily or mental harm to members of the group; c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) imposing measures intended to prevent births within the group; and e) forcibly transferring children of the group to another group.<sup>85</sup>

Other international crimes include torture (as a discrete crime rather than as a war crime or crime against humanity), piracy, terrorism and aggression.<sup>86</sup> International crimes are distinguished from transnational crimes, such as drugs trafficking, human trafficking, arms trafficking and money laundering.

### Key International Criminal Law Instruments

ICL is governed by various instruments, including the statutes of international criminal tribunals (such the Rome Statute of the International Criminal Court) as well as multi-lateral treaties such as the Geneva Conventions of 1949, the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Customary interna-

<sup>83</sup> Rome Statute of the International Criminal Court (1998), Art. 8.

<sup>84</sup> Ibid., Art. 7.

<sup>85</sup> Ibid., Art. 6. See also the Convention on the Prevention and Punishment of the Crime of Genocide (1948), Art. 2.

<sup>86</sup> In June 2010, the Assembly of State Parties to the Rome Statute of the International Criminal Court adopted a resolution amending the Statute to include the crime of aggression (Resolution RC/Res.6). However, the Court will not be able to exercise jurisdiction over the crime until after 1 January 2017 when State Parties are set to decide on activating the Court’s jurisdiction.

tional law has evolved to include the holding of the perpetrators of war crimes, crimes against humanity, genocide and torture directly and individually accountable.

### Implementation and Enforcement of International Criminal Law

ICL is implemented by international, mixed (“hybrid”) and national courts. The prosecution and adjudication of international crimes is covered in Chapter 16 on transitional justice.

## 6. International Refugee Law

### Definition of International Refugee Law

Three areas of international law are particularly relevant for the protection of refugees and other persons of concern: international refugee law, IHRL and IHL. Effective and comprehensive protection can only be achieved by applying, in concert, the standards set out in these three complementary branches of international law. A related issue is statelessness, which is covered above under IHRL.

A “refugee” is defined as a person who: a) has a well-founded fear of persecution because of his or her race, religion, nationality, membership in a particular social group or political opinion; b) is outside his/her country of origin; and c) is unable or unwilling to avail him/herself of the protection of that country, or to return there, for fear of persecution.<sup>87</sup>

Under the principle of “non-refoulement”, a refugee is prohibited from being expelled or returned (“refoulement”) in any manner whatsoever to the frontiers of territories where his or her life or freedom would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion.<sup>88</sup> This principle does not, however, apply to refugees for whom there are reasonable grounds to believe that they may pose a danger to the security of the country in which they are present, or who, having been convicted by a final judgment of a particularly serious crime, constitute a danger to the community of that country.<sup>89</sup>

Internally displaced persons (IDPs) are often incorrectly called refugees. IDPs are defined as persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of, or in order to avoid, the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.<sup>90</sup> IDPs have often fled for reasons similar to refugees, but unlike refugees, IDPs have not crossed an international border to find sanctuary, but have remained inside their home States. Accordingly, IDPs legally remain under the protection of their own government – even if that government may have

<sup>87</sup> Convention relating to the Status of Refugees (1951), Art. 1.

<sup>88</sup> Ibid., Art. 33(1).

<sup>89</sup> Ibid., Art. 33(2).

<sup>90</sup> *Guiding Principles on Internal Displacement* (1998), para. 2.



been the cause of their flight. As citizens, they retain all of their rights and protection under both IHRL and IHL.

### Key International Refugee Law Instruments

International refugee law is based on the 1951 United Nations Convention relating to the Status of Refugees (Refugee Convention) and its 1967 Protocol. The Refugee Convention provides a definition of “refugee”, and sets out minimum standards for the treatment of persons who are found to qualify for refugee status. Because the Refugee Convention was drafted in the aftermath of the Second World War, its definition of refugees focuses on persons who are outside their country of origin, and are refugees as a result of events occurring in Europe or elsewhere before 1 January 1951.<sup>91</sup> The 1967 Protocol removes these geographical and temporal restrictions from the Convention.

The *Guiding Principles on Internal Displacement* is a non-binding instrument applicable to IDPs. The *Guiding Principles* include principles that are non-binding standards aimed to protect the specific rights of IDPs, but are based on and consistent with IHRL, IHL and international refugee law. IDPs enjoy the same rights and freedoms as other persons in the country and they should not be discriminated against because they are internally displaced.<sup>92</sup> National authorities have primary responsibility for providing protection and humanitarian assistance to IDPs.

### Implementation of International Refugee Law

Protection is first and foremost the responsibility of States. Each State is responsible for respecting, protecting and fulfilling the rights of its citizens, including in situations of internal displacement and return. International protection is only needed when national protection is denied or is otherwise unavailable.

Within the United Nations system, the Office of the United Nations High Commissioner for Refugees (UNHCR) is the focal point for matters relating to refugees and IDPs. UNHCR was established by the General Assembly in the aftermath of the Second World War to protect and find durable solutions for refugees. The Refugee Convention sets out obligations on States to cooperate with UNHCR in the exercise of its functions.<sup>93</sup>

UNHCR’s original mandate does not specifically cover IDPs, but because of the agency’s expertise on displacement, it has for many years been assisting millions of IDPs, more recently through the “cluster approach”. This approach aims to ensure greater leadership and accountability in key sectors where gaps in humanitarian response have been identified, and to enhance partnerships among humanitarian, human rights and development actors, including the United Nations. Under this approach, UNHCR has the lead role in overseeing the protection and shelter needs of “conflict induced” IDPs<sup>94</sup> as well as the coordination and management of camps.

<sup>91</sup> UNHCR, *Refugee Protection: A Guide to International Refugee Law* (2001), page 8.

<sup>92</sup> *Guiding Principles on Internal Displacement* (1998), Principle 1.

<sup>93</sup> Convention relating to the Status of Refugees (1951), Art. 35.

<sup>94</sup> While UNHCR leads the global protection cluster, the choice of lead agency in disaster situations or in complex emergencies without significant displacement, is made among UNHCR, OHCHR and

National authorities are responsible for ensuring that an appropriate legal framework or standard is in place to address internal displacement. The Framework for National Responsibility is a key document which sets out steps that governments must take to ensure IDP protection.<sup>95</sup>

The International Organization for Migration (IOM) is the leading intergovernmental organization in the field of migration. IOM includes 127 Member States and has offices in over 100 countries. It works to help ensure the orderly and humane management of migration, to promote international cooperation on migration issues, to assist in the search for practical solutions to migration problems and to provide humanitarian assistance to migrants in need, including refugees and IDPs.



Q & A: What is the relationship between IHL and IHRL?<sup>96</sup>

**IHL and IHRL are complementary and strive to protect the lives, health and dignity of individuals. IHRL applies at all times, while IHL only applies in armed conflict. It is possible to derogate from IHRL but not from IHL (and IHRL specifically says that there is no derogation from IHL). IHRL applies to governments, although increasingly IHRL is thought to apply also to non-state actors (particularly if they exercise government-like functions). IHL is applicable to both state and non-state parties to an armed conflict.**



Q & A: What is the relationship between IHL and ICL?

**ICL holds persons individually criminally responsible for certain violations of humanitarian law, for genocide, and for gross violations of human rights amounting to crimes against humanity. Thus, ICL adds greatly to the enforcement of IHL and IHRL. This is discussed in greater detail in Chapter 16 on transitional justice.**



Q & A: What is the relationship between international refugee law, IHL and IHRL?

UNICEF, under the leadership of the United Nations Humanitarian Coordinator and the United Nations Resident Coordinator. For more information, see the *Handbook for the Protection of Internally Displaced Persons*, March 2010.

<sup>95</sup> Brookings-Bern Project on Internal Displacement, *Addressing Internal Displacement: A Framework for National Responsibility* (2005).

<sup>96</sup> OHCHR, *Fact Sheet No. 13 on International Humanitarian Law and Human Rights* (undated).

Because refugees often find themselves in the midst of international armed conflict, refugee law is often linked to IHL. The fourth Geneva Convention includes a provision that deals specifically with refugees and displaced persons (Article 44) and its Additional Protocol I (Article 73) also provides that refugees and stateless persons are to be protected under the provisions of Parts I and III of the fourth Geneva Convention. IHL stops applying to asylum seekers once they flee the country where the conflict has taken place. International refugee law is part of the larger mosaic of international human rights law. Refugees are entitled to general human rights and also rights specific to refugees, as set out in the Refugee Convention. In addition, the Convention against Torture (Article 3) and the Convention on the Rights of the Child (Article 22) provide specific provisions, firstly on preventing return or refoulement to a home State where torture is likely, and secondly on special protections for child refugees.

## 7. References

### Multilateral treaties

African Charter on Human and Peoples' Rights (1981) and Protocol on the Rights of Women in Africa (2003)

African Charter on the Rights and Welfare of the Child (1990)

American Convention on Human Rights (1969)

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and Optional Protocol (2002)

Convention on the Elimination of All Forms of Discrimination against Women (1979) and Optional Protocol (1979)

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968)

Convention on the Prevention and Punishment of the Crime of Genocide (1948)

Convention on the Reduction of Statelessness (1961)

Convention on the Rights of Persons with Disabilities and Optional Protocol (2006)

Convention on the Rights of the Child (1989), Optional Protocol on the sale of children, child prostitution and child pornography (2000) and Optional Protocol on the involvement of children in armed conflict (2000)

Convention relating to the Status of Refugees (1951) and Protocol (1966)

Convention relating to the Status of Stateless Persons (1954)

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987)

European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

Framework Convention for the Protection of National Minorities (1995)

Geneva Conventions (1949) and Additional Protocols I and II (1977)

Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994)

Inter-American Convention to Prevent and Punish Torture (1985)

International Covenant on Civil and Political Rights (1966), Optional Protocol (1966) and Second Optional Protocol aiming at the abolition of the death penalty (1989)

International Covenant on Economic, Social and Cultural Rights (1966)

International Convention for the Protection of All Persons from Enforced Disappearance (2006)

International Convention on the Elimination of All Forms of Racial Discrimination (1965)

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)

United Nations Charter (1945)

Vienna Convention on the Law of Treaties (1969)

Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations (1986)

### Constituent instruments of international courts and criminal tribunals

Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodia Law for Crimes Committed during the Period of Democratic Kampuchea (2003)

Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (2004)

Rome Statute of the International Criminal Court (1998)

Statute of the International Court of Justice (1945)

Statute of the International Criminal Tribunal for the former Yugoslavia (1993)

Statute of the International Criminal Tribunal for Rwanda (1994)

Statute of the Special Court for Sierra Leone (2002)

### Other relevant instruments

*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* (2006)

*Basic Principles for the Treatment of Prisoners* (1990)

*Basic Principles on the Independence of the Judiciary* (1985)

*Basic Principles on the Role of Lawyers* (1990)

*Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (1990)

*Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (1988)

*Code of Conduct for Law Enforcement Officials* (1979)

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985)

Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981)

Declaration on the Elimination of Violence against Women (1993)

Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live (1985)

Declaration on the Protection of All Persons from Enforced Disappearance (1992)

Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974)

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992)

*Guidelines for Action on Children in the Criminal Justice System* (1997)

*Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime* (2005)

*Guidelines on the Role of Prosecutors* (1990)

*Guiding Principles on Internal Displacement* (1998)

*International Code of Conduct for Public Officials* (1996)

*Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity* (1973)

*Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (1989)

*Principles relating to the Status of National Institutions* ("Paris Principles") (1993)

*Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty* (1984)

*Siracusa Principles on the Limitation and Derogation Provisions of the International Covenant on Civil and Political Rights* (1985)

*Standard Minimum Rules for the Treatment of Prisoners* (1955)

*United Nations Guidelines for the Prevention of Juvenile Delinquency* ("Riyadh Guidelines") (1990)

*United Nations Rules for the Protection of Juveniles Deprived of Liberty* (1990)

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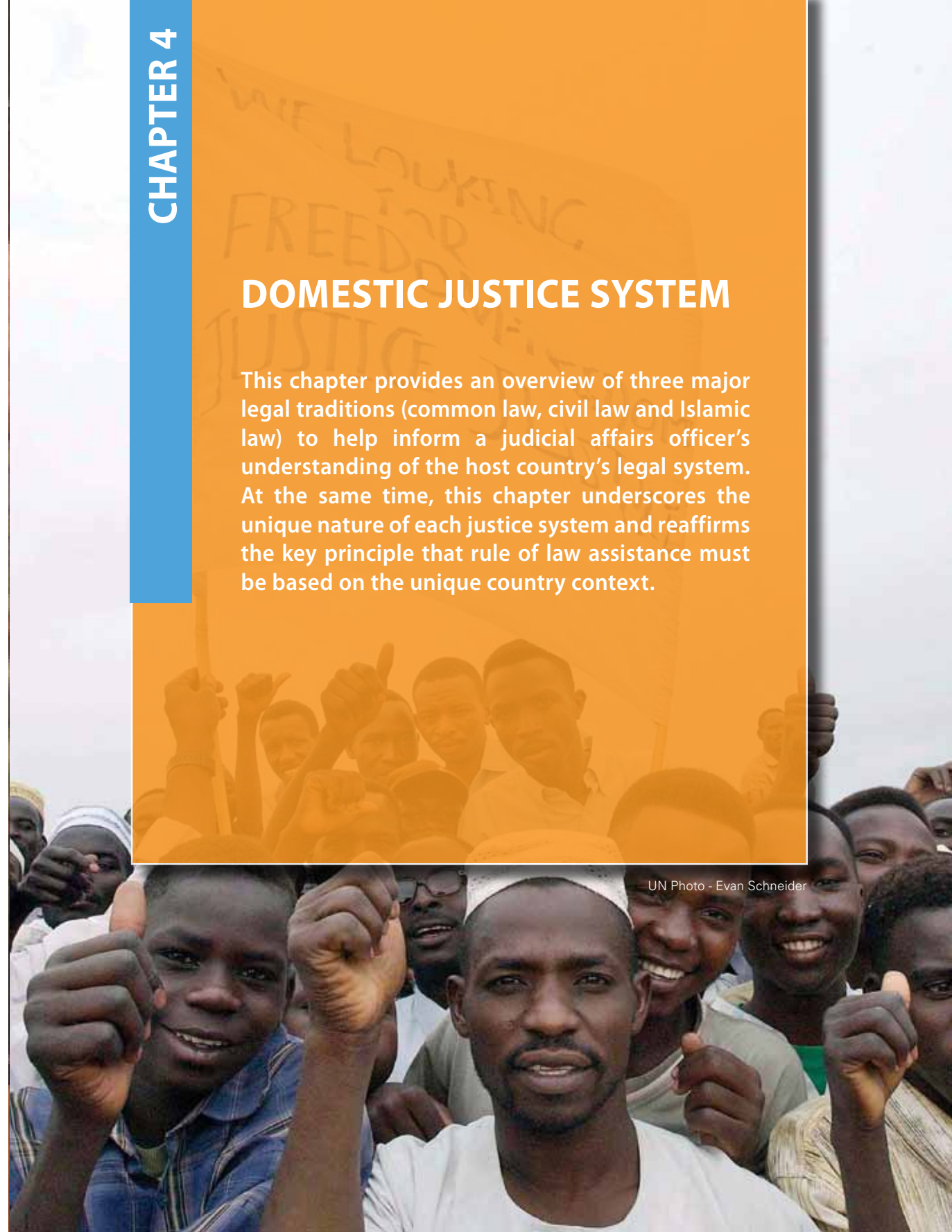
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## CHAPTER 4

### DOMESTIC JUSTICE SYSTEM

This chapter provides an overview of three major legal traditions (common law, civil law and Islamic law) to help inform a judicial affairs officer's understanding of the host country's legal system. At the same time, this chapter underscores the unique nature of each justice system and reaffirms the key principle that rule of law assistance must be based on the unique country context.

UN Photo - Evan Schneider



## 1. Introduction

One of the key principles of the United Nations approach to rule of law assistance is that such assistance must be based on the unique country context, including the nature of the country's justice system.<sup>97</sup> To be effective, it is essential that judicial affairs officers understand the key features, laws and institutions of the host country's justice system.

The purpose of this chapter is to highlight the uniqueness of justice systems in mission areas, and to underscore the risks of making assumptions about the host country's justice system. This chapter also provides brief overviews of common law, civil law and Islamic law systems, while emphasizing the limitations of classifying justice systems into such categories. An overview of informal justice mechanisms is provided in Chapter 17.

## 2. Uniqueness of Justice Systems

The advice and assistance provided by judicial affairs officers to national counterparts must be tailored to the unique characteristics and history of the host country's justice system. Accordingly, an important first step for judicial affairs officers even before arriving in a mission area is to learn as much as possible about the host country's justice system, history and political system. In doing so, judicial affairs officers must take care not to assume that the host country's justice system is similar to the system "back home". For example, the host country's justice system may not have the same institutions (e.g. investigating judge) or the same procedures (e.g. guilty pleas) that judicial affairs officers may have in their own justice systems.

Judicial affairs officers may do more harm than good if they try to assist national actors without sufficiently understanding the host country's justice system or if they assume it is the same as their own system. Such an approach would be highly inappropriate, and is likely to be rejected by national counterparts, in turn undermining the credibility of the mission. Moreover, national counterparts may take offence or lack confidence in judicial affairs officers who do not make an effort to learn about the host country's justice system or are otherwise unfamiliar with the basic features of the local justice system.

Unfortunately, there have been situations where international advisers have provided rule of law assistance without adequately taking into account the host country's justice system. An international "expert" may provide advice on a draft law without any knowledge of the broader national legal framework in the host country, the relationship between the draft law and other related laws, or the institutional and societal challenges to implementing the draft law. International advisers should avoid attempting to transplant laws, regulations, procedures, terminologies and concepts from their home countries. Such advice and such an approach may lead to the adoption of foreign laws and alien concepts and procedures, which cannot be implemented in the host country or which are otherwise unsuitable or inappropriate.

<sup>97</sup> *Guidance Note of the Secretary-General on the United Nations Approach to Rule of Law Assistance* (2008), page 3.



Q & A: What documents should judicial affairs officers read in order to familiarize themselves with the justice system of the host country?

Judicial affairs officers should make an effort to learn as much as possible about the host country's justice system, including the following documents:

- ceasefire and peace agreements;
- constitution and relevant domestic laws;
- national justice and governance strategies;
- Poverty Reduction Strategy Papers (PRSPs);
- annual/thematic reports and strategy/policy papers by the host government's justice and central agencies (such as the Ministry of Justice);
- Common Country Assessment (CCA) reports, Post-conflict Needs Assessment (PCNA) reports, Strategic Assessment (SA) reports; Technical Assessment Mission (TAM) reports and In-Mission Assessment (IMA) reports;
- monthly, quarterly and other reports of the mission's justice, corrections, police, SSR and other relevant components;
- reports by other United Nations entities, including Office of the High Commissioner for Human Rights (OHCHR) reports, reports by special mechanisms of the Human Rights Council, Universal Periodic Reviews (UPRs), and concluding observations of human rights treaty bodies;
- reports by national and international think tanks and academic institutions;
- reports of national and international non-governmental organizations;
- reports of regional organizations;
- academic papers and articles by experts; and
- media reports.

## 3. Categories of Justice Systems

Many comparative law scholars and practitioners have sought to categorize justice systems under certain labels that reflect historic influences and traditions (e.g. common law, civil law, Romanic (French) law, Germanic law, Slavic law, Islamic law and Socialist law). They have also been criticized as giving the inaccurate impression that a justice system can be classified as one system rather than a combination of systems and that the system of justice provided by the state is the one and only justice system operating in a post-conflict State.

It is a misconception that there are "pure" justice systems. Most systems are a combination of various systems ("mixed" or "hybrid" systems). Even among countries which are considered to belong to the same legal tradition (e.g. civil law, common law or Islamic law), there are often more differences than similarities. In reality, most jurisdictions are

characterized by “legal pluralism”, in which multiple systems and sub-systems of justice – formal and informal – intersect, overlap and compete.

While knowledge of comparative justice systems – such as common law, civil law, Islamic law and others – provides a useful context for understanding the justice system in a particular country, it is crucial for judicial affairs officers to recognize that each country has its own unique justice system.



Q & A: Do you think a common law lawyer can help to strengthen the justice system in a civil law country, and vice versa?

**There is a common misconception that a common law lawyer cannot work in a civil law country on reforms, and vice versa. When considering reforms, it is useful for a judicial affairs officer from another legal tradition to be part of discussions as s/he can bring new ideas and approaches to the table. In many post-conflict reform processes, elements of one system have been incorporated in the other to create more of a hybrid system.**

### Common Law

Common law systems have their roots in legal developments in England during the 11th and 12th centuries, but draw also from earlier practice and from Roman law. Common law systems have subsequently developed in areas that have had contact either with England, or with countries that based their systems on the English model. Countries with common law systems include Australia, Jamaica, Canada, the United States, South Africa, Liberia, New Zealand, Kenya and India.

Common law systems vary in many respects, but generally share the principle that the sources of law include both legislative law, as well as court decisions that interpret legislative law. The latter source of law, referred to as case law, is grounded in the principle of *stare decisis*, or precedent, which provides that case law from a higher court must be applied in later cases with similar facts by that same court, as well as by lower courts. The decisions of other courts outside a judicial hierarchy can be persuasive but are not binding.

In a typical common law system, the initial investigation of a crime is carried out by the police who gather evidence (often independently) and thereafter transmit the evidence to a prosecutor who then files an indictment (in some systems, after presentation of the evidence to a grand jury) and prosecutes the case. The case is adjudicated by a judge and may be decided by a jury of lay persons. Defence counsel protects the defendant’s rights throughout the proceedings, challenges the prosecution case, and presents any case for the defendant. Victims do not generally play an active role in common law criminal proceedings, except as witnesses and in making victim impact statements.



Q & A: Why is the common law system often described as an “adversarial” system?

**In common law systems, the prosecution and the defence present and argue their cases before an impartial judge or jury, which generally has no role in adducing evidence. The focus is on evidence presented by the two sides at trial, rather than written testimonies taken previously. These are no longer features of the adversarial systems alone.**

### Civil Law

Civil law has been influenced by Roman law (*Corpus Juris Civilis*), canon law, Germanic law and European commercial law. Civil law spread through parts of Europe and different nations on other continents which adopted their own codes (e.g. Latin America, Africa, the Middle East and Asia).

Civil law is a codified system which, in part, places particular emphasis on the distinction between the role of the legislature in making law and of judges in applying the law.<sup>98</sup> In civil law countries, legislation is seen as the primary source of law. Courts base their judgments on the provisions of codes and statutes, from which solutions in particular cases are to be derived.

Civil law adheres to a strict hierarchy of laws: the constitution sits at the top, followed by treaties and international agreements, organic laws, laws and regulations (which are also called “implementing regulations”) and then custom. Most branches of law are embodied in statute books or codes with annotations to specific law cases. In many civil law systems, prior judicial decisions are not technically binding on other decisions, although higher court decisions generally serve as persuasive precedent.

In a typical civil law system, the prosecutor is a member of the “standing” magistracy (as opposed to “sitting” magistracy) and represents public order. The chief prosecutor generally initiates preliminary investigations and, if necessary, asks that an investigating judge, or *juge d’instruction*, be assigned to lead a formal judicial investigation. In some cases the assignment of an investigative judge is mandatory. The investigating judge otherwise directs the investigation, instructing the police, interviewing witnesses and going to the crime scene to collect evidence. In some countries, judicial police are solely responsible for criminal investigation under the supervision of the investigating judge. During criminal proceedings, prosecutors are responsible for presenting the case at trial to either the bench or a jury. While defence counsel play an active role during the trial, judges dominate trials in civil law systems. Victims have an

<sup>98</sup> See Claus Kress, “Nulla Poena Nullum Crimen Sine Lege”, *Max Planck Encyclopedia of Public International Law*, paras. 1 and 5 (2010), available at [www.mpepil.com/subscriber\\_article?script=yes&id=/epil/entries/law-9780199231690-e854&recno=1&searchType=Quick&query=nulla+poena](http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e854&recno=1&searchType=Quick&query=nulla+poena).

important role in civil law proceedings and in some countries are parties to the proceedings.



Q & A: Why is the civil law system often described as an “inquisitorial” system?

**In a civil law system, the investigating judge is responsible for leading the collection of evidence for cases involving serious or complex crimes. The investigating judge must look for both incriminating and exculpatory evidence. The accused may be compelled to testify, and is expected to contribute to the discovery of truth.**

### “Adversarial” and “Inquisitorial” Processes Compared

In the context of criminal justice, “discovering the truth” – exactly what has happened, and who the perpetrator is – remains a necessary prerequisite for any attempt to ensure social peace and justice. It is also imperative that criminal sanctions are only imposed upon those who are in fact guilty. Traditionally, two basic approaches to truth-finding have developed: **the adversarial approach** (generally applying in systems with common law traditions), which relies on opposing parties presenting their competing versions of the truth, challenging each other’s version, and **the inquisitorial approach** (generally applying in systems with civil law traditions), which entrusts a judge, prosecutor or magistrate with collecting relevant evidence, a process that includes the interrogation of suspects and witnesses during the investigative stage.

Although there are unquestionably two different traditions, the blending between the two has been so extensive that it would now be inaccurate to classify any one system as being wholly adversarial or wholly inquisitorial.

However, it is important that judicial affairs officers understand the historical legal traditions in the countries in which they are working. Each tradition has a general, internal logic, including a system of checks and balances to best arrive at the truth. Familiarity with each tradition can facilitate one’s understanding of criminal justice in a particular country. Notable historical differences between the two traditions include the following:

- Systems with broadly **adversarial traditions** have placed greater emphasis on the trial in which the defence and prosecutor, on an equal basis, may adduce evidence and confront/cross-examine witnesses from the other side, with the judge playing a more passive, oversight role. In an adversarial proceeding, the accused may choose to exercise his/her right to silence and cannot be compelled to testify.
- The accused may also enter a guilty plea, after which the case proceeds to sentencing. Exclusionary rules of evidence and plea bargains often play a prominent role in **adversarial proceedings**. The adversarial model strictly separates the investigation from the trial. In such a model only the evidence adduced in a public trial may be used as the basis for the final verdict.

- Under a traditional **inquisitorial system**, the preliminary investigative phase serves as the central process of criminal proceedings, as this is when evidence is not only collected, but also tested. The trial often serves as an official reading of evidence gathered during the investigative stage, with the prosecutor and defence lawyer playing a more passive role. Judges themselves may have the power to introduce evidence, including calling additional witnesses. Although witnesses can be called at trial, the final verdict is often heavily reliant on the dossier of evidence gathered during the investigative phase.
- Historically, **inquisitorial proceedings** did not involve guilty pleas by defendants. Although exclusionary rules of evidence can be found in most systems, they run counter to the goals and spirit of the inquisitorial tradition and are less prevalent than in adversarial-influenced systems. Rather, inquisitorial-influenced systems tend to take a broader approach to the admission of evidence, with factors that may impugn evidence going to its weight. Unlike adversarial proceedings, inquisitorial systems often permit victims to play an active role at trial, including representation by their own lawyers and even, in limited cases, a role in the prosecution of a case.
- In some **inquisitorial systems** the public prosecutor is often regarded as a judicial figure and part of the same cadre of the justice system that includes judges and appellate judges. Prosecutors and judges may even belong to the same professional association.
- **Inquisitorial systems** normally enshrine the principle of mandatory prosecution, while **adversarial systems** incorporate a greater element of discretion in the decision to prosecute. In systems with inquisitorial traditions, new judges are usually appointed at early stages in their careers to perform the functions of investigative judges.

Again, the above differences have become less distinct with the blending of adversarial and inquisitorial traditions. For example, most inquisitorial systems have now incorporated adversarial procedures, such as guilty pleas, an increased focus on the evidence adduced at trial, and adversarial rights of confrontation and cross-examination. However, many features of the inquisitorial tradition, such as the judicial role of prosecutors, formal investigative hearings, and the rights of victims to participate in criminal trials, have been retained in many systems.

### Islamic Law

Islamic law applies in many countries around the world, but was spread from the Arabian Peninsula to the greater Middle East, South Asia, Southeast Asia and West Africa during the ninth to eleventh centuries. Prior to the emergence of Islamic law, customary law generally dominated (as in the common law and civil law systems in the Arabian Peninsula). Islamic law holds that, from 610 to 632 AD, the Qur’an was revealed to the Prophet Muhammad by the angel Gabriel. The Qur’an was first memorized by followers and then written down.

Some people use Shariah to describe this categorization of the law, but many scholars prefer to use “Islamic law”, as Shariah is both narrower and wider than “Islamic law”.

Shariah describes the divine messages revealed through the Prophet Muhammad and covers both legal and moral aspects. “Islamic law”, on the other hand, covers the rules revealed through the Prophet and those derived from them by means of interpretation. The Shariah principles of justice include: fairness, freedom, mutual protection, equality, dignity, even temperament, honesty, presumption of innocence, mercy and knowledge.

Two main denominations, Sunni and Shia, both have a variety of schools (e.g. the Sunni schools of Hanafi, Malaki, Shafi and Hanbali and the Shia schools of the Twelvers, the Seveners and the Fivers) that interpret Islamic law differently. There is no central authority with the power to make binding interpretations of Islamic law; many issues are subject to multiple interpretations.

Islamic law derives from four main sources: Qur’an, Sunnah, Ijma and Qiyas.

- The **Qur’an** has 114 surahs or chapters and each chapter is divided into verses (ranging from 3 to 286 verses). The Qur’an provides guidance to Muslims on all aspects of life, and is said to have 200 to 600 verses with direct legal implication out of 6,236 total verses. Some areas of Islamic law are regulated in the Qur’an (e.g. penalties for certain crimes) and are quite clear.
- The **Sunnah** refers to the acts, deeds and words of the Prophet Muhammad during his lifetime. The reports of the Sunnah vary depending on which school of Islam is followed.
- **Ijma** or “consensus”, refers to those questions on which there is a consensus of jurists.
- **Qiyas** or “analogy”, refers to the use of strictly regulated analogical reasoning on particular questions of law.

In addition to the Shariah, there is *feqh*. Since the Shariah is regarded as a comprehensive legal system which is, however, in need of interpretation and concretization, the object of *feqh* is to assess and regulate all aspects of life on the basis of the Shariah. The objective of Islamic legal science is to interpret the will of God for the assessment of human behaviour. *Feqh* focuses exclusively on discovering the will of God as it is expressed in the Shariah and its application to individual cases, whether or not they are real or hypothetical. *Feqh* is therefore described as the knowledge of the legal norms for individual cases, derived from the sources of law. A decisive difference is that, whereas the rules and principles of the Shariah are perceived as being impeccable, eternal and resistant to changes, the results and regulations reached by *feqh* can be modified due to the passing of time and changing circumstances. The Qur’an, Sunnah and *feqh* represent words of God and serve as the key guide and reference for Muslims.

Under Islamic law, there are three categories of crimes:

- **Hudud** crimes are prescribed by the Qur’an. Prosecution and punishment of such crimes are mandatory under the Sunnah. *Hudud* crimes include adultery, defamation, alcoholism, theft, brigandage (highway robbery), rebellion and corruption of Islam, and are punishable in accordance with the Qur’an and Sunnah.

- **Qesas** crimes are not specifically defined in the Qur’an, but have evolved through legal doctrine and jurisprudence, and include murder, voluntary and involuntary homicide, and unintentional and intentional crimes against the person that do not lead to death. Prosecution and punishment for *qesas* crimes is at the discretion of the aggrieved party, who can also forgive the transgressor.
- **Taazir** crimes are offences which are not categorized as *hudud* or *qesas*, and which result in tangible or intangible social or individual harm. Punishment for *taazir* crimes may include imprisonment, corporal punishment, fines, compensation and admonishment.

Islamic law was traditionally administered by the court of a single *qadi*, who sought advice from a *mufti* (professional jurist). In many countries today (e.g. Pakistan, Nigeria, Egypt, Iran, Iraq and Afghanistan), Islamic law has been codified and integrated into the constitution, and is applied by judges in the courts. A *mufti* or several *muftis* often provide advice to the court on matters of Islamic law that may arise. Where the Islamic law and informal justice system overlap, an *imam* at the local level may adjudicate a case based on Islamic means of interpretation.

In the United Nations Mission in the Sudan (UNMIS) judicial affairs officers were concerned that the crime of prostitution was defined in a broad manner, giving discretion to police officers to apprehend and charge individuals with prostitution. Sudanese police officials claimed that the definition was based on Shariah interpretation. UNMIS addressed the issue with the Sudanese Ministry of Justice, Ministry of Interior and Parliament, and noted that the Sudanese definition of prostitution was in contravention to Shariah principles and international human rights standards, as the Sudanese law lacked the presumption of innocence. Although UNMIS did not have the authority to change the law, it used its position to differentiate and clarify the ambiguities regarding the interpretation of domestic law. Sudanese officials are reviewing the issue based upon UNMIS judicial affairs officers’ technical assistance and advice.

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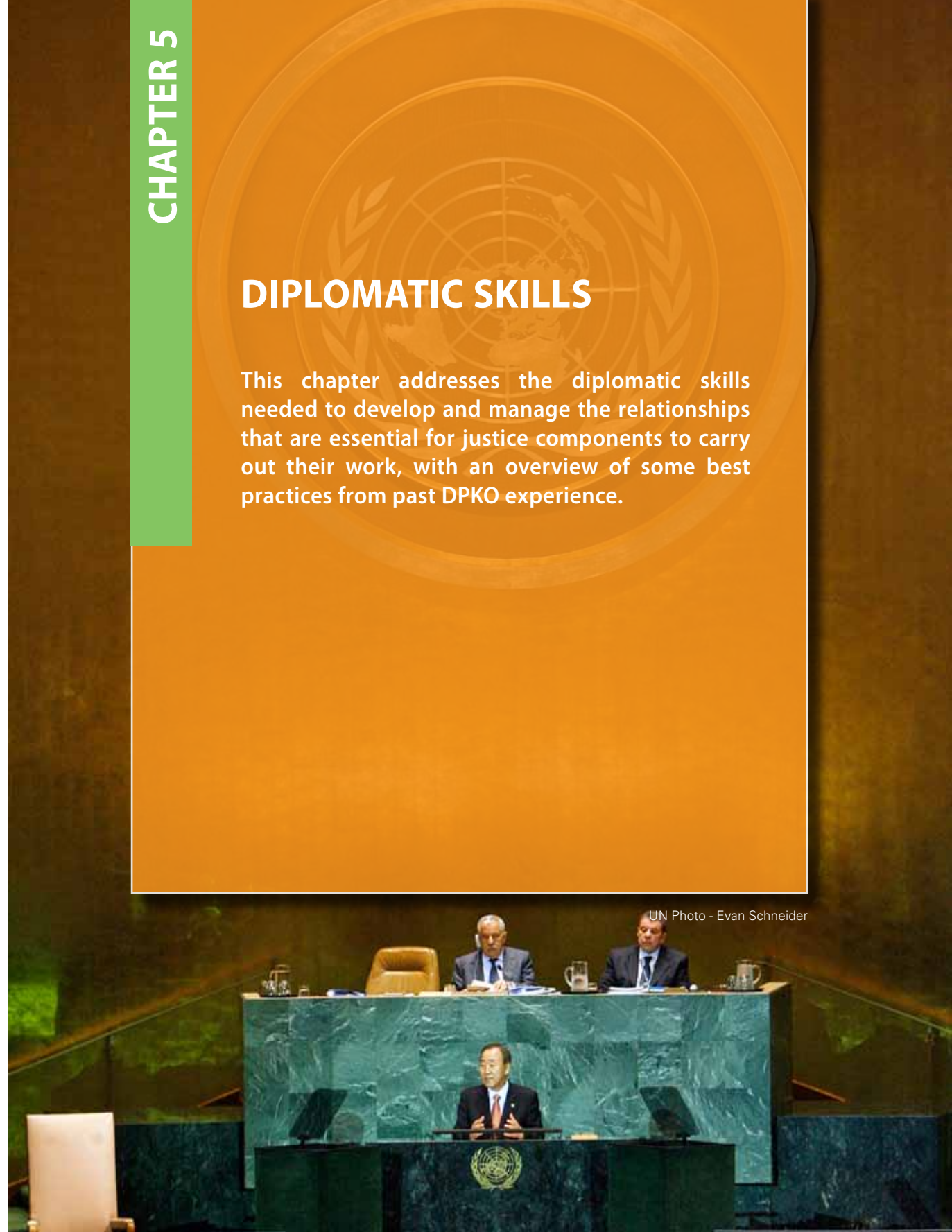
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## CHAPTER 5

# DIPLOMATIC SKILLS

This chapter addresses the diplomatic skills needed to develop and manage the relationships that are essential for justice components to carry out their work, with an overview of some best practices from past DPKO experience.

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## 1. Introduction

For judicial affairs officers, the most important determinant for success is the ability to establish strong relationships with both national and international counterparts.<sup>99</sup> Building these relationships is one of the first things that new judicial affairs officers must do upon arriving in a mission, and these relationships must be maintained and strengthened on an ongoing basis. In order to build strong relationships, judicial affairs officers must have excellent diplomatic skills. Judicial affairs officers are therefore more diplomats than technical experts.

This chapter explores the importance of diplomatic skills, and identifies ways in which the work of judicial affairs officers can be enhanced through the use of such skills. Although this chapter focuses on national counterparts, diplomatic skills also apply to interactions between judicial affairs officers and other international counterparts.

## 2. Importance of Diplomatic Skills

As used in this chapter, “diplomatic skills” refers to the skills which judicial affairs officers need to interact with national counterparts and which enable them to obtain the trust of national counterparts and work with them effectively. The scope of diplomatic skills is much broader than “interpersonal skills” or “people skills”. Diplomatic skills are necessary for advocacy, coordination, building partnerships, conducting assessments, facilitating dialogue, obtaining political buy-in and supporting reform constituencies.

Diplomatic skills are based on several of the principles of rule of law assistance covered in Chapter 1. These include:

- ensuring national ownership and leadership;
- developing local knowledge and sensitivity;
- empowering national actors;
- addressing rule of law needs at the political level; and
- managing expectations.

## 3. Perceptions of International and National Actors

The way in which international actors behave is a significant factor that may cause national actors to resist or reject their assistance. If international actors, including judicial affairs officers, act as “foreign experts” and behave in a way that suggests that they are more qualified and educated than the national actors, this is likely to increase the possibility that the international actor will be “shut out”. At the same time, national actors may be very sensitive to international actors who seem arrogant or dismissive in any way. In some situations, however, international actors may experience resistance by national or international counterparts no matter how diplomatic they are. Many

international actors assume that they are welcome in a post-conflict state, but this is not always the case.

National actors, including national staff members, may view international actors in various ways. International actors may be seen very positively – as knowledgeable, eager to assist and helpful. However, even when they are perceived as dedicated, they may be seen as relatively junior in age or professional status. International actors may also be perceived negatively – as arrogant, ignorant of the national legal context, divided and/or interested only in the material benefits of being an international civil servant.

Conversely, international actors may harbour a range of perceptions about their national counterparts and national staff members. They may regard them as welcoming, knowledgeable and genuinely interested and committed to strengthening the rule of law in the host country. Alternatively, international actors may view their national counterparts as less knowledgeable, fearful of or resistant to change and, in some cases, corrupt or obstructionist. The perceptions of international actors and national actors of each other can be surprisingly (or perhaps not surprisingly) similar.

Such (mis)perceptions are dangerous because they may lead judicial affairs officers, including National Professional Officers, to behave in inappropriate ways, for example by:

- excluding, either intentionally or unintentionally, national actors in strategy discussions or decisions;
- developing rule of law assistance programmes and activities without adequately consulting relevant national actors and experts;
- demanding information from national actors in order to design a rule of law assistance project, and then neglecting to provide them with updates on the status of the project; and
- failing to use interpreters appropriately (e.g. by talking directly to the interpreters instead of to the national actors).

In order to avoid negative perceptions, it is important for judicial affairs officers to understand their role in the host country. It is also important to recognize that there may be different perceptions of judicial affairs officers not only on the part of national counterparts, but even within justice components, missions and the United Nations more broadly.

The depiction of judicial affairs officers as “experts” does not fully convey the scope of their functions and roles. Judicial affairs officers may more accurately be described as “facilitators” or “change agents” – persons who support and enable national actors to strengthen the rule of law. The goal of judicial affairs officers, therefore, should be to reinforce, enhance and strengthen the capacities of local actors, and not to replace or undermine them.<sup>100</sup>

<sup>99</sup> DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), page 8.

<sup>100</sup> *Ibid.*, page 6.

## 4. Trusting Behaviours

There are a number of behaviours that are often associated with strong diplomatic skills. These include the following, which are based primarily on the “trusting behaviours” in Stephen Covey’s *The Speed of Trust*:<sup>101</sup>

- Tell the truth. Be honest. Exercise integrity. Let people know where you stand. Use simple language. Don’t manipulate or spin the truth. Don’t leave false impressions.
- Demonstrate respect. Note the importance of the little things. Genuinely care. Treat people with dignity. Take time. Listen.
- Create transparency. Disclose. Be open and authentic. Don’t hide information or have hidden agendas.
- Right wrongs. Correct mistakes. Apologize quickly. Demonstrate humility.
- Show loyalty. Give credit to others. Acknowledge the contributions of others. Speak about people as if they were present. Do not badmouth or reveal private or confidential information.
- Deliver results. Establish a track record of results. Get the right things done. Make things happen. Do not over-promise and don’t under-deliver. Do not make excuses for not delivering.
- Constantly improve. Be a learner. Develop feedback mechanisms. Act on feedback and appreciate it.
- Confront reality. Take issues head-on even if they are hard to discuss. Address the tough stuff. Acknowledge the unsaid.
- Clarify expectations. Disclose and reveal expectations. Discuss them and validate them. Be realistic. Do not create expectations that you will not be able to meet. Do not assume that expectations are shared or clear.
- Practice accountability. Hold yourself and others accountable. Take responsibility for results. Be clear about how you or others are doing. Do not shirk responsibility or blame others.
- Listen. Listen before you speak. Understand. Listen with your ears, eyes and heart. Do not presume that you have all the answers or know what is best for others. Ask them. Demonstrate understanding and compassion.
- Keep commitments. Say what you are going to do and then do it. Make commitments carefully and keep them. Make keeping commitments the symbol of your honour. Do not break confidences.
- Create and extend trust. Learn to extend trust based on the situation, risk and credibility but have a propensity to trust and don’t withhold because of risk. Extend trust abundantly to those who have earned it. Extend trust conditionally to those who are earning it.

<sup>101</sup> Stephen Covey, *The Speed of Trust: The One Thing That Changes Everything* (2006), pages 136–231.

- Show cultural awareness and appreciation. Don’t assume that what can be done or said “back home” can be done or said everywhere else. Be sensitive to differences in social practices.

## 5. Working with Reluctant Counterparts

In working with national as well as international counterparts, it is important for judicial affairs officers to understand the motivations and interests of their counterparts, particularly those who are reluctant or resistant. Counterparts may be reluctant for a variety of reasons, including the desire not to work with “arrogant” international actors; the unwillingness to work with women or persons from certain racial, ethnic or national backgrounds; and the fear of security threats or risks. Although it may not be easy to do so, understanding the roots of reluctance will assist in addressing the reluctance and moving forward.

It may be difficult to determine why a national actor is reluctant and what motivates him or her. It should not be assumed that reluctance is always based upon mistrust. Whatever the reason for the reluctance, judicial affairs officers should use diplomatic skills to initiate and nurture relationships. Judicial affairs officers should likewise work closely with National Professional Officers to break down barriers and foster relationships.

Common reasons that national actors may be reluctant to engage constructively with international actors include the following:

- They may be under political (or, perhaps in certain situations, criminal) pressure not to cooperate (e.g. by government officials fearing credibility problems when the country’s own human rights abuses are exposed and questioned).
- They may be more interested in international travel or other “perks” than they are in genuine rule of law reform.
- They may feel threatened by outsiders who they believe are more educated or knowledgeable.
- They may be worried that their institution and colleagues are not competent and hope to divert embarrassment from the institution as well as their own limitations.
- They may doubt the credibility of the judicial affairs officer for a multitude of reasons – because of her/his age, gender, race, ethnicity, experience, knowledge or qualifications (either real or perceived).
- They may not wish to seek assistance because of pride and embarrassment.
- They may be sceptical of outsiders (“Who are the judicial affairs officers to think that within four months they can tell us what to do? We didn’t ask for their help”).
- They may feel annoyed by, or distrustful of, the judicial affairs officer’s attitude, whether real or perceived (or through hearsay).
- They may have financial or other incentives to maintain the status quo (and, in extreme situations, may be corrupt).

- They may have fears that the country's sovereignty, independence or power will be undermined.
- They may genuinely disagree with reform initiatives or the way international donor funds are being utilized.
- They may be frustrated by the high turnover of international actors and the associated repetition of identical questions by successive international actors and other international organizations, without results.
- They may be considering competing donor initiatives and are playing one off against another or have already said yes to another donor.
- They may be frustrated by the piecemeal, unstructured or competing approaches of different international rule of law assistance providers.
- They may just be having a bad day.

## 6. Best Practices

In many peacekeeping contexts, the same national actors are often asked to meet a number of international actors repeatedly. This may not only be overwhelming and time-consuming, but also may induce scepticism about the efforts and the international community more generally. To prevent or minimize such situations, judicial affairs officers should ensure that meetings with national counterparts are not burdensome or otherwise badly received. Judicial affairs officers may also wish to coordinate with other partners, or hold joint meetings, so that they avoid duplicative meetings and multiple requests for information. In meetings, they should make sure to:<sup>102</sup>

- be polite and respectful throughout;
- introduce themselves and others, including by providing business cards;
- thank the counterparts for agreeing to the meeting;
- explain the mandate of the mission;
- explain the purpose of the meeting;
- explain how the national counterparts may benefit;
- explain how the information provided by the national counterpart will be used (including whether it will be kept confidential);
- keep the meeting appropriate and as brief as possible;
- listen to and understand counterparts' perspectives; and
- thank the counterparts for their time.

Where judicial affairs officers do not speak the local language, it may be necessary to rely on interpreters when meeting with national counterparts. However, using interpreters effectively requires practice, and is an acquired skill which judicial affairs officers should not underestimate. The way in which interpreters are used can have a

<sup>102</sup> DPKO/DFS, *Guidelines on Methodology for Review of Justice and Corrections Components in United Nations Peace Operations* (2009), pages 11–12.

significant impact on relationships with national actors. Best practices on the use of interpreters include the following:

- Brief the interpreters in advance to make sure that they understand the background and context of the issues that will be discussed.
- In advance of meetings, discuss with interpreters the potential sensitivities that may arise, and ensure that they will use neutral language that will not offend the national actor (e.g. in Kosovo, a Serbian counterpart would be offended by an Albanian interpreter speaking Serbian and using Albanian words such as “Kosova” instead of “Kosovo”).
- Ensure that interpreters translate fully and accurately rather than summarize large amounts of speech. This can be done by speaking in short sentences and stopping periodically to make sure that the interpreter is given enough time to translate.
- Look at the national actor when speaking rather than at the interpreter.

## 7. References

Karl Albrecht, *Social Intelligence: The New Science of Success* (2006)

Karl Albrecht, *The Triune Intelligence Model: An Optimistic View of Human Capability* (2008)

Stephen Covey, *The Speed of Trust: The One Thing That Changes Everything* (2006)

Daniel Goleman, *Social Intelligence: The New Science of Human Relationships* (2007)

# SECTION TWO

## FUNCTIONS

This section addresses many of the core functions of justice components, as set out in the DPKO/DFS *Policy on Justice Components in United Nations Peace Operations*.

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS AND ADVISORY OPINIONS

CASE CONCERNING TEMPLE OF PREAH VIHÉAR

(CAMBODIA v. THAILAND)

PRELIMINARY OBJECTIONS

1961

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS, AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DU TEMPLE DE PRÉAH VIHÉAR

(CAMBODGE c. THAÏLANDE)

EXCEPTIONS PRÉLIMINAIRES

ARRÊT DU 26 MAI 1961





## CHAPTER 6

### MAPPING AND ASSESSING THE JUSTICE SYSTEM

This chapter addresses mapping and assessment of a justice system, as a sound basis for providing national and international decision-makers with accurate and specific information for reform.

## 1. Introduction

To be effective, judicial affairs officers need to know and understand the justice system of the host country, including the relevant institutions, actors and laws. A key function of judicial affairs officers, particularly at the start of the mission, is to ensure that the mapping and assessment of the justice system takes place as soon as possible. This is essential, as mapping and assessment exercises provide judicial affairs officers with the information necessary to tailor their assistance to the needs of the host country, and ensure that their efforts contribute to the maintenance of peace and security. Mapping and assessment exercises can also provide other national and international decision-makers with the information needed to strategically target resources for reform based on clearly identified needs, challenges and obstacles.

This chapter provides guidance on the institutions and laws which should be mapped and assessed, as well as the methodology for carrying out mapping and assessment exercises.

## 2. Overview of Mapping and Assessment

### Definition

Mapping can be defined as the identification and profiling of justice institutions as well as the applicable legal framework. Institutional profiles should include information on capacity, authority, governance, material and human resources, and linkages with other institutions. Profiles of the legal framework should include information on the constitution or its equivalent and the hierarchy of laws applicable in the country, including international law (i.e. whether the country is monist or dualist).

Assessment can be defined as the process of information gathering and analysis to inform decision-making. This generic definition covers different types of assessments carried out to inform a range of decisions, primarily in the context of United Nations mission planning and programming. Assessments of the justice system should include the strengths, weaknesses and gaps of the relevant institutions and laws.

Mapping and assessment are not always considered two separate activities. Often, mapping is assumed to be part of assessment. This chapter will address mapping and assessment separately, but takes into account the overlap between the two activities.

### Purpose

Security Council resolutions often mandate peacekeeping operations to advise and assist national authorities in rebuilding and/or reforming law enforcement, justice and corrections institutions. However, a high level of uncertainty generally marks post-conflict contexts, and reliable information on the state of the rule of law is often unavailable. Often these sectors are comprised of a confusing multiplicity of actors with loose ties to various institutions. The status and mandate of the institutions may also be unclear, inappropriate, overlapping and/or non-complementary. Under such cir-

cumstances, mapping and assessment exercises serve a number of purposes, including:

- to gain an in-depth understanding of the host country's justice system;
- to enable rule of law assistance providers to target their efforts and resources based on clearly identified needs, challenges and obstacles;
- to support the design of reform strategies and programmes, including a national justice strategy;
- to identify entry points to support justice institutions and processes;
- to identify the activities of other rule of law assistance providers and potential partners for future engagement;
- to identify possible "spoilers";
- to create a baseline from which to evaluate programme impact; and
- to inform the development of policy and guidance documents for judicial affairs officers and other rule of law assistance providers.

The United Nations Integrated Peace-building Office in the Central African Republic (BINUCA) conducted a mapping and assessment exercise of the justice system in the Central African Republic and identified the national and international stakeholders involved in the justice sector. They also coordinated and facilitated the interactions between national and international stakeholders in order to ensure the effectiveness and coherence of the different activities in the justice sector.

### Challenges

Judicial affairs officers are likely to face considerable challenges in mapping and assessing the justice system in post-conflict contexts. In mission areas where numerous assessments have already been carried out, host-country counterparts may suffer "assessment fatigue".<sup>103</sup> National counterparts may also be reluctant to agree to, or engage in, mapping and assessment exercises carried out by international actors, since such exercises will most certainly draw attention to weaknesses and problems in the host country's justice system.

Additional challenges may arise when mapping and assessing laws. First, it may not be easy to locate and obtain copies of laws. In post-conflict environments such as Timor-Leste or Liberia, laws and legal records were burned or destroyed, and copies of many laws did not exist. Judicial affairs officers may need to carry out extensive legal research both in and outside the country. It may also be necessary to reach out to members of the diaspora who fled the country, taking copies of laws with them. This was the case in Liberia, where the current Head of the Law Reform Commission, who had fled to the United States, had the most extensive collection of Liberian laws in the

<sup>103</sup> World Bank, *Justice Sector Assessments: A Handbook (2007)*, page 13, box 3.

world. Judicial affairs officers should ensure that copies of any lost, damaged or destroyed laws are made available to the host state and its citizenry. Such documents may represent the beginning of a first legal library in the host country.

Another common challenge in mapping and assessing laws is the uncertainty regarding the applicable law. In Bosnia and Herzegovina, for example, there were a number of constitutions developed before and after the Dayton Peace Agreement, along with many wartime regulations. Similarly in Liberia, many interim governments passed laws, some of which duplicated or contradicted each other. In Afghanistan, there were over 50,000 standing presidential orders and decrees on the books in 2003. There were also five constitutions between 1964 and 1992. In some instances, the applicable law can be identified but there may be uncertainty and/or chaos due to political resistance or widespread rejection of the existing laws. To illustrate, in Kosovo, the Serbian law was considered a tool of an oppressive regime and was rejected by the general population as well as by judges. The difficulties in determining the applicable law may further be compounded where the formal justice system and the informal justice system intersect and overlap.

### 3. Mapping and Assessing Institutions

Although the specific institutions will vary from country to country, the types of institutions that should be examined when mapping and assessing the justice system include, but are not limited to:

- formal state institutions, including the judiciary, prosecution service and legal defence/aid (civilian and military);<sup>104</sup>
- executive institutions, including the Ministry of Justice;
- legislative institutions, including parliamentary bodies and committees;
- independent bodies, including law reform commissions;
- legal education institutions, including universities and training institutes;
- legal professional associations, including bar associations;
- private bar;
- informal justice mechanisms;
- civil society groups and non-governmental organizations; and
- international donors and actors.

When mapping and assessing the justice system, other relevant institutions should also be included. For example, a mapping and assessment exercise focusing on the criminal justice system should examine not only the justice institutions listed above, but also police and other law enforcement agencies, as well as corrections services. This should be undertaken in concert with the relevant mission component.

<sup>104</sup> UNODC, *Criminal Justice Assessment Toolkit* (2006), Access to Justice Sector; OHCHR, *Rule-of-Law Tools for Post-conflict States: Mapping the Justice Sector* (2006), pages 5–22.

It is also important to map institutions that influence the operation of the broader justice system, e.g. national human rights institutions (human rights commissions and ombudspersons); research organizations, academic centres and think tanks; forensic science and medical institutions; and media organizations.<sup>105</sup>

With respect to each institution, key issues which should be examined include:

- structure and organization, including an organizational chart;
- powers and duties, including in relation to other institutions;
- relevant laws and regulations, including operating procedures and ethical codes;
- budget, including authorized and actual budget allocations and budget sources;
- personnel, including number, job categories, distribution of work, salaries, conditions of service, qualification criteria, selection processes, diversity, performance evaluations and monitoring;
- infrastructure, including the number, location, structural conditions and security of buildings, as well as necessary equipment, consumables and legal texts; and
- contact information, including names, postal addresses, telephone and fax numbers and email addresses.<sup>106</sup>

### 4. Mapping and Assessing the Legal Framework

The mapping and assessment of the legal framework is a fundamental precursor to assisting national counterparts with the immediate effectiveness of the justice system (as covered in Chapter 12) and also legislative reform and constitution-making (as covered in Chapter 13). The specific laws that should be mapped and assessed will depend on the nature of the host country's justice system as well as the mandate of the mission. In peacekeeping contexts, judicial affairs officers typically map and assess laws governing a variety of areas, but most often focus on the following laws:

- constitution, particularly those parts which govern issues related to the conflict, such as citizenship, property rights and the respective powers of regional and national authorities;
- criminal procedure code;
- criminal code;
- law on the organization of courts;
- laws establishing and/or regulating relevant institutions, including the judiciary, prosecution service, legal aid/legal defence, police and other law enforcement agencies and corrections services; and
- law on the bar association.

<sup>105</sup> OHCHR, *Rule-of-Law Tools for Post-conflict States: Mapping the Justice Sector* (2006), pages 22–30.

<sup>106</sup> DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), page 32.



Judicial affairs officers often focus on mapping and assessing criminal laws since a functioning criminal justice system is critical for ensuring law and order and consolidating peace. This enables judicial affairs officers to understand the criminal justice process – from the initial investigation to the enforcement of a final judgment – as well as the role of specific institutions and actors in each step of the process, and relevant time limits (for example, the maximum period of detention before a detainee must be taken before a judicial authority or the time limit for the issuance of an indictment after an individual is detained). The mapping and assessment of criminal laws should also be a tool for identifying gaps in the law. For example, there may be criminal offences, such as domestic violence, sexual offences, enforced disappearance, war crimes, genocide and crimes against humanity, that are missing from the law. Similarly, legal provisions for measures such as legal assistance, witness protection, and special measures for cases involving children may be lacking.

When mapping and assessing any law, it is necessary to examine its consistency with international human rights instruments, particularly those relating to the administration of justice (see Chapter 3 on international law for a list of these instruments). Laws should also be examined to assess whether they may be discriminatory, in intent and/or impact.



**Are there electronic resources for texts and translations of national laws?**

Many countries have official websites which contain information on their justice systems, including texts of key national laws. These websites can be found easily by searching for the name of the country and “laws”.

In addition, the following electronic databases may contain the original text and/or translation of national laws:

- International Labor Organization NATLEX<sup>107</sup>
- Library of Congress Global Legal Information Network<sup>108</sup>
- New York University GlobaLex<sup>109</sup>
- Jurist Legal Intelligence<sup>110</sup>
- World Legal Information Institute<sup>111</sup>
- Cornell University Legal Information Institute<sup>112</sup>

<sup>107</sup> [www.ilo.org/dyn/natlex/natlex\\_browse.byCountry](http://www.ilo.org/dyn/natlex/natlex_browse.byCountry)

<sup>108</sup> [www.glin.gov/search.action](http://www.glin.gov/search.action)

<sup>109</sup> [www.nyulawglobal.org/globalex](http://www.nyulawglobal.org/globalex)

<sup>110</sup> [www.jurist.org](http://www.jurist.org)

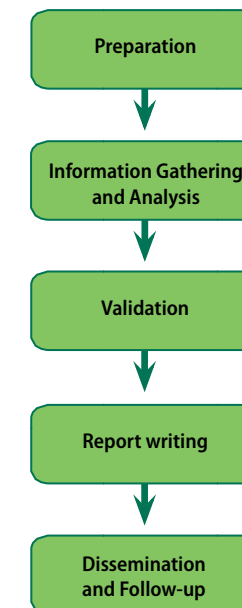
<sup>111</sup> [www.worldlii.org/](http://www.worldlii.org/)

<sup>112</sup> [www.law.cornell.edu/world](http://www.law.cornell.edu/world)

## 5. Mapping and Assessment Methodology

Most mapping and assessment exercises will comprise five main stages – preparation; information gathering and analysis; validation; report writing; and dissemination and follow-up.<sup>113</sup> However, the methodology for a particular mapping and assessment exercise should be tailored to reflect the unique circumstances of each country, the mandate of the mission and the particular objectives of the exercise.

Mapping and Assessment: Step by Step



### Preparation

When preparing to map and assess the justice system, an initial step is identifying similar and relevant mapping and assessment exercises which have already been carried out by the mission, the United Nations country team, other organizations or national actors. This will help to determine the need for and receptivity (or “fatigue”) towards the mapping and assessment activity being considered. It will also allow judicial affairs officers to build upon those earlier mapping and assessment activities instead of re-doing what has already been done, and focus on institutions or laws that require particular attention. This, in turn, will inform the objectives and scope of the exercise, including whether police, other law enforcement agencies and corrections services are part of the exercise.

<sup>113</sup> DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), pages 30–3; UNODC, *Criminal Justice Assessment Toolkit* (2006), pages 5–8; and World Bank, *Justice Sector Assessments: A Handbook* (2007), pages 6–14.

The next step is to prepare the terms of reference (TOR) for the mapping and assessment exercise. The TOR should contain relevant background information, objectives, methodology and expected outcomes. It should also indicate the resources and time needed, and the members of the team which will undertake the mapping and assessment.

When determining the members of the mapping/assessment team, careful consideration should be given to the appropriate levels of expertise, commitment to joint partnerships, expected level of engagement from members, and the involvement of national actors. Where appropriate, teams should include experts in other related areas, including police, corrections, human rights, security sector reform (SSR), child protection and gender. The mapping and assessment of the legal framework will require skilled practitioners with expertise in international human rights law, international criminal law and comparative justice systems (including Islamic law where applicable). Where possible, the mapping and assessment team should include National Professional Officers (NPOs) who are familiar with the host country's justice system and who are fluent in the local language(s). They will be crucial in analysing official documents which have not been translated and interviewing national counterparts.

In the process of developing the TOR, other United Nations entities should be consulted, particularly those who will be directly involved in the exercise. This includes the United Nations country team, as well as mission components such as police, corrections, human rights, SSR, child protection and gender. Consultations should also be held with national actors to obtain their support for the exercise. National partners who need to be informed include related government officials; representatives of the key police, justice and corrections institutions; key civil society organizations; and important bilateral or multilateral partners and donors. In some mission areas, it may be necessary to obtain the explicit agreement of national authorities before a mapping and assessment exercise is carried out. Such agreement may greatly facilitate access to relevant documents and facilities.

### Information Gathering and Analysis

The mapping and assessment of the justice system should be based on information from various sources. This is because there is generally no single source for all of the information needed, and because the combination of data sources helps to corroborate findings and check against biases which may be present on a single data source.<sup>114</sup> Data sources commonly used by judicial affairs officers in mapping and assessing the justice system include:

- documents, including published and unpublished documents;
- interviews; and
- direct observation, including through site visits.<sup>115</sup>

The information that is collected should be verified using the “triangulation” method. This requires that information is cross-checked by at least two sources, such as a repre-

<sup>114</sup> World Bank, *Justice Sector Assessments: A Handbook* (2007), page 32.

<sup>115</sup> Other information sources not covered in this chapter include opinion surveys and focus groups. For guidance on opinion surveys and focus groups, see World Bank, *Justice Sector Assessments: A Handbook* (2007), pages 40–3 and 52.

sentative of the institution being mapped and assessed, and another external representative. As much as possible, these should be complemented by direct observations by judicial affairs officers.

**Document** reviews should include those documents collected during the preparation stage and official documents such as court files and detention records. Since translations of official documents will not usually be available, the review of such documents may be difficult and time-consuming for judicial affairs officers who are not fluent in the local language. As noted above, NPOs can therefore play an important role in analysing such documents, and should not be used solely as interpreters and/or translators.

**Interviews** are an integral source of information and should be carried out with individuals who work within and outside the institutions being examined, and also the general public. Interviews are particularly useful for obtaining information on actual practice which is not reflected in official documents, and to identify concrete and specific problems in the justice system. When conducting interviews, there are several considerations which judicial affairs officers should take into account.<sup>116</sup> Interviewees should be selected with the aim of ensuring the multiplicity and diversity of sources. It is also important to establish trust, for example by agreeing with each interviewee whether s/he will be attributed in the assessment report. Finally, judicial affairs officers must not promise specific outputs or funds during the mapping/assessment exercise before their final report is complete.

**Direct observations** are also an essential source of information when mapping and assessing the justice system. For example, sitting in a courtroom and observing a court proceeding first hand may reveal practices which are not mentioned in the law or in interviews. Similarly, observing the way police officers and prosecutors carry out an investigation is likely to provide a clearer understanding of their respective roles and the linkages between them, than simply reviewing the criminal procedure code. In using direct observations, however, judicial affairs officers should be careful to assess whether the observed practice is exceptional and unusual, or typical and common.

### Validation

The preliminary findings of the mapping and assessment exercise should be validated before being finalized, to help to ensure the accuracy and objectivity of the analysis. This can be done in various ways, such as through review by an expert panel, discussion in a public forum and verification of numerical or statistical data.<sup>117</sup> The results of the exercise may also be validated by sharing drafts with individuals and groups. Consideration should also be given to organizing workshops and conferences for this purpose.

### Report Writing

The validation phase should be followed by the drafting of the mapping and assessment report. The report should be finalized as soon as possible so that the informa-

<sup>116</sup> World Bank, *Justice Sector Assessments: A Handbook* (2007), pages 35–9.

<sup>117</sup> DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), page 33.

tion and analysis do not become “stale” and are superseded by subsequent developments. If delays are unavoidable, the report should be carefully reviewed and updates or changes should be made, where necessary.

Although the structure and format of reports may vary, they should include the following elements:

- executive summary, including key findings and recommendations;
- introduction, including the objectives of the mapping and assessment exercise;
- background information, including a brief overview of the justice system and any previous mapping and assessment exercises;
- methodology, including information sources;
- findings, including key problems identified and causes;
- recommendations, including actions to be taken, corresponding timelines and sequencing/prioritization;
- list of references and data sources; and
- annexes, including the TOR.

To have optimal impact, the report should be written in a clear and concise way, and be easily understood by non-experts. It should avoid oversimplifications and generalizations. Rather, it should be as concrete and specific as possible. The report will also need to take into account the various groups and individuals who may read the report, from national and international working-level counterparts to senior United Nations and host-country officials. This means that the report should be critical, constructive and diplomatic – all at the same time.<sup>118</sup> Finally, the report should be translated into the local language for local counterparts and the general public.

The United Nations Operation in Côte d’Ivoire (UNOCI) conducted a mapping and assessment exercise of the Ivorian justice system and produced reports on the organization and functioning of the judicial institutions. As part of the exercise, the UNOCI justice component developed a questionnaire to assist in the consolidation of information from all stakeholders of the justice sector. The exercise provided a basis for supporting the Ivorian authorities to improve the justice system. The reports became a critical tool for mobilizing resources and implementing a justice reform strategy.

### Dissemination and Follow-up

The mapping and assessment exercise does not end with the finalization of the report. For the exercise to be useful, the report must thereafter be disseminated – within the mission; to national authorities and stakeholders; to donors and technical assistance providers; and to the Criminal Law and Judicial Advisory Service (CLJAS) at Headquar-

<sup>118</sup> World Bank, *Justice Sector Assessments: A Handbook* (2007), pages 75–7.

ters.<sup>119</sup> Meetings should be organized to present the report to national stakeholders, including those who were interviewed or were otherwise involved in the exercise, and to secure their support for the findings and recommendations. An implementation plan which lists the specific recommendations (along with relevant actors and timelines) is a practical way to follow up on the actions to be taken and track progress (or lack thereof).



### What are the United Nations Rule of Law Indicators?

One of the fundamental challenges of rule of law work has been the need for objective, verifiable measures to assist in the development of activities that strengthen the rule of law and in the assessment of their impact. To address this challenge, the Department of Peacekeeping Operations (DPKO) and the Office of the High Commissioner for Human Rights (OHCHR) have developed the United Nations Rule of Law Indicators. The *United Nations Rule of Law Indicators: Implementation Guide and Project Tools* can be found at: [www.un.org/en/peacekeeping/publications/un\\_rule\\_of\\_law\\_indicators.pdf](http://www.un.org/en/peacekeeping/publications/un_rule_of_law_indicators.pdf).<sup>120</sup>

The purpose of the Indicators is to provide a “snapshot” of the status of criminal justice institutions (police, judiciary and corrections), and help to identify the strengths and weaknesses of the rule of law sector in a given country in order to assist national and international stakeholders in strengthening the rule of law reform, including through the development of national rule of law strategies. They can be used to measure the transformation of these institutions over time, although they are not a substitute for more comprehensive assessments.

As part of this initiative, 135 Indicators related to the police, the judiciary and corrections have been developed. Both outputs (i.e. the activities undertaken by the targeted institutions) and outcomes (i.e. the impact or lack thereof of their activities) are taken into account. Indicators are grouped into baskets, each capturing a key concept that relates to one of four core components: performance; integrity, accountability and transparency; the treatment of vulnerable groups; and capacity.

The Rule of Law Indicators project also offers guidance on sources of relevant data, including methodologies for developing certain data. The sources of data for the Rule of Law Indicators include reviews of official documents, administrative and field data, surveys of experts, and public perception surveys.

The Indicators were finalized in April 2011, and have been implemented in Liberia, Haiti and South Sudan. Implementation of the Rule of Law Indicators in a particular mission setting requires the support of national authorities and adequate financing. General guidance on how to prepare for a decision to implement Indicators in a particular country is set out in the *United Nations Rule of Law Indicators: Implementation Guide and Project Tools*.<sup>121</sup>

<sup>119</sup> DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), page 33.

<sup>120</sup> DPKO/OHCHR, *The United Nations Rule of Law Indicators: Implementation Guide and Project Tools* (2011), [www.un.org/en/peacekeeping/publications/un\\_rule\\_of\\_law\\_indicators.pdf](http://www.un.org/en/peacekeeping/publications/un_rule_of_law_indicators.pdf).

<sup>121</sup> See, in particular, pages 13–16.

When implemented in a country, the data collected on the Indicators is synthesized in a report. The report, of course, is not an end in itself, but serves as sound data that can, together with other information and analyses, form a basis for the national authorities, the mission and other partners to assess and modify existing rule of law programmes and activities or develop new ones. Following the finalization of the report, a process of workshops, led by national authorities, is envisaged to assist in the formulation of recommendations based on the report's findings. Such workshops should be organized with the active participation of concerned governmental stakeholders, civil society, the United Nations system and donors.

For more detailed guidance and support in considering how to implement the Indicators, as well as guidance on the financial implications, judicial affairs officers should consult with CLJAS.

## 6. References

### United Nations references

DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006)

DPKO/DFS, *Guidelines on Assessment of Police and Other Law Enforcement, Justice and Corrections Sectors* (forthcoming)

DPKO/DFS, *Policy on Justice Components in United Nations Peace Operations* (2009)

DPKO/OHCHR, *The United Nations Rule of Law Indicators: Implementation Guide and Project Tools* (2011); available from: [www.un.org/en/peacekeeping/publications/un\\_rule\\_of\\_law\\_indicators.pdf](http://www.un.org/en/peacekeeping/publications/un_rule_of_law_indicators.pdf).

OHCHR, *Rule-of-Law Tools for Post-conflict States: Mapping the Justice Sector* (2006)

OHCHR, *Rule-of-Law Tools for Post-conflict States: Monitoring Legal Systems* (2006)

UNDG, UNDP and World Bank, *Practical Guide to Multilateral Needs Assessments in Post-conflict Situations* (2004)

UNDP, *Capacity Assessment Practice Note* (2008)

UNODC, *Criminal Justice Assessment Toolkit* (2006) [Particularly relevant chapters are the Introduction (methodology); and within the Access to Justice Sector: Chapter 1 (Courts), Chapter 2 (Independence, Impartiality and Integrity of the Judiciary), Chapter 3 (Prosecution Service), and Chapter 4 (Legal Defence and Legal Aid)]

### Non-United Nations references

Amnesty International, *Fair Trials Manual* (1998)

United States Institute of Peace, Irish Centre for Human Rights, OHCHR and UNODC, *Model Codes for Post-conflict Criminal Justice* (2006/2007)

World Bank, *Justice Sector Assessments: A Handbook* (2007)

## CHAPTER 7

# ASSISTING IN THE DEVELOPMENT OF NATIONAL JUSTICE STRATEGIES

This chapter provides an overview of the process of assisting the development of national justice strategies, including the steps typically involved, as well as an overview of many of the key challenges encountered.



## 1. Introduction

One of the key functions of judicial affairs officers is to encourage and support the government and the judiciary to develop a national justice strategy. A national justice strategy is an essential tool in post-conflict environments for uniting disparate groups around shared goals regarding the programming, sequencing and responsibilities of national actors and the international community. In the absence of a strategic framework, international actors – including donors and the United Nations – have tended to provide assistance in an ad hoc manner. This has resulted, for example, in the provision of assistance in areas which are of interest to the assistance provider, but which may not necessarily be a priority for the host country. The lack of a national justice strategy has also hindered reform initiatives by subjecting national authorities to donor agendas and undercutting political will for reform. National justice strategies thus serve an important purpose by enabling national and international actors to strengthen the justice system in a coherent, coordinated and structured way.

This chapter reviews the role of judicial affairs officers in assisting national actors to develop justice strategies, and identifies best practices and lessons learned to enhance such assistance.

## 2. Content of National Justice Strategies

The format, scope and content of national justice strategies vary widely. Nevertheless, there are certain elements which should be included in all justice strategies in order to make them sufficiently concrete and achievable. These include:<sup>122</sup>

- **Objectives**  
Depending upon the breadth of the strategy and focus of the national counterparts, the objectives may address institutional, legal and political aspects of justice reform.
- **Prioritization and timeframes**  
The strategy should include priorities, including phases (or sequences) of assistance and specific timeframes. National and international stakeholders should agree on the priorities and timeframe and base them upon existing human and financial resources so that expectations are manageable. National political will may be undermined if deadlines are not met because expectations are set too high.
- **Programmes and activities**  
The justice strategy should include descriptions of proposed programmes and refer to proposals that will outline how the activities progress the aim of the strategy and utilize human and financial resources. In the post-conflict environment, the focus of the strategy should be on the actors, institutions and laws most likely to have the greatest impact on the system as a whole. In addition, consideration of donor goals, sustainability and compatibility with international standards must be incorporated.

<sup>122</sup> DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), page 35.

- **Responsible authorities or organizations**

A justice strategy should include a list of organizations that have agreed to lead and accept responsibility for the delivery of programmes or other aspects of the reform process. This ensures that delegated responsibilities are transparent and not easily interrupted by turnover of personnel.

- **Financial implications**

A well-defined summary of the expected sources of financial support and the expenditure of programmes and other components of the reform process should be included in the justice strategy. In addition, the strategy should include an analysis of the relative allocation to justice considerations in the national budget.

- **Monitoring and evaluation criteria**

A clear measurement of the delivery and impact of programmes in light of the reform objectives is necessary in order to determine success, foresee challenges, and revise the implementation of the justice strategy, if needed. Monitoring and evaluation bodies that are protected from improper external influences are important tools for ensuring the implementation of the strategy.



What are some examples of national justice strategies?

Examples of national justice strategies include the **National Justice Sector Strategy for Afghanistan (2008–2013)**<sup>123</sup> with its corresponding **National Justice Programme and the Justice Sector Strategic Plan for Timor-Leste 2011–2030**<sup>124</sup> developed with the assistance of the United Nations.

## 3. Process of Developing National Justice Strategies<sup>125</sup>

National justice strategies should ideally be developed by national authorities following a process of broad national consultation and, if necessary, the assistance of the international community. When assisting national authorities in the development of national justice strategies, judicial affairs officers should emphasize the importance of planning and coordination. This requires that the process be transparent, open and participatory and that civil society has a substantial and formal role. National stakeholders who should participate in the development of the justice strategy should include representatives of the government, judiciary, professional organizations, non-governmental or-

<sup>123</sup> <http://info.publicintelligence.net/AfghanNJSS.pdf>

<sup>124</sup> [www.tl.undp.org/undp/procurementrules/RFQ%20044-2010%20Justice%20Sector%20Strategic%20Plan%20Book%20Printing/JSSP\\_ENGLISH.pdf](http://www.tl.undp.org/undp/procurementrules/RFQ%20044-2010%20Justice%20Sector%20Strategic%20Plan%20Book%20Printing/JSSP_ENGLISH.pdf)

<sup>125</sup> This section is drawn from DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), pages 34–7.

ganizations, academia and civil society, among others. Judicial affairs officers should play a catalyzing, bridging and facilitation role, taking into account that there may be challenges to undertaking strategic planning in the immediate aftermath of conflict.

The process of developing a national reform strategy will typically include the following steps:

- **Assessment and agreement on priorities and challenges**  
An assessment should be completed which will form the basis for identifying priorities and challenges. Part or all of this assessment may have already taken place through a mapping and assessment exercise, as discussed in Chapter 6.
- **Establishment of coordination and planning mechanisms**  
Mechanisms such as reform commissions, committees or working groups should be created which include key stakeholders such as the government, judiciary, civil society and donors. Such mechanisms should focus on strategic decision-making, rather than on operational implementation, of the reform initiatives. In some contexts, a reform commission may have been established under the peace agreement. The process for selecting commissioners should be transparent and involve civil society as well as the general population. To be effective, commissions must have qualified administrative staff and facilities, good public information capacity and modern management practices. Political will and support from key national and international stakeholders are essential components for success.
- **Drafting**  
When drafting a justice strategy, there are key elements that should be included, as discussed above in detail.
- **Dissemination**  
The draft strategy should be widely disseminated, including through public information campaigns. Such campaigns should communicate the vision of reform and encourage support for its adoption and implementation.
- **Public consultations**  
Consultations should take place through surveys and/or participatory forums with civil society and the public at large, in an effort to obtain feedback and establish broad understanding and support.
- **Review and incorporation of feedback**  
Views and inputs expressed during the consultation phase should be given serious consideration.
- **Formal approval and commitment**  
The strategy must be approved by responsible national authorities, such as the prime minister, cabinet and/or supreme court.

In the United Nations Integrated Mission in Timor-Leste (UNMIT) judicial affairs officers assisted in the development of a national vision and strategy for the justice sector by facilitating the Independent Comprehensive Needs Assessment (ICNA). The purpose of the ICNA was to determine the extent to which the justice system met the needs of Timor-Leste. Following the 2009 report and with technical support from UNMIT, the government engaged in a consultative process leading to the development of the national Justice Sector Strategic Plan,<sup>126</sup> which also covers the area of corrections.

In Afghanistan, the National Justice Sector Strategy<sup>127</sup> and National Justice Programme (NJP) were finalized in April 2008. The NJP identifies six main components of work in the justice sector: accountability, infrastructure, training, law reform, institutional cooperation and public awareness. A Programme Oversight Committee (POC), consisting of the three justice institutions, the Ministry of Finance and the Ministry of Economy, was established with the responsibility for overall policy direction and guidance, interacting with donors at a high level, and overseeing implementation of justice sector activities. To assist the POC in its efforts to coordinate donor activities, donors established the Board of Donors, chaired by UNAMA,<sup>128</sup> with a rotating co-chair to allow for quarterly interaction between international donors and the justice institutions.

In the United Nations Integrated Peace-building Office in the Central African Republic (BINUCA), judicial affairs officers provided technical assistance to the Ministry of Justice in the development and implementation of their strategic national justice reform plan, adopted in 2010. BINUCA facilitated a round table in Brussels with international experts to assist the Ministry of Justice to prioritize their actions.

## 4. Challenges to Developing and Implementing National Justice Strategies

There are a number of challenges in assisting national actors to develop and implement a national justice strategy. These include the following:

<sup>126</sup> Justice Sector Strategic Plan for Timor-Leste 2011–2030 (2010), [www.tl.undp.org/undp/procurementrules/RFQ%20044-2010%20Justice%20Sector%20Strategic%20Plan%20Book%20Printing/JSSP\\_ENGLISH.pdf](http://www.tl.undp.org/undp/procurementrules/RFQ%20044-2010%20Justice%20Sector%20Strategic%20Plan%20Book%20Printing/JSSP_ENGLISH.pdf).

<sup>127</sup> National Justice Sector Strategy for Afghanistan (2008), <http://info.publicintelligence.net/AfghanNJSS.pdf>.

<sup>128</sup> UNAMA: United Nations Assistance Mission in Afghanistan.

- **Lack of political will and national engagement**

In some post-conflict situations, national actors are not interested in developing a justice strategy or are actively opposed to it. In such countries, judicial affairs officers will need to emphasize the importance of strategic planning to national authorities.

- **Lack of capacity**

The capacity to develop strategies can be strengthened through training and mentoring, but it is labour-intensive and results are likely to be seen over a period of time. The co-location of an international technical planning adviser within the Ministry of Justice is a common approach, and training in planning processes is often necessary to support the building of national capacity in strategic planning. Where host governments lack the political will and space required for developing a national justice strategy, the justice component should consider developing its own strategic plan with input from key national and international counterparts.<sup>129</sup>

- **Failure to integrate justice strategy into broader national strategies**

Too frequently in post-conflict countries, goals in various thematic areas are dealt with in isolation and do not find their way into a comprehensive national agenda. Justice strategies may be thematic (e.g. focusing on detention and anti-corruption), institutional, sectoral or national. Institutional and sectoral strategies should find their way into national strategies, such as Poverty Reduction Strategy Papers (PRSPs), national development plans or similar multi-sectoral national plans.

- **Failure to include non-state actors**

The development of national justice strategies should involve not only national authorities, but also non-state actors including legal professional organizations, traditional leaders, women's groups, victims' groups, refugee and displaced persons' groups, non-governmental organizations, academics as well as the general public. In many countries, legal services are often provided by non-state actors.

- **Implementation**

The development of a national justice strategy should not be seen as an end in itself but rather the start of a longer process of reform. Some national and international actors may, for a variety of reasons, have limited interest in actually implementing the strategy. To ensure that the national strategy and any related national programmes are implemented, there should be established credible and nationally led structures, such as a national strategy/programme oversight committee (composed of the leadership of the main national justice institutions), in order to oversee implementation of the strategy. A working-level body, possibly facilitated and supported by judicial affairs officers, should support the work of such an oversight committee to provide continuous technical support, including coordination

of planning, execution, monitoring and evaluation. Judicial affairs officers should also draw upon the good offices of the mission leadership to address any obstacles regarding implementation.

## 5. References

DPKO, *Legal and Judicial Rule of Law Work in Multi-Dimensional Peacekeeping Operations: Lessons-Learned Study* (2006)

DPKO, *Policy Directive on Quick Impact Projects* (2007)

DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006)

DPKO/DFS, *Policy on Justice Components in United Nations Peace Operations* (2009)

*Guidance Note of the Secretary-General on the United Nations Approach to Rule of Law Assistance* (2008)

*Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies* (2004), S/2004/616

<sup>129</sup> DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), page 36.

## CHAPTER 8

# COORDINATING AND CONVENING STAKEHOLDERS

This chapter describes the role justice components can play in coordination: both of international stakeholders and within the United Nations, as well as promoting the coordination of national stakeholders.





## 1. Introduction

In most peacekeeping settings, there are numerous international actors and donors providing rule of law assistance to the host country. Similarly, there are many national actors engaged in the rule of law, including representatives of the government, non-governmental agencies, professional organizations and civil society, among others. Coordination among these various national and international stakeholders is crucial for ensuring the effectiveness and coherence of their efforts, identifying gaps in assistance and preventing duplicative or conflicting efforts.<sup>130</sup> By helping to convene these various stakeholders and facilitating their coordination, judicial affairs officers can bring stakeholders together when they might otherwise have worked in a separate and ad hoc manner.

This chapter explores the role of judicial affairs officers in providing assistance to coordinate and convene international and national stakeholders engaged in the rule of law. It will also identify key challenges to coordination, as well as best practices.

## 2. Coordination of International Stakeholders

Ideally, the government, including the judiciary, should take the lead in coordinating the activities of donors and other assistance providers, with the justice component of the peacekeeping operation providing support.<sup>131</sup> Where this is not feasible, the justice component or a key donor may take the primary facilitating role for coordination, either jointly with the government or on its own.<sup>132</sup> Even where there is a nationally led coordination mechanism in place, there is much added value in meeting with international donors and agencies on a periodic basis, without the presence of national justice actors, to discuss the progress of their support for justice reform, enhance the level of information exchange among international agencies and donors, identify gaps, constraints and challenges, address potential areas of duplication and resolve differences on sensitive policy issues.

There are a number of ways in which judicial affairs officers can promote and facilitate coordination among international stakeholders. For example, judicial affairs officers may:

- convene international rule of law assistance providers, donors and other stakeholders;
- establish and manage coordination mechanisms, such as task forces, committees and consultative groups;
- pursue partnerships and joint programmes with other relevant actors; and

<sup>130</sup> DPKO/DFS, *Policy on Justice Components in United Nations Peace Operations* (2009), para. 8.3; *Guidance Note of the Secretary General on the United Nations Approach to Rule of Law Assistance* (2008), page 4.

<sup>131</sup> DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), page 22.

<sup>132</sup> *Ibid.*

- serve as a key source of information and analysis on developments and donor or agency activities in the justice sector.

Judicial affairs officers should determine whether coordination mechanisms already exist in the mission area, particularly where there has already been considerable international engagement prior to the establishment of the peacekeeping operation. In such settings, judicial affairs officers should work within such structures instead of creating new ones.

In the United Nations Integrated Peacebuilding Office in the Sierra Leone (UNIPSIL) human rights officers have coordinated stakeholders and built partnerships in the areas of human rights and the rule of law. UNIPSIL Human Rights Section/Office of the High Commissioner for Human Rights (OHCHR), the United Nations Children's Fund (UNICEF), the International Organization for Migration (IOM) and the United Nations Development Programme (UNDP) participate in the general framework of cooperation provided by the United Nations Joint Vision for Sierra Leone. Members have agreed to bring workplans together, discuss priorities and identify gaps in human rights work, and to join efforts in training and capacity-building activities and eventually pool resources to avoid overlapping and to optimize available resources.

The coordination of international assistance providers is not an easy or straightforward task. One challenge is the high turnover of assistance providers who often stay only for short periods in the host country. Changes in personnel, especially senior personnel, may lead to reduced support and resources and hamper the ability to reach objectives through coordination in a timely manner. Another common challenge is the donor-driven (rather than needs-based) nature of rule of law assistance programmes. For example, a coordination mechanism led by a former colonial power may pursue projects aligned with the colonial power's continued strategic interests in the country rather than with the genuine needs of the host country's justice system.

Coordination is also made difficult by competition among stakeholders. Stakeholders, including United Nations entities, may compete for leadership roles, human resources and donor funding. At the same time, international actors may sometimes pursue coordination merely for the sake of coordination, even though a coordinated approach may not necessarily be the most effective or efficient. Coordination in and of itself should not be the aim.

To address such challenges, judicial affairs officers should consider the following best practices:

- Heads of Mission should designate a senior-level staff member to represent him or her in coordination mechanisms.

- Where possible, missions should include dedicated senior-level staff to lead efforts on coordination in specific areas. In MONUSCO and UNMIL,<sup>133</sup> for example, there are Deputy Special Representatives of the Secretary-General (DSRSGs) specifically appointed for rule of law, whose responsibilities include ensuring the coordination of the police, justice, corrections and other components in those missions. In MINUSTAH,<sup>134</sup> a director-level staff member coordinates all rule of law activities, including those of the justice, corrections and police components.
- Although coordination is important for major issues, such as developing a national justice strategy, it may be wise to begin to coordinate on discrete topics. Coordination on a specific topic can act as a precursor for widespread coordination, since strong relationships established when coordinating a narrow issue can act as a basis for broader coordination efforts. For example, in UNMIS,<sup>135</sup> a working group focusing on informal justice was established. In UNMIT,<sup>136</sup> working groups were established to focus on the relationship between the police and the prosecution.
- A retreat addressing rule of law issues may act as a catalyst to coordinate more effectively. In MINUSTAH, representatives of all United Nations agencies attended a retreat organized with the aim of determining how to work more effectively on justice efforts. This resulted in the establishment of a coordination mechanism – the Rule of Law Policy Group.
- Coordination should not be limited to the capital, but should be extended into the provinces.

Since March 2011, the UNIPSIL Human Rights Section has supported the establishment of coordination fora on the administration of justice in different districts throughout Sierra Leone. The fora aim to create a platform for justice sector stakeholders to examine the performance of justice institutions in the districts, to examine human rights flaws arising out of systemic and structural failings of rule of law institutions, and to map out strategies that will help to improve justice delivery. Among the positive effects of such fora, in April 2011, the High Court in Kenema fast-tracked 34 sexual and gender-based violence-related cases which had been pending for at least six months.

- Coordination among stakeholders may be enhanced and a unified plan of action could be more easily implemented by sharing resources, such as staffing, financial resources and facilities.

<sup>133</sup> MONUSCO: United Nations Organization Stabilization Mission in the Democratic Republic of the Congo; UNMIL: United Nations Mission in Liberia.

<sup>134</sup> MINUSTAH: United Nations Stabilization Mission in Haiti.

<sup>135</sup> UNMIS: United Nations Mission in the Sudan.

<sup>136</sup> UNMIT: United Nations Integrated Mission in Timor-Leste.

UNMIT judicial affairs officers work closely with UNDP and other partners to support the Timorese government. UNMIT gives technical and strategic advice in the areas of corrections, gender and juvenile justice. UNMIT supports enhancement of information exchange through the maintenance of a donor activity matrix, and facilitation of policy discussions on key justice issues.

### 3. Coordination within the United Nations

The success of the United Nations efforts in the host country will depend greatly on coordination among components in a peacekeeping operation, and between a peacekeeping operation and the United Nations Country Team (UNCT) and other relevant entities. Coordination may range from information-sharing and harmonization of efforts to joint activities and programmes. Within the mission, judicial affairs officers must work closely with counterparts in the corrections, police, human rights, security sector reform (SSR), civil affairs, political, military, child protection and gender components of the mission.<sup>137</sup> In order to ensure complementary, coherent and mutually supportive programmes of work, justice components and human rights components in particular should maintain a strong partnership as they often engage with the same institutions of the justice sector.<sup>138</sup> Judicial affairs officers should also coordinate with partners in OHCHR (where there is a field presence separate from, or instead of, the human rights component of the mission), UNDP, Office of the United Nations High Commissioner for Refugees (UNHCR), UNICEF, United Nations Office on Drugs and Crime (UNODC) and UN Women.

*The Report of the Panel on United Nations Peace Operations* (“Brahimi Report”), issued in 2000, identified the absence of an integrated planning capacity in the Secretariat for peacekeeping operations as a major vulnerability in the system.<sup>139</sup> Since then, a number of measures have been adopted in an effort to improve integration and coordination with the United Nations at Headquarters and in the field.

In 2000, the Secretary-General created the triple-hatted DSRSG/Humanitarian Coordinator (HC)/Resident Coordinator (RC) function, formalizing the concept of “structurally integrated missions” by bringing the HC/RC into the mission leadership in order to link the mission and the UNCT.<sup>140</sup> In 2006, the Secretary-General endorsed the Guidelines for the Integrated Mission Planning Process (IMPP) and established the IMPP as the authoritative basis for the planning of all new integrated missions, as well as the revision of existing integrated mission plans for all United Nations departments, offices, agencies, funds and programmes.<sup>141</sup>

<sup>137</sup> DPKO/DFS, *Policy on Justice Components in United Nations Peace Operations* (2009), para. 8.3.

<sup>138</sup> OHCHR, DPKO, DPA and DFS, *Policy on Human Rights in United Nations Peace Operations and Political Missions* (2011), para. 102.

<sup>139</sup> *Report of the Panel on United Nations Peace Operations* (“Brahimi Report”) (2000), A/55/305 – S/2000/809, para 198.

<sup>140</sup> *Note of Guidance on Relations between Representatives of the Secretary-General, Resident Coordinators and Humanitarian Coordinators* (2000), para 11.

<sup>141</sup> *United Nations Integrated Mission Planning Process Guidelines* (2006), page 2.

Most recently, Decision No. 2008/24 of the Secretary-General on Integration re-affirmed integration as the guiding principle for all conflict and post-conflict situations where the United Nations has a UNCT and a multidimensional peacekeeping operation or political mission/office.<sup>142</sup> The decision identified 18 countries to which the principle of integration would be applied, including Afghanistan, Burundi, Central African Republic, Chad, Côte d'Ivoire, the Democratic Republic of the Congo, Guinea-Bissau, Kosovo, Haiti, Liberia, Sierra Leone, Somalia, Sudan and Timor-Leste. In each of these countries, the United Nations is responsible for developing an Integrated Strategic Framework (ISF) to articulate a shared vision of the Organization's strategic objectives and an associated set of agreed results, timelines and responsibilities for tasks critical to peace consolidation. At the Headquarters level, the decision also reaffirmed that lead Departments should maintain integrated task forces for each integrated United Nations presence – Integrated Mission Task Forces (IMTF) for missions led by the Department of Peacekeeping Operations (DPKO) and Integrated Task Forces (ITF) for missions led by the Department of Political Affairs (DPA).

In the United Nations Integrated Peace-building Office in the Central African Republic (BINUCA), the justice component coordinates and facilitates the engagement of national and international stakeholders to ensure the effectiveness and coherence of the different activities in the justice sector. It actively supported the Ministry of Justice in the organization of a round table highlighting the national strategic justice reform plan. BINUCA also established and coordinated a working group on the rule of law composed of representatives of donors, United Nations, national and international non-governmental organizations (NGOs) and other actors involved in justice reform. As a result of the working group, international support and assistance to the government is better coordinated, information exchange has been enhanced, and a more coherent, structured and strategic approach to rule of law programming has been adopted.

#### 4. Promoting the Coordination of National Stakeholders

Many of the challenges and best practices discussed above in relation to the coordination of international stakeholders also apply to the coordination of national stakeholders. National stakeholders include national actors from the government (including the judiciary), non-governmental entities, professional organizations and civil society, among others. For example, judicial affairs officers may:

- support and/or facilitate nationally led coordination mechanisms at the national level, bringing together the key national institutions, civil society and international stakeholders;

<sup>142</sup> Decision No. 2008/24 of the Secretary-General on Integration (2008), para i.

- support and/or facilitate nationally led coordination mechanisms at the provincial/district/county level;

The United Nations Assistance Mission in Afghanistan (UNAMA), together with UNDP, launched the Provincial Justice Coordination Mechanism (PJCM). Endorsed by the government, the PJCM established a presence in eight regional offices. It worked with the national justice institutions to establish a variety of nationally led rule of law coordination bodies at the provincial level, and, in cooperation with local actors, undertook analyses of justice issues and developments. The work of the PJCM included an assessment of assistance to the justice sector in the provinces. The PJCM also produced reports on expanding legal services and on the work of the Ministry of Justice's Huquq Department at the district level including its role in mediating disputes through traditional dispute resolution mechanisms and raising public legal awareness. The information provided in these reports fed into the decisions of the government, international partners and provincial reconstruction teams to give greater support for these services at the local level.

- help to strengthen relationships between various actors within the justice system, including the police, judiciary and corrections services;

The United Nations Integrated Peacebuilding Office in Guinea-Bissau (UNIOGBIS) helped the Ministry of Justice, the Supreme Tribunal and the Prosecutor General's Office to organize the National Criminal Justice Forum. The Forum brought together magistrates, lawyers and other judicial officials involved in the administration of justice in the country and provided a unique opportunity for discussions and exchange of knowledge, experiences and information on the development of national strategies to combat national and international crime.

In the United Nations Operation in Côte d'Ivoire (UNOCI), judicial affairs officers supported a programme to reinforce the capacity and coordination of magistrates and police within the framework of judicial police activities. The legal training workshop addressed gaps in collaboration between magistrates and police, particularly during the investigative phase.

- convene national stakeholders in order to design and implement national justice strategies, as discussed in Chapter 7;
- include and encourage full participation of national stakeholders in the design and implementation of programmatic activities to strengthen the justice system; and

- disseminate information to national stakeholders regarding developments and donor or agency activities in the justice sector.

With respect to the coordination of national justice actors, judicial affairs officers should consider the following best practices:

- In order to enhance national ownership, national stakeholders should lead the process, with international stakeholders assisting and supporting them by, for instance, providing secretariat services or suitable premises for meetings. At the very least, meetings should be chaired by national stakeholders, such as the Minister of Justice or Chief Justice.
- The importance of regular and open communications in ensuring coordination with and among national stakeholders cannot be underestimated. Coordination is most effective when meetings are held on a regular basis and when open channels of communication are developed with and between national stakeholders.
- The roles and responsibilities of state institutions and civil society with respect to coordination should be clarified and agreed upon. This will help to avoid misunderstandings and promote a coherent approach in which all stakeholders play key roles.

## 5. References

DPKO, *Legal and Judicial Rule of Law Work in Multi-Dimensional Peacekeeping Operations: Lessons-Learned Study* (2006)

DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006)

DPKO/DFS, *Policy on Justice Components in United Nations Peace Operations* (2009)

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*Report of the Panel on United Nations Peace Operations ("Brahimi Report")* (2000), A/55/305 – S/2000/809

*Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies* (2004), S/2004/616

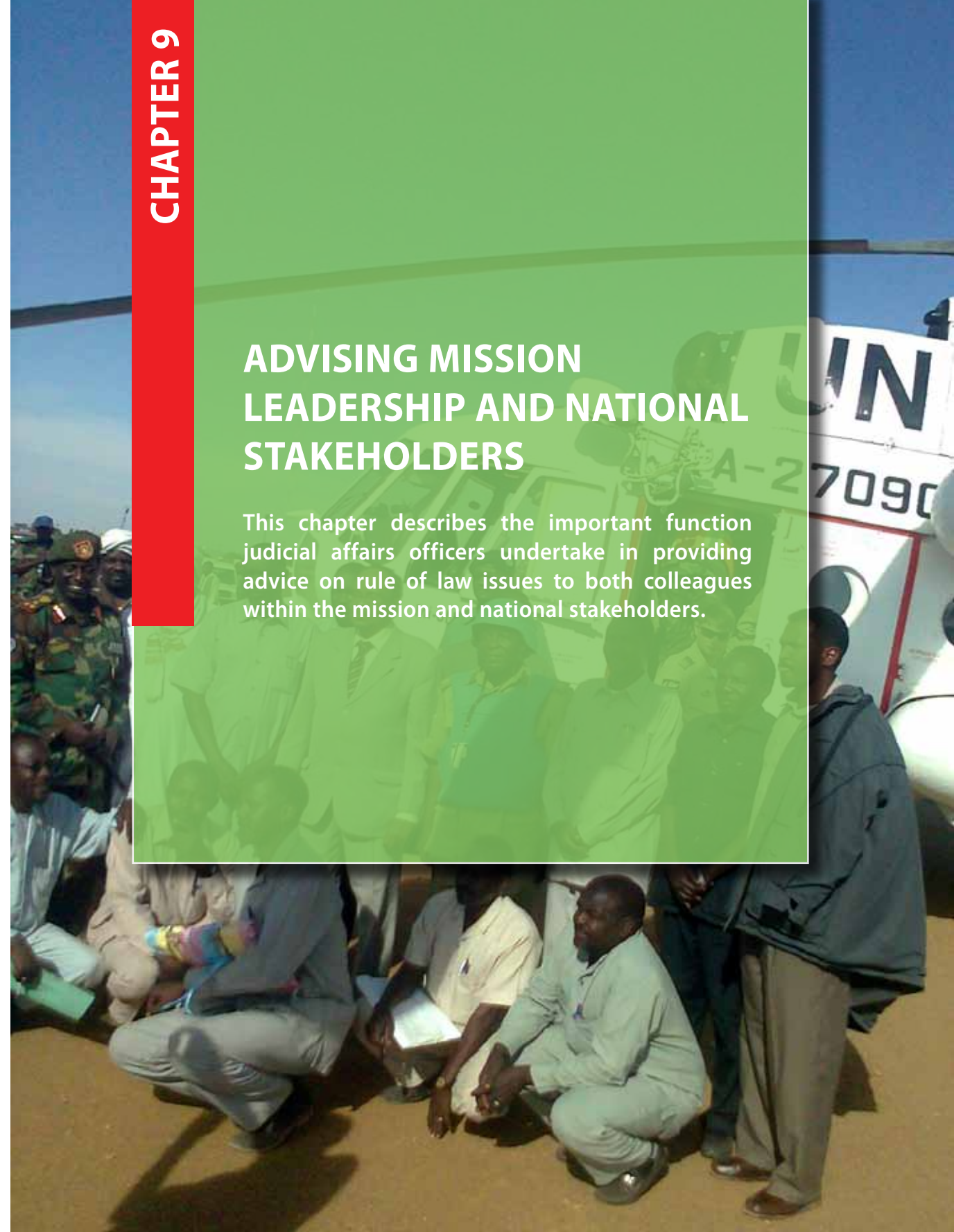
Decision No. 2008/24 of the Secretary-General on Integration (2008)

*United Nations Integrated Mission Planning Process Guidelines* (2006)

## CHAPTER 9

# ADVISING MISSION LEADERSHIP AND NATIONAL STAKEHOLDERS

This chapter describes the important function judicial affairs officers undertake in providing advice on rule of law issues to both colleagues within the mission and national stakeholders.



## 1. Introduction

One of the most important functions of judicial affairs officers is to provide advice on rule of law issues to both mission colleagues and national stakeholders. Senior mission leadership and other mission colleagues will require crisp, clear legal analysis and advice on issues related to the host country's justice system, particularly those which are related to the peace process and/or which are likely to have wider political and security implications.<sup>143</sup> They should also be advised on other justice-related matters, including the political nature of justice reform and the implications of the mission's political strategy for strengthening justice systems and, conversely, larger political issues which have implications for the justice system. Similarly, national stakeholders will require technical advice and assistance in various programmatic areas.<sup>144</sup> While it will not be possible for judicial affairs officers to provide assistance in all areas, they should facilitate the engagement of other international assistance providers in strengthening the host country's justice system.

This chapter provides an overview of the role of judicial affairs officers in advising mission colleagues and providing technical assistance to national actors. It will also suggest best practices that judicial affairs officers should consider when providing such advice and assistance.

## 2. Advising Mission Leadership and Mission Colleagues

Judicial affairs officers should advise mission colleagues on rule of law issues as needed, with or without an explicit request. Mission colleagues include the Special Representative of the Secretary-General (SRSG), the Deputy SRSG and other senior mission leadership, as well as colleagues in the police, corrections, human rights and other components who work on justice-related issues or have close linkages with the host country's justice system and the justice component. Judicial affairs officers may also be requested to advise visiting non-governmental or governmental organizations or United Nations entities.

The head of the justice component is not the only person within the justice component who should provide advice, although s/he is more likely to be in close contact with the SRSG or heads of other components. In many missions, judicial affairs officers also provide advice, for example by researching or writing a response that will be reviewed and presented by the head of the justice component.

The issues on which judicial affairs officers may provide advice may vary widely, and may not always be strictly legal in nature. In most cases, however, they will be directly

<sup>143</sup> DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), pages 12–15 and 33–4; DPKO/DFS, *Policy on Justice Components in United Nations Peace Operations* (2009), para. 9.5.

<sup>144</sup> DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), pages 40–41; DPKO/DFS, *Policy on Justice Components in United Nations Peace Operations* (2009), para. 9.6.

or indirectly related to the mission's mandate and to the peace process. Examples of such issues include:<sup>145</sup>

- disputes which may arise regarding the interpretation of the constitution, or issues relating to the constitution-making process;
- specific incidents with legal or judicial implications (such as the legal basis for the dismissal of judges by the president, the arrest of opposition leaders or claims made by former land-owners on hunger strike);
- general trends relating to the judicial and legal systems (such as the inability of the parliament to adopt legislation, the excessive numbers of pre-trial detainees, increase in the number of arrests, and the legality of carrying weapons); and
- issues relating to the content of peace agreements and other related arrangements.

To ensure that the advice provided is well received and useful, there are several best practices that judicial affairs officers should consider when advising mission colleagues on rule of law issues. First, judicial affairs officers should analyse issues in terms of both applicable international and national law. For example, in advising on the recent arrests of non-violent protestors, judicial affairs officers should examine whether the arrests are in accordance not only with international law, but also with national law. In most contexts, senior mission leadership may find it easier to raise the matter with national authorities if they emphasize violations of national law rather than international law.

Second, judicial affairs officers should limit their advice to their legal background, experience and knowledge. Where they lack such expertise or experience, they should clearly indicate so. There may also be issues which are not within the authority or competence of judicial affairs officers, such as issues that should be addressed by the Office of Legal Affairs (OLA) on behalf of the Secretary-General. Giving advice when judicial affairs officers lack the necessary expertise or authority may undermine the justice component's credibility and may potentially have other adverse consequences. If judicial affairs officers lack the requisite expertise or authority, they should refer the colleague who is seeking advice to the appropriate United Nations office or external expert.

Third, judicial affairs officers should engage senior leadership and other mission colleagues by proactively providing advice even when they have not been requested for advice. For example, justice components can disseminate timely analyses of recent incidents or developments rather than waiting for colleagues to seek advice. The head of the justice component should also meet with the SRSG on a regular basis and be a member of the mission's senior management group and/or strategic planning group to ensure that s/he has regular interactions with senior mission leadership and is an integral part of the mission's decision-making process.

Finally, justice components should work closely with the mission's public information component to shape the way in which the mission addresses or responds to legal is-

<sup>145</sup> DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), pages 12–16 and 33; DPKO/DFS, *Policy on Justice Components in United Nations Peace Operations* (2009), para. 9.5.

sues as well as political developments with legal or judicial implications. In particular, senior mission leadership and other mission colleagues may have a tendency to overlook the legal dimensions of incidents and developments that appear on the surface to be purely political. It is therefore important for judicial affairs officers to advise colleagues so that they can consider the matter fully before issuing public statements.

### 3. Technical Assistance to National Actors

In addition to advising mission colleagues, judicial affairs officers should also take an active role in providing advice and technical assistance to national actors, including authorities (e.g. Ministry of Justice officials) and non-governmental and professional organizations (e.g. bar associations and law schools). Such assistance is usually provided through reports, analyses, consultations, mentoring, monitoring, training, assessment, reporting and planning.<sup>146</sup> These activities will vary according to the mandate and resources of the mission, as well as the specific circumstances and needs of the host country. They will also depend on the interests and priorities of national counterparts, which should be set out in a national justice strategy developed with inputs from a wide array of national actors. Many of the key areas on which judicial affairs officers may provide technical assistance, such as development of national justice strategies, legislative reform and constitution-making, legal education and gender justice, are reviewed in detail in Section 3 of this Handbook on substantive areas.

A number of challenges may arise when advising national actors. National counterparts may not be interested in receiving advice from judicial affairs officers or may question the expertise or integrity of those giving advice. Regardless of the nature or extent of the technical assistance or advice provided by judicial affairs officers, the underlying purpose must be to strengthen, rather than replace, national institutions and actors.<sup>147</sup>

Any technical assistance that judicial affairs officers provide to national actors should reflect relevant best practices. First, judicial affairs officers should not attempt to cover all programmatic areas on their own. The priorities of judicial affairs officers should be to address immediate concerns and gaps that result from the conflict and that have an impact on peace and security, particularly legal and judicial issues that are highlighted in the peace agreement.<sup>148</sup> These may include, for example, constitutional reform, development of specific legislation, strengthening of the independence of the judiciary, issues of national identification and citizenship, and property claims of returning populations.

Many technical assistance activities will not fall within the scope of the mission's mandate and should be undertaken by other international partners. However, judicial affairs officers can facilitate the engagement of other international assistance providers

in areas of strategic need. They can also ensure that everyone is in agreement and coordinated as to next steps to address an issue. After technical assistance is provided, it may be useful to seek broad consultations with national stakeholders to determine how best to move forward.

Second, judicial affairs officers should take care not to promise or offer more assistance than they are able to provide. Disappointment on the part of potential beneficiaries may undermine the credibility of the justice component and adversely affect their working relationship with the mission. It is therefore necessary to manage expectations and be realistic about potential challenges and ultimate achievements.

Third, judicial affairs officers should carefully consider the timing of assistance to national actors. Judicial affairs officers will usually be able to have greater impact once they have developed relationships and gained the trust of national counterparts. In order to develop close working relationships, judicial affairs officers will need to rely on their diplomatic skills.

### 4. References

DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006)

DPKO/DFS, *Policy on Justice Components in United Nations Peace Operations* (2009)

*Guidance Note of the Secretary-General on the United Nations Approach to Rule of Law Assistance* (2008)

*Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies* (2004), S/2004/616

<sup>146</sup> DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), page 41.

<sup>147</sup> DPKO/DFS, *Policy on Justice Components in United Nations Peace Operations* (2009), para. 9.6.

<sup>148</sup> DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), page 41.

## CHAPTER 10

# REPORTING

This chapter emphasizes the essential role of reporting across all of the core functions of a justice component and offers guidance on maximizing the impact of reports. It highlights the role of reporting as a critical and flexible tool to promote support for rule of law development activities and to record a justice component's assessment of rule of law issues, including for input into a variety of other United Nations documents. The chapter also sets out DPKO's guidance on general mission reporting guidelines, to which justice components will contribute.



## 1. Introduction

Producing reports on the host country's justice sector and the various efforts being undertaken to strengthen the rule of law is a fundamental function of judicial affairs officers. Too often, however, the significance of reporting is not fully recognized. The information contained in both internal and public reports can feed into a variety of other documents, including Security Council resolutions, thematic or country-specific reports of the Secretary-General, Department of Peacekeeping Operations (DPKO) public information documents (such as the annual *Justice Review and Corrections Update* magazines and the quarterly DPKO *Justice and Corrections Newsletter*) and guidance materials.

Reports produced by judicial affairs officers are therefore critical for drawing attention to the weaknesses and challenges facing the host country's justice system; mobilizing resources for addressing those weaknesses and challenges; and promoting the achievements of justice components.<sup>149</sup> Such reports provide a basis for initiatives aimed at strengthening rule of law in a host country and serve a number of important purposes which can impact mission mandates, the resources allocated to missions in the justice area, and ultimately, the capacity of missions to assist national authorities to strengthen their justice systems.

This chapter reviews the types of reports that judicial affairs officers should produce, and provides suggestions on ways that such reports should be drafted in order to maximize their impact. It begins with an overview of general mission reporting requirements and addresses relevant inputs to these reports by justice components. It then outlines other, more in-depth internal and public reports that justice components should produce.

## 2. Types of Reports

### Mission Reporting Guidelines

Reporting guidelines for peacekeeping missions are set out in the *Standard Operating Procedure on Integrated Reporting from DPKO-Led Field Missions to United Nations Headquarters*. Most missions produce various types of reports to which justice components contribute. These include the following:

- **Daily/weekly situation reports**<sup>150</sup>

Justice components provide inputs to the integrated daily and weekly situation reports ("sitreps") produced by each mission. These inputs should be sufficiently detailed and include management issues such as personnel, recruitment and deployment, as required. Daily sitreps cover events, incidents or developments with a notable political, security or operational impact (not routine meetings or activities).

<sup>149</sup> DPKO/DFS, *Policy on Justice Components in United Nations Peace Operations* (2009), para. 18.

<sup>150</sup> DPKO, *Standard Operating Procedure on Integrated Reporting from DPKO-Led Field Missions to UN Headquarters* (2012), paras. 16, 18, 22, 23 and 42.

Weekly sitreps require greater analytical focus than daily sitreps and should not reiterate the operational details contained in the daily sitreps but, instead, recap and analyse the most significant events. They should identify trends, explore linkages between cross-cutting issues and contain assessments and commentary. Sitreps are accessible at Headquarters after they have been uploaded, registered and approved in the Operations Reports Repository, a secure, web-based tool.

- **Special incident reports**<sup>151</sup>

Special incident reports ("flash" reports) should be used to transmit short and operationally focused information when an incident of great urgency occurs. Flash reports are prepared in response to a significant event or during an emergency, crisis or other rapidly deteriorating situation (such as a noteworthy change in the operational situation, a mission-area event that has immediate or potential impact on the mission's operations, or preliminary information about United Nations personnel death or serious injury or illness). Flash reports are transmitted to Headquarters by clear or encrypted email, depending on the sensitivity of the material.

### Other Justice Component Reports

Aside from providing inputs to mission reporting requirements, reporting that is focused on rule of law issues is a crucial element of the work of justice components. Detailed and in-depth reporting on rule of law topics should include the following.

- **Monthly/quarterly/annual reports**<sup>152</sup>

Justice components should provide monthly and/or quarterly thematic reports which incorporate information from other United Nations partners, non-governmental actors and national counterparts, together with the justice component's recommendations.<sup>153</sup> These reports should contain analyses and recommendations on strategic issues and challenges relating to the fulfilment of the mission's judicial mandate. They should be coordinated with relevant corrections, police, security sector reform (SSR) and disarmament, demobilization and reintegration (DDR) efforts.

Monthly reports should contain an overview of each component's work and its linkages to other relevant mission entities; identify strategic and operational challenges and needs (including personnel generation); outline implementation plans and mechanisms; and describe cooperative efforts with relevant United Nations,

<sup>151</sup> DPKO, *Standard Operating Procedure on Integrated Reporting from DPKO-Led Field Missions to UN Headquarters* (2012), para. 29, 30 and 33.

<sup>152</sup> DPKO/DFS, *Policy on Justice Components in United Nations Peace Operations* (2009), para. 18; DPKO, "Code Cable 2203 on Rule of Law and Security Institutions Components – Coordination and Reporting" (2007), paras. 12–15.

<sup>153</sup> The role of reporting by justice components is set out in the broader context of communications between justice components and their counterpart at Headquarters, CLJAS, in a paper jointly prepared by CLJAS and heads of justice and corrections components: "Effective Communication between Justice and Corrections Components in United Nations Field Operations and the Criminal Law and Judicial Advisory Service: Recommendations Paper", 29 August 2012.



bilateral, multilateral, non-governmental and host-country partners. Quarterly reports should analyse key strategic trends, provide an update on mandate implementation vis-à-vis the results-based framework, and update on financial expenditures of assessed and voluntary sources.

Monthly and quarterly reports should be transmitted to Headquarters by code cable. Justice components are also strongly encouraged to produce annual reports which should synthesize the component's strategic analyses of trends, developments, obstacles and challenges, thereby furthering the retention of institutional knowledge.

- **Public reports**<sup>154</sup>

Public reports produced by a mission can be a highly effective way to address a particular theme relating to the host country's legal and judicial systems (e.g. pre-trial detention, the tenure of judges, legal aid). Such reports can demonstrate the impact of the mission's programmes or the urgency of a particular situation. Public reports can also play an important role in motivating national authorities to address challenges and issues of concern, and in convincing the international community that the situation requires their time, attention and resources. In particular, judicial affairs officers are encouraged to produce public reports based on their assessment and other activities. When producing public reports, judicial affairs officers should coordinate with other relevant mission components, such as the human rights component.<sup>155</sup> Whether public reports in draft form should be shared with national authorities before publication will depend on a number of factors, including the purpose of the report, the nature of the issues covered, the possible security implications arising from the issuance of the report and the relationship between the mission/justice component and national authorities.

Examples of public reports by justice components include:

- Human Rights and Rule of Law Units of UNAMA,<sup>156</sup> "The Application of Fair Trial Guarantees in Afghan Criminal Proceedings" (2009)
- Human Rights Unit of UNAMA (with assistance from other entities, including the Rule of Law Unit), "Arbitrary Detention in Afghanistan: A Call for Action" (2009)
- Legal and Judicial System Support Division of UNMIL,<sup>157</sup> "Case Progression: Assessment/Capacity Development of Tribal Governors' Court" (2011)
- Legal and Judicial System Support Division of UNMIL, "Report on Circuit Courts and Sexual and Gender-Based Violence: Consolidated Report, 2010/2011"

<sup>154</sup> DPKO/DFS, *Policy on Justice Components in United Nations Peace Operations* (2009), para. 18; DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), pages 33–4.

<sup>155</sup> DPKO/DFS, *Policy on Justice Components in United Nations Peace Operations* (2009), para. 9.4.

<sup>156</sup> UNAMA: United Nations Assistance Mission in Afghanistan.

<sup>157</sup> UNMIL: United Nations Mission in Liberia.



**What are the reports of the Secretary-General on specific missions and how are they produced?**

At regular intervals, usually every three to six months, the Security Council requests the Secretary-General to report on progress made in the implementation of the mission's mandate. The reports of the Secretary-General pursuant to such requests cover the activities of the mission and related developments. For missions with a justice component, these reports should therefore include the activities of the justice component as well as key rule of law developments, achievements and challenges during the reporting period.

The reports of the Secretary-General are usually drafted within the mission, and are then finalized by Headquarters (DPKO for peacekeeping operations and Department of Political Affairs (DPA) for special political missions) in consultation with the mission. The Criminal Law and Judicial Advisory Service (CLJAS) reviews draft reports of the Secretary-General and has the opportunity to provide comments before they are finalized. Justice components are strongly encouraged to share their inputs for these reports with CLJAS so that it can help to ensure that justice-related issues are adequately reflected in the final version of the report.

### 3. Maximizing the Impact of Reporting

In most missions, all judicial affairs officers will have varying degrees of reporting responsibilities. However, because reporting is often a time-consuming and ongoing task, some justice components may have reporting officers at mission headquarters who are dedicated exclusively (or almost exclusively) to reporting. Such officers will usually be tasked to produce reports on behalf of the component, and also coordinate with other mission colleagues to ensure that mission-wide reports include justice-related inputs and considerations.

In order to have maximum impact, reports produced by judicial affairs officers must be well written, accurate, concise and meaningful. The following guidelines are suggested in this regard:

- Avoid listing the activities of the justice component (such as meetings), but instead, explain the significance, impact and outputs of the justice component's activities.
- Provide an overview and analysis of key developments in the justice sector, including trends and the role of the justice component in those developments, including the impact on the peace process.
- Identify the legal and judicial implications of political and security developments in the host country.
- Provide context for the justice component's activities, including linkages to other United Nations actors and non-United Nations actors and their efforts in the host country.

- Be concrete about the justice component's assistance to national actors, and avoid the use of "support", "facilitate" and other vague language to describe the justice component's work.
- Be specific and provide basic information (Who? What? When? Where? Why?), while maintaining brevity.
- Where appropriate, use figures, data and statistical analysis to illustrate developments and trends.
- Use short, simple sentences, and avoid long, complex sentences.
- Structure the report so that it is easy to read, for example through the use of headings and numbering/bullet points.
- Include recommendations and expected assistance from Headquarters.

#### 4. References

DPKO, "Code Cable 2719 on Content and Format of Code Cables" (2004)

DPKO, "Code Cable 2203 on Rule of Law and Security Institutions Components – Coordination and Reporting" (2007)

DPKO, "Code Cable 0642 on Reporting to Headquarters" (2012)

DPKO, *Standard Operating Procedures on Integrated Reporting from DPKO-Led Field Missions to UN Headquarters* (2012)

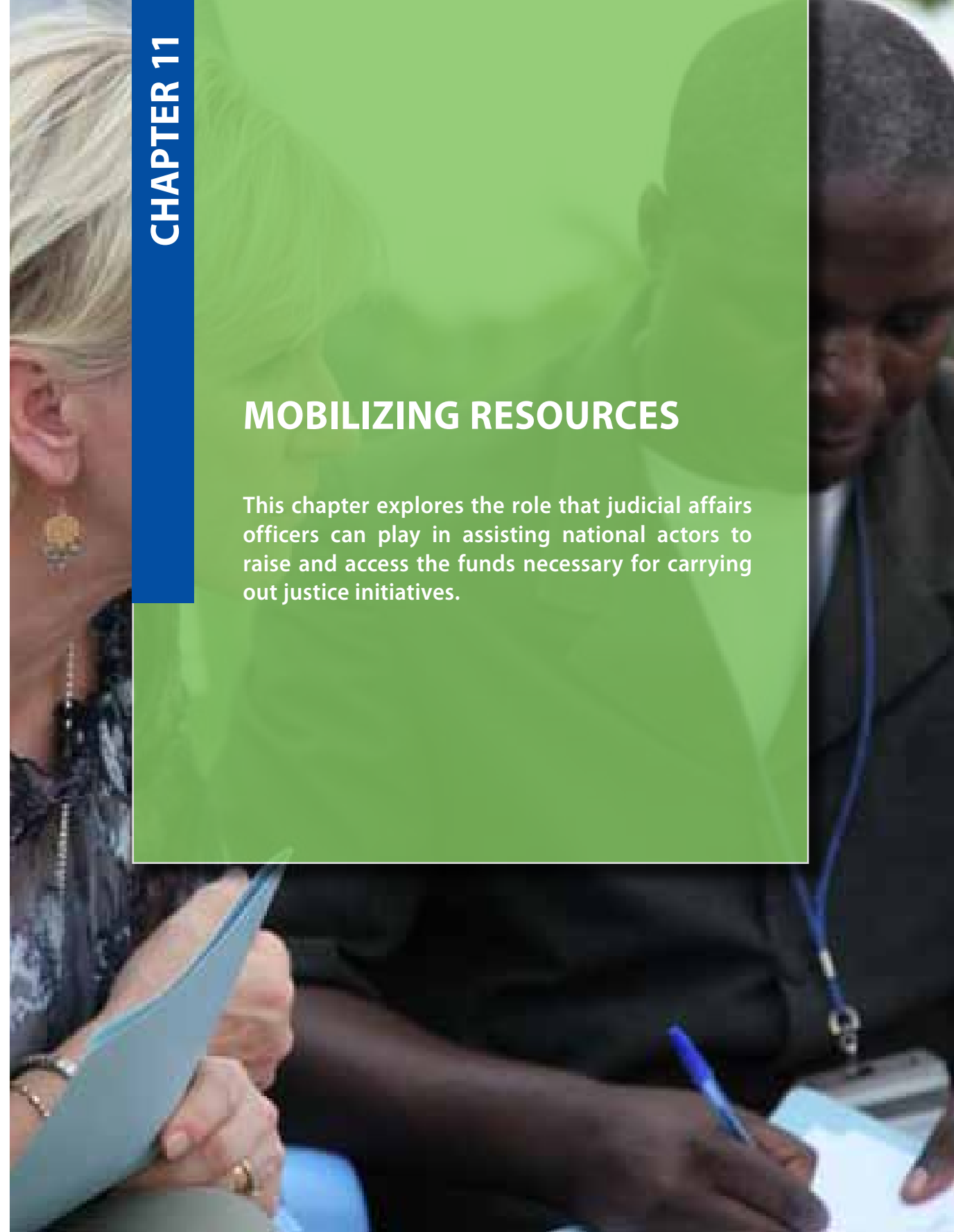
DPKO/DFS, *Policy on Justice Components in United Nations Peace Operations* (2009)

DPKO, DPA and OHCHR, *Policy Directive on Public Reporting by Human Rights Components of United Nations Peace Operations* (2008)

## CHAPTER 11

### MOBILIZING RESOURCES

This chapter explores the role that judicial affairs officers can play in assisting national actors to raise and access the funds necessary for carrying out justice initiatives.



## 1. Introduction

In most post-conflict environments, the resources needed to rebuild the country are scarce, including those relating to the justice system. Peacekeeping operations themselves are not well placed to provide such resources since they operate on “assessed budgets” which generally do not cover programmatic activities. Judicial affairs officers can nevertheless play a key role in mobilizing resources in support of efforts to strengthen the host country’s justice system.<sup>158</sup> They can do so by helping national actors to raise funds and access the resources necessary to strengthen the justice sector, for example by assisting them to develop funding proposals and facilitating their participation in donor conferences. The ultimate goal is to attract multi-year, sustainable funding for justice and rule of law in the host country.

This chapter provides an overview of resource mobilization, including the key elements which should be included in any funding proposal. It also introduces potential sources of funding which should be considered by judicial affairs officers in support of national counterparts seeking funding for justice-related initiatives. Finally, this chapter suggests approaches which judicial affairs officers should consider in order to mobilize resources effectively.

## 2. Funding Proposals

One of the most useful ways that judicial affairs officers can support national counterparts to access funding and other resources is by assisting them in developing funding proposals. As much as possible, judicial affairs officers should develop proposals with, rather than for, national counterparts. This will help to strengthen national capacity to mobilize resources and ensure that projects (and their outcomes) are sustainable over the long term.

The format of funding proposals will vary from donor to donor, and care should be taken to follow the required specifications of a particular donor. Proposals should also be clearly linked to key priorities in the aftermath of conflict, in particular the maintenance of peace and security, and the strengthening of the rule of law.

Judicial affairs officers should assist national actors in ensuring that funding proposals for justice-related projects and programmes include the following components:

- **Purpose and objectives**

The proposal should explain the aims and outcomes sought as well as the beneficiaries of the project. In addition, it should explain how the project supports the peace process and addresses the needs of the host country. For certain funding sources, the proposal may also need to explain how the project contributes to the implementation of the mission mandate.

<sup>158</sup> DPKO/DFS, *Policy on Justice Components in United Nations Peace Operations* (2009), para. 9.3; DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), pages 38–40.

- **Description of activities**

The proposal should provide a concise description of proposed activities. It may be useful in this regard to refer to other similar projects which have been implemented previously, and how the proposed project complements and builds upon those projects.

- **Implementing entities**

The proposal should include a description of the implementing entities and their status (e.g. non-governmental organization (NGO), government institution, the United Nations, etc.).

- **Consultations and coordination**

The proposal should indicate the nature and extent of consultations held with relevant national stakeholders regarding the proposed project. It should also explain how the proposed project has been coordinated with other relevant international and national actors, including how it would complement broader efforts to strengthen the rule of law in the host country.

- **Timeline**

The proposal should indicate a timeline for the project, including proposed start and completion dates, as well as anticipated dates for key stages of the project.

- **Budget**

The proposal should include a detailed budget for the project, taking into account the human, material and logistical resources needed for the successful and timely implementation of the project.

- **Monitoring and evaluation**

The proposal should include clear monitoring and evaluation criteria, as reflected in the measurement of the delivery and impact of the proposed project. The proposal should also specify the entities which will be responsible for monitoring and evaluation. For some projects, this may require the engagement of independent experts.

- **Sustainability**

The proposal should explain the measures which have been taken to ensure that the outcomes of the proposed project are sustainable. It should also indicate the national and international stakeholders who will support project outcomes beyond the end date of the project.

- **Other potential funding sources**

Finally, the description should note whether a similar proposal has been submitted to other donors.

### 3. Funding Sources

The potential sources of funding for justice-related projects will vary from mission area to mission area. Judicial affairs officers, working closely together with national counterparts, should actively seek such sources. In all mission areas, the following key funding sources should be explored:

- **Mission budgets**

Mission budgets are funded through assessments of Member States according to a set formula and established through a coordinated process on an annual basis within the United Nations system. Mission budgets generally cover the costs of mission personnel and basic support for those personnel. It is recommended that justice components request, in their mission budgets, modest amounts of programmatic funding as well. This could include training, national and international consultancies, materials and equipment. Judicial affairs officers should also ensure that the mission's finance component and the Chief of Mission Support are well aware of the particular needs of the justice component when they make decisions regarding the allocation and use of mission funds.

- **Mission trust funds**

Some missions have their own trust funds to support projects, and judicial affairs officers should be informed of their nature and availability. If a trust fund does not exist, judicial affairs officers should explore the possibility of establishing a trust fund by contacting the mission's finance component.

- **Quick Impact Projects (QIPs)**

Most peacekeeping operations have a small allocation for QIPs<sup>159</sup> to address urgent needs for small projects that will produce rapid and visible results. While these funds generally have only limited and short-term impact, they may be particularly useful in the initial phases of the mission's life to build local confidence in the justice component's capacity to rapidly assist national counterparts with viable results. A good track record with such small projects may also be useful in mobilizing donor funding later. They can be used to establish conditions for future development (e.g. rehabilitating infrastructure) and reinvigorate processes which outlast initial funding. QIPs are subject to a maximum of approximately \$50,000 per project, with the average project costing approximately \$15,000. The projects are intended to be short term in nature and generally must be completed within six months.

In Liberia, where the court infrastructure was heavily damaged as a result of the conflict, the United Nations Mission in Liberia (UNMIL) used QIP funding to undertake basic court rehabilitation and refurbishment projects, such as fixing walls and buying office furniture and a generator.

<sup>159</sup> Further information can be found in DPKO, *Policy on Quick Impact Projects* (2007).

- **Peacebuilding Fund (PBF)**

The PBF<sup>160</sup> was established in 2005, through General Assembly resolution 60/180 and Security Council resolution 1645 (2005). The PBF relies upon voluntary contributions from Member States, organizations and individuals, and funds initiatives that fulfil one or more of the following criteria: 1) they respond to imminent threats to the peace process and support peace agreements and political dialogue; 2) they build or strengthen national capacities to promote coexistence and peaceful resolution of conflict; 3) they stimulate economic revitalization to generate peace dividends; and/or 4) they re-establish essential administrative services. Countries on the agenda of the Peacebuilding Commission (PBC) may receive funding. In addition, countries that are not on the PBC agenda may receive funding following a declaration of eligibility by the Secretary-General.

- **United Nations Democracy Fund (UNDEF)**

UNDEF<sup>161</sup> was established by the Secretary-General in July 2005 as a United Nations General Trust Fund, with the primary purpose of supporting democratization around the world. It supports projects that aim to strengthen the voice of civil society, promote human rights, and encourage the participation of all groups in democratic processes. The large majority of UNDEF funds go to local civil society organizations, both in the transition and consolidation phases of democratization. UNDEF plays a role in complementing United Nations work with governments to strengthen democratic governance in countries.

The Human Rights Section in the United Nations Integrated Peacebuilding Office in Sierra Leone (UNIPSIL) has provided advice to international and national partners on access to United Nations funding (United Nations Fund for Victims of Torture, United Nations Trust Fund to End Violence against Women, and UNDEF) and funding from other interested donors.

- **The United Nations Trust Fund to End Violence against Women**

This Trust Fund was established by General Assembly resolution 50/166 in 1996 and is managed by UN Women on behalf of the United Nations system. The UN Trust Fund works with partners across the world to secure much-needed services for women and girls affected by violence. The UN Trust Fund awards grants annually through an open and competitive process. The majority of its grantees are NGOs, with grants awarded also to governments and United Nations Country Teams (UNCTs). Access to this fund requires the submission of detailed project proposals.<sup>162</sup>

<sup>160</sup> Further information can be found on [www.unpbf.org](http://www.unpbf.org).

<sup>161</sup> Further information can be found at [www.un.org/democracyfund](http://www.un.org/democracyfund).

<sup>162</sup> Further information can be found at [www.unwomen.org/how-we-work/un-trust-fund](http://www.unwomen.org/how-we-work/un-trust-fund).

- **Other United Nations partners through joint programmes**

Peacekeeping operations are increasingly developing and implementing joint justice programmes with other United Nations partners. These initiatives are based on the view that joint programming facilitates overall coherence, coordination and effectiveness of efforts through the combined resources of the participating entities. Similarly, justice components should also partner with other mission components on projects which would benefit from such linkages.

In Afghanistan, the Provisional Justice Coordination Mechanism was a joint United Nations Assistance Mission in Afghanistan (UNAMA) and United Nations Development Programme (UNDP) project established to assist the Afghan government in strengthening the rule of law beyond Kabul and improving the delivery of justice in the provinces.

- **Bilateral and regional donors**

Some Member States and regional organizations have funds for justice-related projects and/or for mission programmatic support in mission areas. Judicial affairs officers should approach representatives of Member States and regional organizations engaged in the host country to determine whether there is interest in supporting justice projects and, if so, the requirements and process for obtaining funding. One common practice among bilateral and regional donors is the provision of funding to a host-country organization in partnership with the Department of Peacekeeping Operations (DPKO). Judicial affairs officers are also encouraged to share project proposals with the Criminal Law and Judicial Advisory Service (CLJAS) at Headquarters, which is in frequent contact with Member States and other potential donors.

In the United Nations Operation in Côte d'Ivoire (UNOCI), judicial affairs officers developed a partnership with donors interested in the justice sector, and facilitated the support of the European Union, which in the past funded the rehabilitation of courts and prisons. In 2011, the European Union pledged 18 million euros through its European Development Fund for broad-based justice sector reform in Côte d'Ivoire.

## 4. Approaches for Mobilizing Resources

Mobilizing resources for strengthening the host country's justice system is an important function of judicial affairs officers, but is itself a resource-intensive task. To ensure that any effort to mobilize resources is effective and sustainable, judicial affairs officers should plan carefully before approaching funding sources in a random manner. A resource mobilization strategy is a fundamental basis for such an approach. A stra-

tegy, even one that is broadly outlined, should identify priority aims, potential donors, means for accessing those donors and general timeframes.

Justice components should also consider delegating resource mobilization responsibilities to an individual or team of judicial affairs officers. These officers, together with their national counterparts, can approach interested donors, develop project proposals, track programmes and produce reports for donors. This will help to streamline the resource mobilization process, and ensure coherence among various mobilization efforts.

Another way that judicial affairs officers can assist national counterparts is by helping to develop concept notes. Concept notes or preliminary proposals briefly describe the project parameters and funding requirements. These concept notes are useful because they can be shared with potential donors to ascertain their interest before a more detailed funding proposal is developed in accordance with the specific requirements of each donor.

Judicial affairs officers can also mobilize resources by organizing donor conferences and facilitating the participation of national counterparts in such events. Donor conferences can be an effective way to link donors with programmatic officers, draw attention to the needs of the host country's justice system, and increase interest in funding projects. Donor conferences may sometimes take place outside the host country in remote locations such as New York. CLJAS can assist mission colleagues in organizing such events.

Finally, as already emphasized in Chapter 8 on coordinating and convening stakeholders, the coordination of rule of law assistance providers and donors is critical to the coherence and success of various resource mobilization efforts. Such coordination is necessary to ensure that priority needs are met, and that initiatives do not overlap or conflict. A donor coordination mechanism is often useful for this purpose.

## 5. References

DPKO, *Legal and Judicial Rule of Law Work in Multi-Dimensional Peacekeeping Operations: Lessons-Learned Study* (2006)

DPKO, *Policy Directive on Quick Impact Projects* (2007)

DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006)

DPKO/DFS, *Policy on Justice Components in United Nations Peace Operations* (2009)

*Guidance Note of the Secretary-General on the United Nations Approach to Rule of Law Assistance* (2008)

*Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies* (2004), S/2004/616



# SECTION THREE

## SUBSTANTIVE AREAS

This section provides an overview of a number of the substantive areas in which justice components may engage. The areas selected for inclusion in this section are those that justice components will most commonly address, as set out in the *DPKO/DFS Policy on Justice Components in United Nations Peace Operations*.



## CHAPTER 12

### IMMEDIATE EFFECTIVENESS OF THE JUSTICE SYSTEM

This chapter describes activities that a justice component can undertake in order to help national actors implement immediate measures to enhance the justice system's capacity to meet demand – a particularly urgent and profound challenge in the immediate aftermath of conflict.

## 1. Introduction

One of the most pressing challenges facing the justice system in many post-conflict settings is the high levels of crime, including organized crime and serious human rights violations. This can jeopardize law and order, and undermine reconstruction and rehabilitation efforts. Under such circumstances, the justice system must be able to investigate and adjudicate cases in a fair, impartial and timely manner. In post-conflict environments, however, the justice system may not have sufficient capacity to meet the demands on the system, which in turn results in impunity. Because impunity may have been a root cause of the conflict, continuing impunity in the post-conflict period may pose a serious risk to peace and security.

To help address this situation, judicial affairs officers should assist national actors with the implementation of immediate and interim measures to “kick-start” the justice system and address impunity and the backlog of criminal cases.<sup>163</sup> Such measures should be aimed at quickly making the justice system operational and effective. At the same time, they must also build the capacity of national counterparts and lay the foundation for longer term reform.

This chapter provides an overview of measures which judicial affairs officers should consider supporting in order to enable the immediate effectiveness of the justice system. It also provides concrete examples of such measures which judicial affairs officers have undertaken.

## 2. Immediate Measures

### Justice Infrastructure<sup>164</sup>

In post-conflict settings, courts and other justice buildings may have been destroyed or damaged. Moreover, infrastructure for justice facilities may be absent in rural areas. In such contexts, it is likely that some form of rehabilitation for the formal institutions will be necessary. Court rehabilitation will not only enable the conduct of judicial proceedings, but may also provide increased security and improved materials and equipment necessary for the operation of the court. However, while infrastructure is important, rehabilitation alone will not lead to the immediate effectiveness of the justice system.

The security needs of judicial personnel, lawyers, victims and witnesses should not be underestimated. Courts may not have security personnel, and antiquated court facilities frequently have limited equipment to detect weapons. In addition, court designs may lack separation between defendants and judges. Courts may also lack segregated waiting rooms for the parties, victims or witnesses, and separate and protected

<sup>163</sup> DPKO/DFS, *Policy on Justice Components in United Nations Peace Operations* (2009), para. 10.1; DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), pages 41–2.

<sup>164</sup> DPKO/DFS, *Policy on Justice Components in United Nations Peace Operations* (2009), para. 10.2; DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), pages 60–2.

entries for judicial personnel may not exist. Court construction and refurbishment are resource-intensive and most appropriately undertaken by development organizations. However, judicial affairs officers can support programmes that improve the infrastructure of courts, including basic refurbishment (such as office, equipment, supplies and generators); basic rehabilitation (such as to address leaking roofs and broken doors); and the modernization and expanded use of information technology.

### Coordination Between Justice Actors<sup>165</sup>

One way to quickly address the lack of coordination among criminal justice institutions and actors is to strengthen relationships and information exchange between them. For this purpose, coordination mechanisms could be developed or enhanced to increase the collaboration and effectiveness of the justice, police and corrections institutions, targeting the specific areas where their interface is particularly important. Such coordination mechanisms may be in the form of working groups or task forces which bring together the key actors on a regular and ongoing basis to discuss issues of concern and identify potential solutions. Judicial affairs officers can support and assist these mechanisms.

A related need in many post-conflict settings is the harmonization of policies and procedures among police, judicial and corrections institutions. These may include the standardization of systems for collecting and storing evidence, the standardization of forms for the transfer of detainees and evidence, and protocols among agencies for serving warrants and executing judicial decisions. In collaboration with the police and corrections components of the mission, judicial affairs officers should assist national counterparts in undertaking such reforms.

### Pre-trial Detention/Case Management Committees<sup>166</sup>

Where case backlogs lead to prison overcrowding or illegal/prolonged detentions, a working-level committee could be assembled to review the appropriateness of pre-trial detentions and make recommendations for action to the court or the administration, as appropriate. Such committees should in no way replace the right of the accused to seek review of his or her detention before a court. The establishment of such committees may require a legislative basis and must be consistent with the applicable criminal procedure law and international human rights law. They should meet frequently and have transparent rules that govern the review of cases. Judicial affairs officers can assist in establishing and organizing committees.

While management committees are useful to reduce both those in pre-trial detention and those imprisoned after sentencing, there are limitations to utilizing them. First, in terms of pre-trial detention, care should be taken to ensure that management committees in no way replace the right of the accused to seek review of his or her detention

<sup>165</sup> DPKO/DFS, *Policy on Justice Components in United Nations Peace Operations* (2009), para. 10.1; DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), pages 42–3, 45.

<sup>166</sup> DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), page 43. See also Lynn Hastings, *Challenges and Lessons Learned: Arbitrary and Prolonged Pre-trial Detention in Conflict and Post-conflict Areas* (2011).



before a court on the basis that the State has no justification or further justification for holding the detainee, as is the detainee's right under international human rights law. Where a person has been sentenced to a term of imprisonment, case management committees should not interfere with the duties and obligations of any parole board that is established or the Head of State's right to pardon an individual. Finally, care should be taken to ensure that when a person is released from a prison sentence, legal procedures are followed to avoid impunity and opportunities for corruption.

Before the January 2010 earthquake, Haiti had made efforts to reduce the estimated 80 per cent of detainees who had not yet been tried. The Ministry of Justice and Public Security, with the support of the justice component of the United Nations Stabilization Mission in Haiti (MINUSTAH), set up a National Commission on Prolonged Pre-trial Detention to identify affected detainees. The Commission reviewed all pending cases and transmitted names and recommendations to the Prosecution and Investigating Judge's Offices. Pre-trial detention was also reduced following the establishment of legal aid offices throughout the country and the subsequent availability of legal assistance for all detainees.

In 2004, the Ministry of Justice in Liberia faced overcrowding of pre-trial detainees in its prisons. The Legal and Judicial Systems Support Division of the United Nations Mission in Liberia (UNMIL), in collaboration with the Ministry of Justice and the Judiciary, responded to the crisis by initiating the Case Flow Management Committee, which met weekly to review the individual file and the status of each detainee. The Committee submitted recommendations to the Solicitor General on a case-by-case basis.

### Mobile Courts<sup>167</sup>

The difficulty of dispensing justice outside the capital can be acute in post-conflict environments. Mobile justice facilities, which bring judges, prosecutors and defence counsel and any necessary court administrative staff (including interpreters) to remote locations where regular courts do not exist, can help to prevent case backlogs and lengthy pre-trial detention by ensuring that criminal proceedings are carried out expeditiously. Judicial affairs officers can help to establish mobile courts and provide technical advice, as well as facilitate transport, logistics and security support. In providing advice, judicial affairs officers must ensure that they do not infringe upon the independence of the judiciary.

<sup>167</sup> DPKO/DFS, *Policy on Justice Components in United Nations Peace Operations* (2009), para. 10.1; DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), page 43.

In Chad, with the support of the United Nations Mission in the Central African Republic and Chad (MINURCAT), judges and prosecutors were deployed to the east as part of the mobile court system to hear criminal cases at both trial and appellate levels. MINURCAT provided logistical and technical support by transferring detainees, distributing court summonses to trial parties, and helping to coordinate inter-agency involvement in the mobile court programme.

The United Nations Operation in Côte d'Ivoire (UNOCI) facilitated the operation of the mobile court process which determined the issuance of identification documentation such as birth certificates, so that holders of these documents would be eligible to vote in the elections.

In order to help reduce the number of pre-trial detainees in Liberia, UNMIL's Legal and Judicial Systems Support Division initiated discussions with the Ministry of Justice and the Judiciary to conduct magisterial court sessions in the Central Prison in Monrovia. The project was later expanded to include additional international partners and has been ongoing since February 2009.

### Hybrid or Special Courts<sup>168</sup>

The development of hybrid and special courts, which are also covered in Chapter 3 on international law and Chapter 16 on transitional justice, are examples of programmatic activities that enable the immediate effectiveness of the justice system. Such mechanisms are created for a variety of reasons depending upon the context, but primarily because of the lack of capacity and/or independence and impartiality of the national justice system. It is important that they not only investigate and adjudicate cases, but that they also help to develop and strengthen the capacity of national actors and institutions.

In line with Decision No. 2006/47 of the Secretary-General on Rule of Law, advocacy for the establishment of hybrid courts will usually be undertaken by human rights components of missions, together with colleagues from the Office of the High Commissioner for Human Rights (OHCHR) in Geneva.<sup>169</sup> In addition, the legal basis for such mechanisms will be led by the Office of Legal Affairs (OLA) at Headquarters.<sup>170</sup> However, judicial affairs officers may still play a key role in building the capacity of national

<sup>168</sup> DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), pages 45–6.

<sup>169</sup> Decision No. 2006/47 of the Secretary-General on Rule of Law (2006), Annex 2.

<sup>170</sup> Ibid.

counterparts working in hybrid courts and in selecting and supporting the national judges, prosecutors, defence counsel and other staff working in these institutions. In missions which have executive mandates, judicial affairs officers may also exercise judicial functions.

### Legal Defence Programmes<sup>171</sup>

Public defender programmes and/or other state-sponsored legal assistance mechanisms are integral to state responsibility to ensure meaningful legal representation.<sup>172</sup> The availability of effective legal representation is also a crucial foundation for a functioning criminal justice system. Capable defence lawyers who are free to challenge police and prosecutors, probe the evidence in the case, and generally ensure due process for their clients, play a central role in helping to make the system work. Lack of access to lawyers endangers public confidence in the system.

Where effective public defender programmes or other mechanisms do not exist, judicial affairs officers can promote and provide technical assistance for the establishment of a formal public defender programme or, alternatively, support and/or facilitate the expansion of legal assistance services provided by national or international non-governmental organizations (NGOs). The cost of developing and maintaining a state-sponsored legal aid system in a post-conflict country is likely to be a major obstacle. In such situations, an approach should be identified which corresponds to the specific context of the host country and which is in accordance with the applicable national laws. These may include access to pro bono lawyers through the bar association or NGOs, law students through legal clinic programmes and paralegals.

Paralegals are particularly valuable in the absence of qualified lawyers who are able to offer their services pro bono or at a reduced fee. However, paralegals are not trained as lawyers and cannot replace lawyers in all tasks. Attention must be given to the national rules pertaining to the responsibilities of lawyers. Judicial affairs officers can provide advice in relation to legislation that promotes access to legal aid.

In Liberia, the Consortium of Paralegal Organizations, with the support of UN-MIL, has proposed the establishment of a secretariat with the aim of supporting member organizations which provide paralegal support to the population, among other services.

<sup>171</sup> DPKO/DFS, *Policy on Justice Components in United Nations Peace Operations* (2009), para. 10.10; DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), pages 66–7.

<sup>172</sup> See *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* (2012).

The Judicial Advisory Unit of the African Union-United Nations Hybrid Operation in Darfur (UNAMID) is collaborating closely with the United Nations Development Programme (UNDP) to provide prisoners and detainees with access to legal representation. The Judicial Advisory Unit is advocating with the bar association to identify suitable lawyers, while UNDP provides funding for salaries, office equipment and supplies. Through its seconded prison personnel, the UNAMID Prison Advisory Unit also collects the necessary data on detainees and prisoners in need of legal advice and representation and engages legal aid lawyers accordingly.

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*Guidance Note of the Secretary-General on the United Nations Approach to Rule of Law Assistance* (2008)

*Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies* (2004) S/2004/616

UNODC and the United States Institute of Peace, *Criminal Justice Reform in Post-conflict States: A Guide for Practitioners* (2011)

A person wearing a straw hat and gloves is working in a rice field, using a tool to harvest rice. The background is a lush green field of rice plants.

## CHAPTER 13

### LEGISLATIVE REFORM AND CONSTITUTION-MAKING

This chapter looks at the role judicial affairs officers play in supporting legislative reform and constitution-making. These are critical tasks as countries emerging from conflict often have legislative gaps, as well as laws that are unclear, outdated or incompatible with international norms and standards.

## 1. Introduction

In countries emerging from conflict, the legal framework, including the constitution, is often unclear, outdated or incompatible with international law. There may also be gaps in the law which prevent the justice system from addressing certain crimes or ensuring due process. In addition, after years of conflict and multiple governments, there may be a number of statutes, policies and procedures which overlap or are inconsistent. As stated by the Secretary-General, “in post-conflict settings, legislative frameworks often show the accumulated signs of neglect and political distortion, contain discriminatory elements and rarely reflect the requirements of international human rights and criminal law standards”.<sup>173</sup>

In this context, judicial affairs officers have a key role in supporting legislative reform and constitution-making.<sup>174</sup> Judicial affairs officers should help national actors to ensure the conformity of laws with international human rights instruments, and to address gaps in the legal framework or constitution. In doing so, they should ensure that the legal context and legal traditions of the host country are respected, and that there are adequate levels of public participation and consultations in the constitution-making and legislative processes. Judicial affairs officers should also help to create a library or repository of laws, and ensure that laws are published and disseminated widely.

This chapter provides a summary of the legislative reform and constitution-making process, from the initial identification of needs to the implementation of the adopted law. It also provides examples of the various types of support that judicial affairs officers can provide to national actors with respect to legislative reform and constitution-making.

## 2. Legislative Reform and Constitution-Making Processes

The legislative reform and constitution-making process varies from country to country, and sometimes from law to law within the same country. However, there are key steps which are commonly part of most processes. These steps, as described below, are drawn from the *Guidance Note of the Secretary-General on United Nations Assistance to Constitution-making Processes* (2009). While the process in the Guidance Note applies to constitution-making, it is also applicable to legislative reform.

- **Needs identification**

The flaws or gaps with respect to the pre-existing law, including its compliance with international norms and standards, will first need to be identified. The assessment of the legal framework is discussed in more detail in Chapter 6 on mapping and assessing the justice system. An assessment could also include consultations on cur-

<sup>173</sup> *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies* (2004), S/2004/616, para. 27.

<sup>174</sup> DPKO/DFS, *Policy on Justice Components in United Nations Peace Operations* (2009), para. 10.3; DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), pages 46–9.

rent problems or gaps in the laws and a determination of what people want from the new law or constitution. There may be an overlap between this kind of consultation and the public consultation process that will be discussed below.

- **High-level negotiations and strategizing**

Key constituencies should meet and agree on how legislative reform/constitution-making will take place (establishing a structure and blueprint for the process, including who will be involved in preparing a draft, how they will be selected, how consensus will be built, how the law/constitution will be adopted, what the timeline will be, and how disputes will be resolved). The strategy phase should also include consideration of how a new law or constitution will be implemented and what other reforms will be necessitated by constitutional or legal reform. Expectations should be realistic with regard to how long the legislative reform/constitution-making process may take. This is often grossly underestimated.

- **Establishment of a coordinating body**

A body or group should be established to lead public education and consultations and to prepare a draft of the law/constitution. For constitutional reform, this may be represented by a constitutional commission on legal reform, a working group, a division of a line ministry (e.g. Ministry of Justice drafting division), or a law reform commission. In line with the principle of transparency, the designated body should be publicized. Traditionally, political parties have played a key role and most countries acknowledge the role of civil society organizations in disseminating information, providing education about the process and issues, aggregating opinions, and articulating views and recommendations.

- **Establishment of a secretariat**

A secretariat is vital for the smooth functioning of the body assigned to draft the new law/constitution and the bodies/organizations responsible for public education and consultation.

- **Public information and civic education**

Public information and education are core components of the process of legislative reform and constitution-making. Public information and civic education campaigns may be led by the constitutional commission or law reform commission, or by civil society organizations working with or independently from the commission.

- **Public consultations**

Public consultations on the draft law/constitution are necessary to gather views and ensure the input of the public, including those representing different regional, religious, ethnic, minority, gender, professional and political groups, as well as trade unions and civic society groups/organizations. Public participation can be secured through various means, including the representation of various interests and groups on the legislative reform/constitution-making body, as well as civic education and the creation of conferences and other opportunities to debate legal

and constitutional issues. Formal surveys and other means for canvassing public views and recommendations should also be considered, although these may be expensive and time-consuming. To enable genuine consultations, it is important to foster an environment in which the public can safely and openly express views, for example through measures aimed at preventing retaliation for views expressed, and separate meetings for particular groups such as women.

- **Drafting and submission to representative forum**

The draft law/constitution will need to be prepared, and submitted to the appropriate legislative or other representative forum.

- **Adoption**

A referendum may be necessary to adopt a constitution. The new law or constitution will then need to be promulgated by the competent authority.

- **Education and implementation**

The adoption of a law or constitution must be followed by implementation. In some cases, it may be necessary to establish a review commission that will be responsible for addressing implementation and developing subsidiary policies and legislation in order to fully realize the provisions of the constitution. Civil society may be actively engaged in post-implementation education efforts. A period of time will be needed between the adoption of a new law/constitution and its implementation (“coming into effect”), in order to train relevant actors, establish new institutions, educate the public and take other necessary actions to ensure the successful implementation of the law/constitution.



#### How can model laws be used in legislative reform efforts?

Model legislation can be a useful reference tool when advising national actors on new laws. For example, the United Nations Office on Drugs and Crime (UNODC) has developed model laws on witness protection, human trafficking and money laundering.<sup>175</sup> The Arab League<sup>176</sup> and the Commonwealth<sup>177</sup> have developed model laws on the implementation of the Rome Statute of the International Criminal Court. The United States Institute of Peace has developed a model criminal code, model code of criminal procedure, model detention act<sup>178</sup> and model police powers act. While model laws provide a useful basis for new laws, they must be adapted to the unique legal context of the country concerned and cannot simply be used “as is” without being tailored to the particular context.

<sup>175</sup> See [www.unodc.org/unodc/en/money-laundering/Model-Legislation.html](http://www.unodc.org/unodc/en/money-laundering/Model-Legislation.html).

<sup>176</sup> See [www.iccnw.org/documents/ArabLeague\\_ModelImplementationLaw\\_29Nov05\\_en.pdf](http://www.iccnw.org/documents/ArabLeague_ModelImplementationLaw_29Nov05_en.pdf).

<sup>177</sup> See [www.iccnw.org/documents/ModelLawToImplementRomeStatute\\_31Aug06.pdf](http://www.iccnw.org/documents/ModelLawToImplementRomeStatute_31Aug06.pdf).

<sup>178</sup> United States Institute of Peace, *Model Codes for Post-conflict Criminal Justice* (2006/2007).

### 3. Supporting Legislative Reform and Constitution-Making

Judicial affairs officers should be careful not to become involved in all legislative reform activities in the host country. Instead, they should limit their engagement to laws which are core to peace and security, such as criminal and constitutional law.<sup>179</sup> Additional areas of concern to judicial affairs officers may include immigration, nationality and asylum laws; prison laws; laws for the protection of minorities, children, displaced and returning populations and other marginalized and vulnerable groups; and laws that establish legal protection for the rights of women on an equal basis with men.<sup>180</sup>

The United Nations Mission in the Sudan (UNMIS) provided technical assistance in the drafting of a new amendment to the criminal code and added a chapter to include international crimes to prosecute the perpetrators of crimes committed in Darfur. The new amendment was passed by Parliament and was in conformity with international standards.

The United Nations Integrated Peacebuilding Office in Guinea-Bissau (UNIOGBIS) supported the drafting of legislation required to establish a witness protection programme.

The United Nations Integrated Peace-building Office in the Central African Republic (BINUCA) assisted the authorities on the legislative reform process, and the revision, harmonization and drafting of laws as necessary, such as “code de la famille” and “loi cadre sur les prisons”

Judicial affairs officers should consider providing different types of support for legislative reform and constitution-making efforts in the host country, including the following:

- **Strategic support**

Judicial affairs officers may support and assist in the negotiation of an initial agreement on a legislative reform/constitution-making process and also providing strategic assistance on the selection process for the drafting body and representative body. Judicial affairs officers may actively advocate for legislative reforms and developing stra-

<sup>179</sup> DPKO/DFS, *The Contribution of United Nations Peacekeeping to Early Peacebuilding: A DPKO/DFS Strategy* (2011).

<sup>180</sup> *Guidance Note of the Secretary-General on the United Nations Approach to Rule of Law Assistance* (2008), page 5.

gies for legal reform. Once laws are enacted, judicial affairs officers may be involved in developing implementation strategies, monitoring how new laws are being implemented and facilitating follow-up discussions about how to fully implement the laws.

- **Analytical and substantive support**

Judicial affairs officers may provide legal analysis and advice on specific areas of law, including comparative examples and advice on how to harmonize draft laws with international human rights instruments. They may also be requested to provide comparative legal analysis on constitutional design and also on key substantive issues such as human rights, power-sharing, federalism and revenue-sharing.

In South Sudan, UNMISS judicial affairs officers helped South Sudan authorities to identify and prioritize the international and regional instruments to ratify and incorporate in their new national laws, as well as in the bill of rights in their new constitution. In particular, UNMISS and UN Women ensured the involvement of women leaders in the drafting of the South Sudan Transitional Constitution.

- **Political support**

Judicial affairs officers may play a political facilitation role on key issues relating to the law or constitution which are contentious.

- **Institutional support**

Judicial affairs officers may help to establish a secretariat to support legislative reform/constitution-making efforts. They can also assist in the establishment of a working group or law reform commission; equip drafters with technical and negotiation skills; help to develop public education and civic education campaigns; facilitate public consultations led by national actors (including focus groups, questionnaires and village meetings); and support the adoption (including any referenda) of the draft law or constitution.

- **Resource mobilization support**

Judicial affairs officers may assist in mobilizing resources necessary for the legislative reform/constitution-making process (see Chapter 11 on mobilizing resources), including the preparation of budgets and funding proposals.

- **Logistical support**

Judicial affairs officers, together with other mission components, may provide logistical support to legislative reform/constitution-making processes, including through the provision of transport and security.

- **Coordination support**

Judicial affairs officers may play a coordinating role to ensure that the mission and the United Nations Country Team (UNCT), as well as other international actors, are harmo-

nized in their support to legislative reform/constitution-making efforts. Judicial affairs officers may also support national actors in coordinating the various national state and non-state actors involved in the legislative reform/constitution-making process.

In north Sudan, UNMIS judicial affairs officers worked to assist national authorities to develop a constitution. In coordination with the Mission's political affairs and human rights components, as well as UNDP, a conference was organized which included the participation of international experts, academics and national and international stockholders. The outcome and recommendations of this conference were utilized by the Sudanese authorities as part of their constitution-making process.

In some situations, judicial affairs officers themselves may not have the required expertise to provide substantive advice on a new law or a new constitution. They can nevertheless assist by helping to identify and recruit experts.

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[www.constitutionmaking.org](http://www.constitutionmaking.org) [joint website from Comparative Constitutions Project and United States Institute of Peace]

[www.iccnw.org](http://www.iccnw.org) [website of the Coalition for the International Criminal Court]

## INDEPENDENCE AND INTEGRITY

This chapter provides an overview of judicial independence, integrity and related concepts, describes the major challenges in these essential areas, and outlines ways in which judicial affairs officers can support efforts to strengthen independence and integrity in the justice system. The importance of understanding the legal context and respecting legal traditions is underscored, as well as the importance of ensuring adequate public participation and consultation.

## 1. Introduction

An independent judiciary is essential not only for the adjudication of criminal and civil cases but also for holding officials and those in power accountable for serious human rights violations, corruption, misuse of public funds, fraud and other misfeasance. In many conflict and post-conflict societies, however, interference in the judicial process and the use of judicial processes for political or economic purposes are common. Justice actors may also lack or be perceived to lack related concepts of integrity, professionalism, accountability, impartiality and transparency. This creates a risk that impunity will become accepted and that the population will have little confidence in the justice system, which may in turn encourage the population to take the law into their own hands and threaten peace and security.<sup>181</sup>

Judicial affairs officers should assist national actors to identify and implement measures to strengthen the independence and integrity of justice actors.<sup>182</sup> Such assistance should be provided in collaboration with other rule of law assistance providers, particularly those who will remain in the host country beyond the lifespan of the peacekeeping operation. However, strengthening the independence and integrity of justice actors is a long-term endeavour in which national actors must ultimately take a leading role.

This chapter provides a brief summary of the concepts of independence, integrity, professionalism, accountability, impartiality and transparency as they relate to justice actors in post-conflict settings. It also provides an overview of the challenges to the independence and integrity of justice actors in post-conflict contexts, and identifies ways in which judicial affairs officers can help to promote independence and integrity.

## 2. Independence, Integrity and Related Concepts

### Independence

Judicial independence refers to the principle that judges should be free from coercion, pressure or influence from the executive or other actors in order to render impartial and fair decisions. Judicial independence is considered a critical aspect of the rule of law. Prosecutors and lawyers must also be independent.<sup>183</sup> Prosecutors must be independent and impartial in their task of investigating and prosecuting suspected criminals. Similarly, it is essential that lawyers, such as defence counsel, are independent and free from influence or fear of reprisals.

<sup>181</sup> OHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors, and Lawyers* (2003), page 116; OHCHR, *Rule-of-Law Tools for Post-conflict States: Vetting: An Operational Framework* (2006), page 11.

<sup>182</sup> DPKO/DFS, *Policy on Justice Components in United Nations Peace Operations* (2009), para. 10.6; DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), pages 52–7 and 62–5.

<sup>183</sup> OHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (2003), pages 115–16.

### Integrity, Professionalism, Accountability, Impartiality and Transparency

The terms integrity, professionalism, accountability, impartiality and transparency are used frequently with respect to justice actors, but there are no standard United Nations definitions of these terms. They are often used to describe challenges to the rule of law (e.g. lack of accountability) or the focus of certain programmes (e.g. developing increased professionalism among judges). While these concepts are separate, they are also interdependent and overlapping. The following definitions are drawn from the *Oxford English Dictionary*:<sup>184</sup>

- **Integrity** may be defined as “the quality of being honest and morally upright”.<sup>185</sup>
- **Professionalism** may be defined as “the competence and skill expected of a professional”.
- **Accountability** may be defined as the “requirement, expectation or responsibility to justify actions or decisions”.
- **Impartiality** may be defined as “the treatment of all rivals and disputants equally”. Although the concept of independence is related to impartiality, they are not the same. A judge could be independent but biased and therefore not impartial.
- **Transparency** may refer to “the condition of being open to public scrutiny”.



**How can concepts such as independence, integrity, professionalism, accountability, impartiality and transparency be assessed or measured?**

Assessing the independence, integrity, professionalism, accountability, impartiality and transparency of justice actors in a given jurisdiction is not an easy task. The United Nations Rule of Law Indicators includes several Indicators relating to these concepts:

- the percentage of judges who are appointed for fixed terms that provide a guaranteed tenure protected until retirement age or the expiration of a defined term of substantial duration;
- whether the population believes that people can avoid a conviction or receive a more lenient sentence by paying a bribe to a judge, a prosecutor or other court personnel;
- whether members of the public are allowed to attend criminal trials (notwithstanding any legal exceptions for cases involving children, sexual violence or national security);
- whether internal procedures and mechanisms exist within prosecution services to assess and monitor compliance with departmental performance guidelines;

<sup>184</sup> *Compact Oxford English Dictionary* (2011).

<sup>185</sup> Integrity may also be defined as “adherence to international standards of human rights and professional conduct, including a person’s financial propriety” (OHCHR, *Rule-of-Law Tools for Post-conflict States: Vetting: An Operational Framework*, 2006, page 4).



- whether courts produce publicly available information on complaints against judges which describes the nature of the complaints and how they were resolved; and
- whether courts periodically produce a publicly available account of spending which is reasonably complete and itemized.<sup>186</sup>

Another initiative aimed at assessing factors crucial for judicial independence and identifying specific blockages is the Judicial Reform Index produced by the American Bar Association. Reports on the implementation of the Judicial Reform Index in specific countries can be found at [www.americanbar.org](http://www.americanbar.org).

### Relevant International Instruments

The right to a competent, independent and/or impartial tribunal is set out in the following international and regional instruments:

- African Charter on Human and Peoples' Rights, Article 7;<sup>187</sup>
- American Convention on Human Rights, Article 8(1);
- European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6(1);
- Universal Declaration of Human Rights, Article 10;
- International Covenant on Civil and Political Rights, Article 14(1); and
- United Nations Convention against Corruption, Article 11.

The following instruments also provide principles and guidelines with respect to judges, prosecutors and lawyers:

- *Basic Principles on the Independence of the Judiciary*;
- *Bangalore Principles of Judicial Conduct*;
- *Basic Principles on the Role of Lawyers*;
- *Guidelines on the Role of Prosecutors*;
- International Charter of Legal Defence Rights;
- *Minimum Standards of Judicial Independence*;
- *Suva Statement on the Principles of Judicial Independence and Access to Justice*; and
- Universal Charter of the Judge.

## 3. Challenges to Independence and Integrity

There are a number of challenges, and sometimes serious threats, to the independence and integrity of justice actors in post-conflict environments. It is important that judicial affairs officers are aware of, and understand, these challenges so that they can assist natio-

<sup>186</sup> DPKO/OHCHR, *The United Nations Rule of Law Indicators: Implementation Guide and Project Tools* (2011), [www.un.org/en/peacekeeping/publications/un\\_rule\\_of\\_law\\_indicators.pdf](http://www.un.org/en/peacekeeping/publications/un_rule_of_law_indicators.pdf).

<sup>187</sup> See also African Commission on Human and Peoples' Rights, resolution 21/96 on the Respect and Strengthening of the Independence of the Judiciary (2006).

nal counterparts effectively. While the specific circumstances of each country are unique, the following challenges are commonly found in many post-conflict environments:<sup>188</sup>

### • Lack of adequate laws and regulations

In many post-conflict countries, the legal framework does not adequately protect, prevent or address challenges to judicial independence. Although many constitutions contain provisions vesting judicial power exclusively with the judiciary and guaranteeing its independence, the provisions can be diluted, manipulated or overturned through constitutional amendments and new legislation. In addition, laws and regulations may not sufficiently govern court functions in a way that minimizes the potential for interference.

### • Poor conditions of service and tenure

Low salaries and the lack of guaranteed tenure for judges may threaten judicial independence by encouraging corruption. Without appropriate criteria, procedures and systems in place, appointments and promotions of judges may be arbitrary, increasing the likelihood of executive interference and decreasing public confidence in the justice system. Similarly, prosecutors, lawyers and court personnel are also likely to be poorly compensated.

### • Possibility of arbitrary removal and discipline

A related challenge to independence is the possibility that judges may be arbitrarily removed and disciplined. The lack of established standards and procedures on the removal and discipline of judges may facilitate or encourage executive interference in the judiciary.

### • Budgetary allocation and control

In post-conflict settings, the judiciary may not only have a limited budget but may also lack sufficient control over its budget. This may render judges more vulnerable to efforts to undermine their independence and integrity.

### • Corruption

In many post-conflict settings, corruption within the justice system is deeply ingrained and widespread, and seriously undermines judicial independence, integrity and accountability. Corruption is seen as the only way to accomplish certain activities and the payment of a bribe is understood as a normal and acceptable way of doing business, including in judicial matters. This is often exacerbated by the lack of sanctions or disincentives for engaging in corrupt practices.

### • Human rights violations

Before or during the conflict, justice officials may have engaged in human rights violations, including those of a serious nature. Allowing such judges to continue working can raise serious doubts regarding their integrity and accountability. This

<sup>188</sup> This section is based largely on UNDP, *Programming for Justice: Access for All* (2005), pages 81–4.

challenge is especially difficult where there is a rule of law gap in the immediate post-conflict period because justice actors fled or were killed during the conflict, and where there are thus few qualified individuals to fill existing positions.

- **Lack of internal review/oversight mechanisms**

Where there is limited oversight of justice actors, rules and procedures can be manipulated with little effort. In many countries, administrative court procedures are bureaucratic, cumbersome and confusing, and are carried out by court personnel who have broad discretionary powers with little accountability.<sup>189</sup> In addition, there may be no ombudsperson, national human rights commission or civil society watchdog groups to monitor and oversee the justice system.

- **Inaccessibility of information and closed trials**

In some countries, judicial decisions are not published, and it may be difficult to obtain accurate and complete information about judicial proceedings. In addition, hearings and trials may not be open to the public, further weakening judicial transparency and accountability.

- **High levels of insecurity and lack of protective measures**

Justice actors in post-conflict environments may face threats to their safety and security, particularly in relation to serious crimes such as conflict-related crimes, corruption and organized crime. Where there are few or no measures in place for the protection of justice actors, they may be subject to intimidation and pressure, hampering their ability to properly fulfil their professional duties and rendering them more vulnerable to interference.

#### 4. Supporting Efforts to Strengthen Independence and Integrity

The challenges to independence and integrity are often rooted in a complex combination of factors which are specific to the country concerned and which may take years to address and overcome. Judicial affairs officers should support efforts to promote and strengthen the independence and integrity of justice actors, but their capacity to do so may be limited due to the nature and duration of peacekeeping mandates. On matters involving independence and integrity, judicial affairs officers should therefore work closely with other rule of law assistance providers who will stay in the host country for some time. As with other initiatives to strengthen the rule of law, national counterparts must be fully involved in these efforts, and where possible, play a leading role. There are various ways that judicial affairs officers can help to strengthen independence and integrity, including the following:<sup>190</sup>

<sup>189</sup> UNDP, *Programming for Justice: Access for All* (2005), page 81.

<sup>190</sup> This section is based largely on DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), pages 52–7 and 62–5.

- **Legal framework**

Judicial affairs officers can assist national actors in drafting and implementing the necessary constitutional and legislative provisions to protect, prevent and address threats to independence and integrity. Where judicial affairs officers do not have the required expertise or capacity, they could nevertheless assist by facilitating the identification of relevant experts.

- **Budgetary allocation and control**

Judicial affairs officers can promote the development and approval of government budgets that provide the judiciary with sufficient resources and control over its own administrative and budgeting functions.

- **Selection and appointment**

Judicial affairs officers can help to establish mechanisms and procedures to ensure that the selection and appointment of judges is based on professional, merit-based criteria in a transparent and independent process which represents the diversity of the country. Such mechanisms include judicial councils, high councils of the magistracy and judicial service commissions.

- **Judicial salaries and tenure**

Judicial affairs officers can promote the raising or supplementing of judicial salaries, as appropriate. They can also help to ensure that judges are guaranteed tenure until mandatory retirement age or the expiry of their term of office, or until a finding of professional misconduct based on an independent investigation with formal proceedings and procedural protections.

- **Court and judicial practice**

Judicial affairs officers can assist in developing and streamlining regulations and procedures to standardize court functions and minimize opportunities for interference and arbitrariness. For example, a transparent case assignment system should be put in place, in order to safeguard against potential external influences and to develop concrete lines of authority, as well as to improve operational efficiency.

- **Code of conduct**

Judicial affairs officers can help to develop basic standards of proper conduct for judges, prosecutors and lawyers. Such codes of conduct should include provisions on internal self-regulation as well as external mechanisms. International standards such as the *Bangalore Principles of Judicial Conduct*, *Guidelines on the Role of Prosecutors*, *Basic Principles on the Role of Lawyers* and others listed in the previous section provide useful guidance regardless of legal traditions.

- **Oversight and disciplinary mechanisms**

Judicial affairs officers can help to establish or strengthen mechanisms for enforcing standards of judicial, prosecutorial and legal conduct, including effective and acces-

sible means for submitting complaints. Such mechanisms should incorporate opportunities for public involvement and should include safeguards to protect judges and prosecutors against politically motivated accusations. In addition to mechanisms to address specific allegations of abuse, it is important to establish oversight controls that check routine operations for compliance with applicable standards. These functions may be addressed through a variety of institutional structures (e.g. the ombudsperson, a high judicial and prosecutorial council, the inspector general or the auditor general), and they may review a wide variety of issues from the personal assets of judges to human resource management. Bar councils can also act as a regulatory body for all legal practitioners as they ensure appropriate qualifications and training before being “admitted” to the practice. They can also act as a complaints bureau and tribunal on complaints of misconduct against lawyers.

- **Vetting**

Vetting can be defined as “assessing integrity to determine suitability for public employment”<sup>191</sup> and usually entails “a formal process for the identification and removal of individuals responsible for abuses, especially from police, prison services, army and the judiciary”.<sup>192</sup> Judicial affairs officers can assist in the establishment of transparent procedures for removing justice actors who were involved in past human rights violations and selecting a core group of fair-minded professionals noted for their integrity and capacity. Vetting is usually a one-time process and should be conducted through an independent review body operating in accordance with due process and the maximum level of transparency appropriate for the task.

- **Professional/judicial associations**

Judicial affairs officers can help to create or re-establish professional/judicial associations to encourage professional self-regulation and development. Judicial associations commonly initiate publications that provide a forum for judges and lawyers to develop technical scholarship. Judicial associations can also highlight for government officials the dangers of low salaries and lack of security, and the vulnerabilities that judges have to attacks from corrupting influences.

With the support of the International Bar Association, the United Nations Integrated Mission in Timor-Leste (UNMIT) facilitated a visiting expert from the International Bar Association to share comparative experiences from other countries on establishing new bar associations. The expert emphasized that Timorese lawyers must decide a model based upon local needs and conditions.

<sup>191</sup> OHCHR, *Rule-of-Law Tools for Post-conflict States: Vetting: An Operational Framework* (2006), page 4.

<sup>192</sup> Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies (2004), S/2004/616, para. 52.

- **Access to information**

Judicial affairs officers should assist in the establishment or re-establishment of a government publications office, or other means by which judicial decisions are published and widely disseminated. This promotes judicial transparency as well as accountability, by subjecting judges to public scrutiny. Other measures that should be supported are publication of annual reports on the performance of courts; initiation of public outreach programmes informing people of court procedures and rules, laws and rights; and the establishment of customer information booths/kiosks at the courts.<sup>193</sup>

- **Performance measurement and monitoring**

Judicial affairs officers can support the establishment of performance monitoring systems, including the collection of statistics and the use of performance indicators. Performance measuring systems should not be based solely on the number of cases resolved, but must take into account other relevant factors such as the complexity of the cases solved. Such systems should not compromise the independence of the judiciary nor influence judges to adjudicate based upon the perceived preferences of those who have the power to intervene in their careers.<sup>194</sup>

## 5. Conduct of Judicial Affairs Officers when Observing or Monitoring Court Proceedings

In order for the rule of law to be established in a post-conflict setting, the work of judges should remain independent and should not be subject to unwarranted interference by external actors – whether local or international. International stakeholders must be careful not to interfere, or be perceived to interfere, with the host country’s justice processes. It would not be appropriate, for example, for judicial affairs officers to interrupt a court hearing to question the judge. On this basis, the following principles must be kept in mind:

- Judicial affairs officers should generally avoid telling or indicating to judges what course of action they should take in specific cases. If a judicial affairs officer has concerns regarding the work of an individual judge, the relevant information should be reported to mission headquarters.
- Judicial affairs officers should avoid the appearance of impropriety in their contacts with judicial officials. If a judge needs to be contacted in order to examine a case file, the judicial affairs officer should avoid expressing opinions on the substance of the case s/he is following.
- Judicial affairs officers should generally avoid the appearance of interference by taking sides in specific cases, or speaking with the accused, or any witnesses or

<sup>193</sup> UNDP, *Programming for Justice: Access for All* (2005), page 75.

<sup>194</sup> *Ibid.*, page 76.

potential witnesses. They should avoid becoming an active advocate for one side or another during a case.

- Judicial affairs officers should exhibit respect for judicial authorities at all times.

## 6. References

### International instruments

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*Bangalore Principles of Judicial Conduct* (2002) and the *Commentary to the Principles* (2007)

*Basic Principles on the Independence of the Judiciary* (1985)

*Basic Principles on the Role of Lawyers* (1990)

European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

*Guidelines on the Role of Prosecutors* (1990)

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International Covenant on Civil and Political Rights (1966)

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The background image shows several individuals in blue uniforms, likely police or military, gathered around a table. They are looking at a large map or document spread out on the table. The scene is brightly lit, and the focus is on the collaborative work being done. A semi-transparent teal box is overlaid on the right side of the image, containing the chapter title and a descriptive paragraph.

## CHAPTER 15

### LEGAL EDUCATION AND PROFESSIONAL TRAINING

This chapter addresses the particular challenges to providing legal education and professional training in post-conflict situations, and proposes a range of activities through which judicial affairs officers can strengthen efforts in these areas.

## 1. Introduction

In any country, the integrity of the legal profession is dependent in large part on a strong foundation of legal education and professional training.<sup>195</sup> Such a foundation promotes a culture of discipline, service and ethics, and is a core part of the framework for strengthening the rule of law.<sup>196</sup> In post-conflict contexts, however, many judges, prosecutors, defence counsel, legal assistants and other legal support staff frequently have little or no formal legal education or training. This may be due to the destruction of educational and training institutes and/or the death or departure of legal professionals from the country as a result of the conflict.

In view of other challenges facing the justice sector, the creation of law schools and universities may not be recognized as an urgent need in the immediate post-conflict period. However, a justice system cannot properly function without adequately educated and trained personnel. Moreover, the development of fully qualified judicial and legal personnel takes considerable time, planning and resources. Judicial affairs officers should therefore assist national actors to strengthen the legal education and professional training opportunities available to students as well as professionals.<sup>197</sup>

This chapter provides an overview of the challenges to legal education and professional training in post-conflict contexts, and suggests ways in which judicial affairs officers can help to promote and enhance legal education and professional training.

## 2. Challenges to Legal Education and Professional Training

In countries which have been devastated by conflict, the challenges of developing and strengthening professional training and legal education are numerous. These challenges include the following:

- Professional training and legal educational infrastructure may have been destroyed or appropriated during the conflict.
- Records, textbooks and other materials may also have been lost as a result of the conflict, particularly important to legal education institutions such as law schools.<sup>198</sup>

<sup>195</sup> In this Handbook, “legal education” refers to programmes that award a law degree to candidates seeking eligibility to join the legal profession. Legal education generally takes place in a university setting over a sustained period of time. Depending on the particular requirements of the jurisdiction concerned, law degrees may be awarded to undergraduate university and/or postgraduate students. Professional training, on the other hand, refers to a broad spectrum of ad hoc courses for individuals already working in the legal profession. These courses may focus on a specific area of law or introduce a new area which can enhance existing knowledge. Professional training may also be called “career training”, “on the job training” or “continuing education”. Unlike legal education, the duration of professional training courses are usually short, from a few hours to a few days.

<sup>196</sup> *Guidance Note of the Secretary General on United Nations Approach to Rule of Law Assistance* (2008), page 6.

<sup>197</sup> DPKO/DFS, *Policy on Justice Components in United Nations Peace Operations* (2009), para. 10.5; DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), pages 49–52.

<sup>198</sup> Christopher Waters, ‘Post-conflict Legal Education’, *Journal of Conflict and Security Law*, vol. 10, no. 1, pages 101–19 (2005).

- There may not be many students and faculty due to fears regarding safety as a result of their positions in the community. In addition, there may be a shortage of experts due to the departure of academics to take refuge elsewhere (“brain drain”). Finally, there may be challenges to attracting qualified professors due to low salaries.<sup>199</sup>
- Legal education and professional training institutions may operate with bias, corruption and favouritism with respect to the admission and grading of students.<sup>200</sup>
- An oversight mechanism for legal education institutions and training programmes may not exist, resulting in low-quality or unsatisfactory training or law schools.
- Accreditation processes might be lacking, relaxed or undermined by corruption.<sup>201</sup>
- The curriculum or methodology for instructing students may be stagnant or unsatisfactory. In many post-conflict countries, traditional training for lawyers is theory-based, and not practice-oriented.<sup>202</sup>
- There may be a lack of coordination between training providers, which can lead to the duplication of training courses, inconsistency in curricula, and the same judges attending similar courses delivered by different providers.

## 3. Supporting Legal Education and Professional Training

There are a number of ways in which judicial affairs officers can help to build and strengthen legal education and professional training institutions. When providing assistance, judicial affairs officers should take care not to reflexively support blatantly corrupt or biased institutions.<sup>203</sup> Doing so may be futile or counterproductive, and may even undermine overall reform efforts.

Judicial affairs officers should also ensure that their assistance builds national capacity to operate legal education and professional training institutions. Ad hoc and internationally driven/delivered training courses often have limited impact and lack sustainability. Wherever possible, judicial affairs officers should focus their efforts on strengthening sustainable national training programmes through the establishment of national legal training centres, nationally run induction/stage and continuing education courses for judges, prosecutors and lawyers and the strengthening of law faculties. Judicial affairs officers can also support the development of quality curricula and written core materials incorporating international standards and help to enhance the capacity of national trainers under the auspices of ‘train the trainer’ programmes.

Ad hoc training courses may be useful as a short-term measure, but should be developed and delivered in a way that will ultimately enable national counterparts to deliver the same training on their own. Where required, judicial affairs officers can deliver

<sup>199</sup> Ibid.

<sup>200</sup> DPKO, *Primer for Justice Components in Multidimensional Peace Operations* (2006), page 50.

<sup>201</sup> Mark K. Dietrich and Nicolas Mansfield, *Lessons Spurned: Legal Education in the Age of Democracy Promotion* (2006), page 3.

<sup>202</sup> DPKO, *Primer for Justice Components in Multidimensional Peace Operations* (2006), pages 49–50.

<sup>203</sup> Ibid., pages 50–51.

and/or organize “emergency” training on key topics, such as due process, case flow and basic procedures.<sup>204</sup> Such training should emphasize both local laws and the host country’s international legal obligations. Interactive training modules, moot court exercises and other proactive teaching methods should also be used to build the skills necessary in a dynamic justice system.

In Haiti, a joint MINUSTAH-UNDP<sup>205</sup> programme aimed at strengthening the professional skills of court registrars, judicial policy officers, judges and prosecutors was conducted throughout the country. The training focused on judicial case and record management, crime scene management and prosecution procedures for gender-based violence.

The development of legal education and training institutions is a long-term endeavour that requires sustained effort over a number of years. It is therefore also important that judicial affairs officers work with other rule of law assistance providers who will remain in the host country long after the mission has ended. Without such coordination, there is also a risk that assistance provided by multiple actors will be disjointed and lack cohesion. Based on these considerations, judicial affairs officers can support law schools and other legal education institutions in the following ways:

- **Training needs assessment**

Judicial affairs officers can help to facilitate or support the conduct of a detailed training needs assessment that evaluates the educational background of justice officials; the needs with respect to law faculties; induction and ongoing training programmes; and the availability of training materials, national trainers, training facilities and equipment.

- **Curriculum development**

Judicial affairs officers can help to develop and modernize course curricula to ensure the integration of relevant international laws, and to incorporate new laws and legal developments.

- **Entrance and grading**

Judicial affairs officers can assist in reforming the entrance and grading systems, for example by introducing blind-graded exams or external monitors, or helping to draft policies to prevent discrimination in admissions processes. This will contribute to reducing corruption and nepotism in entrance and grading practices.

<sup>204</sup> DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), page 51.

<sup>205</sup> MINUSTAH: United Nations Stabilization Mission in Haiti; UNDP: United Nations Development Programme.

- **Accreditation standards**

Judicial affairs officers can assist in the development of accreditation standards for law schools to ensure the quality and uniformity of legal education.

- **Exchange programmes and fellowships**

Judicial affairs officers can facilitate faculty and student exchanges and fellowships with law schools outside the country, including by mobilizing financial resources to enable such programmes.

- **Legal clinics**

Judicial affairs officers can help to set up legal clinics to introduce practice-oriented skills development for law students.

- **Textbooks**

In countries where law textbooks have been lost or destroyed during the conflict, judicial affairs officers can collect textbooks, publish and disseminate copies and build law libraries.

- **Scholarships and financial aid**

Judicial affairs officers can assist in establishing scholarships and financial aid programmes, for example by linking educational institutions with a stakeholder interested in providing financial assistance.

Judicial affairs officers can also help to strengthen professional training institutions and programmes, including in the following ways:

- **Magistrate schools**

Judicial affairs officers can help to establish magistrate schools and other formal professional training institutions.

In Haiti, MINUSTAH supported the re-opening of the Magistrates’ School in 2009. Although it is not yet fully functional, the Magistrates’ School is responsible for providing formal training for judges and other justice sector personnel. MINUSTAH helped to develop the organizational concept for the school and also assisted in designing training courses.

The United Nations Interim Administration Mission in Kosovo (UNMIK) helped to establish the Kosovo Judicial Institute to train the judiciary and prosecutors in the aftermath of the conflict. The Institute is an independent institution which

focuses on general training as well as training on international human rights law and new Kosovar laws. The Institute also supports internships and study tours abroad and facilitates preparation for the judicial entry exam for new judges.

- **Paralegal training programmes**

In order to develop a cadre of legal professionals who can quickly enable the justice system to become operational, judicial affairs officers can assist in developing paralegal training programmes.

- **Continuing education programmes**

Judicial affairs officers can help to develop continuing education programmes for legal professionals to ensure that they are updated on new developments and have the opportunity to refine their skills on an ongoing basis.

- **Training materials**

Judicial affairs officers can help to develop training curricula and materials which adequately reflect both international law and national laws.

- **Mentoring**

As a supplement to formal judicial and prosecutorial training, judicial affairs officers can serve as mentors to newly appointed or returning members of the judiciary.

The United Nations Integrated Office in Burundi (BINUB) engaged in mentoring and other capacity-building efforts, including the creation of a pool of court clerks and magistrates trained in court administration and management, which led to substantially enhanced transparency and performance in judicial processes. In addition, targeted training and a pilot project on court administration in four judicial provinces of Burundi have resulted in rapidly improved judicial performance in the pilot courts, now ranked the highest in the country. As a result, bilateral partners chose to replicate the project in four other judicial provinces.

In Afghanistan, a fair trials manual was developed by the Max Planck Institute in cooperation with the Institut International De Paris La Defense as a core training material. This manual provided comprehensive guidance in both Dari and Pashtun on fair trial standards with specific reference to the Afghanistan Constitution, the criminal procedure and penal codes, other national legislation and the International Covenant on Civil and Political Rights (ICCPR).

A common problem in post-conflict settings in the area of legal education and training is the lack of coordination, and sometimes even competition, between training providers. This can lead to the duplication of training courses, inconsistent messages being transmitted to different groups of judges, or even the same judges attending similar courses delivered by different providers. Judicial affairs officers can help facilitate the establishment of coordination working groups or committees (preferably nationally led) to ensure the effective and coherent coordination of training efforts, including the sharing of curricula and materials, the tracking of justice officials who have attended courses, and a joint commitment to measure the impact of training.

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## CHAPTER 16

# TRANSITIONAL JUSTICE

This chapter provides an overview of transitional justice issues and examples of the role the United Nations has played in supporting transitional justice measures.

## 1. Introduction

Transitional justice has been defined by the Secretary-General as “the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation”.<sup>206</sup> Transitional justice consists of both judicial and non-judicial processes and mechanisms, including prosecution initiatives, truth-seeking, reparations programmes, institutional reform and national consultations. These processes and mechanisms are a critical component of the United Nations framework for strengthening the rule of law in post-conflict settings. Transitional justice can, by addressing the root causes of conflict through legitimate and just ways, help to prevent a return to conflict in the future.

This chapter provides an overview of various transitional justice mechanisms and processes, and the relevant international norms and standards, with an emphasis on the importance of transitional justice for the rule of law, peace and stability. This chapter also explains the roles and responsibilities of justice components and human rights components in United Nations peacekeeping operations with regard to transitional justice.

## 2. Relevant International Norms and Standards

The United Nations should promote the compliance of transitional justice mechanisms and processes with international norms and standards, namely international human rights law, international humanitarian law, international criminal law and international refugee law. In particular, transitional justice mechanisms should ensure the obligations of States to investigate and prosecute gross violations of human rights and serious violations of international humanitarian law.<sup>207</sup> In addition, transitional justice mechanisms should ensure the right of victims to reparations;<sup>208</sup> the right of victims

<sup>206</sup> *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies* (2004), S/2004/616, para. 8.

<sup>207</sup> See, for example, International Covenant on Civil and Political Rights (1966), Art. 2; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), Art. 12; and International Convention for the Protection of All Persons from Enforced Disappearance (2006), Arts. 3, 6, 7 and 11. See also the *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (2005), Principle 19.

<sup>208</sup> See, for example, International Covenant on Civil and Political Rights (1966), Art. 2; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), Art. 14; International Convention for the Protection of All Persons from Enforced Disappearance (2006), Art. 24; International Convention on the Elimination of All Forms of Racial Discrimination (1965), Art. 6; and the Convention on the Rights of the Child (1989), Art. 39. See also *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* (2006); and *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (2005), Principles 31–34.

and societies to know the truth about violations;<sup>209</sup> and guarantees that violations will not reoccur.<sup>210</sup>

International norms and standards also set the boundaries of United Nations engagement in transitional justice efforts. Accordingly, the United Nations cannot play any role in a judicial accountability or transitional justice mechanism which (a) grants amnesty in respect of genocide, crimes against humanity, war crimes, crimes of sexual violence in situations of armed conflict and/or gross violations of human rights and/or (b) imposes the death penalty.<sup>211</sup>

## 3. Prosecutions

The aim of prosecution initiatives is to ensure that those responsible for committing crimes, including gross violations of human rights and serious violations of international humanitarian law, are investigated and tried in accordance with international due process and fair trial standards and, where appropriate, punished. Gross human rights violations include torture and other cruel, inhuman or degrading treatment or punishment; extrajudicial, summary or arbitrary executions; slavery; and enforced disappearance; and includes gender-specific instances of these violations, such as rape. Serious violations of international humanitarian law are “grave breaches of the Geneva Conventions of 12 August 1949 and of Additional Protocol I thereto of 1977” and crimes under international law including “genocide, crimes against humanity, and violations of internationally protected human rights that are crimes under international law and/or which international law requires States to penalize, such as torture, enforced disappearance, extrajudicial execution and slavery”.<sup>212</sup>

States have primary responsibility to exercise jurisdiction over these crimes.<sup>213</sup> However, States emerging from years of conflict or repressive rule may be unable or unwilling

<sup>209</sup> See, for example, International Covenant on Civil and Political Rights (1966), Art. 2; International Convention for the Protection of All Persons from Enforced Disappearance (2006), Art. 24; and the Additional Protocol I to the 1949 Geneva Conventions (1977), Art. 32. See also *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (2005), Principles 2–5; and *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* (2006), Principles 22 and 24.

<sup>210</sup> See, for example, International Covenant on Civil and Political Rights (1966), Art. 2; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), Art. 2; International Convention for the Protection of All Persons from Enforced Disappearance (2006), Art. 23; *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* (2006), Principle 23; and *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (2005), Principles 35–38.

<sup>211</sup> *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies* (2004), S/2004/616, para. 10. See also OHCHR, *Rule-of-Law Tools for Post-conflict States: Amnesties* (2009); *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (2005), Principle 24; and Security Council resolution 1325 (2000), operative para. 11.

<sup>212</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (2005), Definitions.

<sup>213</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (2005), Principle 20; *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies* (2004), S/2004/616, para. 34.

ling to conduct effective investigations and prosecutions. Common challenges in post-conflict settings include: arguments that justice undermines peace; calls for amnesty; gaps or flaws in the applicable law; a weakened or destroyed justice system; high levels of crime and a vacuum of law and order; limited resources and competing demands; large numbers of suspects (raising the prospect of an “impunity gap”); security threats and risks, including the lack of protection for victims, witnesses, investigators, prosecutors and judges; and the potential destruction of or tampering with evidence.

Under such circumstances, the United Nations should seek to support national governmental and non-governmental actors in reinforcing or developing national investigative and prosecutorial capacities, an independent and effective judiciary, adequate legal defence, witness and victim protection and support, and humane correctional facilities. National legislation that is in conformity with international human rights law and international criminal law is also essential. The systematic monitoring of the justice system can be a useful tool for assessing and improving its effectiveness and compliance with international standards.

Under Security Council resolutions 1925 (2010) and 1991 (2011), the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) has been mandated to support national and international efforts to bring perpetrators to justice, including by establishing Prosecution Support Cells (PSC) to assist the Congolese military justice authorities. In July 2011, the General Assembly agreed to the Secretary-General’s request to establish five PSCs, each comprised of military, police and civilian prosecution experts. The cells will provide expert advice, logistical support, on-the-job training and mentoring to Congolese military prosecutors and investigators in investigating war crimes and crimes against humanity, with a particular emphasis on sex crimes, as well as in investigating other violent crimes perpetrated in eastern Democratic Republic of the Congo.

Examples of international criminal tribunals include the International Criminal Court (created by the Rome Statute), the International Criminal Tribunal for the former Yugoslavia (created by a Security Council resolution) and the International Criminal Tribunal for Rwanda (created by a Security Council resolution). The jurisdiction of the International Criminal Court (ICC) is based on the complementarity principle. This means that the ICC cannot act unless a State which has jurisdiction is “unwilling or unable genuinely to investigate or prosecute”.<sup>214</sup>



**How does the ICC determine that a State is “unwilling or unable” to investigate or prosecute?**

<sup>214</sup> Rome Statute of the International Criminal Court (1998), Art. 17(1).

**To determine whether a State is “unwilling” to investigate or prosecute, the ICC will consider whether the proceedings by the State were intended to shield the person concerned from criminal responsibility; whether there has been an unjustified delay in the proceedings which is inconsistent with an intent to bring the person concerned to justice; and/or whether the proceedings were not conducted independently or impartially.**<sup>215</sup>

**To determine whether a State is “unable” to investigate or prosecute, the ICC will consider whether a State is unable to carry out proceedings due to a total or substantial collapse or unavailability of its national judicial system.**<sup>216</sup>

Examples of hybrid (mixed) criminal mechanisms include the panels in Kosovo and Timor-Leste (created by the United Nations peacekeeping operations in Kosovo and Timor-Leste respectively pursuant to Security Council resolutions conferring those missions with executive authority), the Special Court for Sierra Leone (created by an agreement between the Government of Sierra Leone and the United Nations), the Extraordinary Chambers in the Courts of Cambodia (created by national law with international cooperation and assistance, as set out in an agreement between the Government of Cambodia and the United Nations), and the War Crimes Chamber of the Court of Bosnia and Herzegovina (established jointly by the International Criminal Tribunal for the former Yugoslavia and the Office of the High Representative in Bosnia and Herzegovina).



**What is a “hybrid” tribunal?**

**Hybrid tribunals or mechanisms are also called “mixed tribunals” or “internationalized tribunals”. Such tribunals or mechanisms have both national and international elements – they are composed of national and international judges, and apply both national and international law. However, there are significant variations among such institutions. For example, some hybrid mechanisms may be part of the domestic justice system (e.g. panels in Kosovo), while others may exist completely outside the domestic justice system (e.g. Special Court for Sierra Leone).**

The establishment of these various criminal tribunals, particularly the ICC, which is a permanent body, represents a historic achievement in seeking accountability for international crimes. However, it should be noted that international and hybrid tribunals are not always established nor exercise jurisdiction even when national authorities are unable or unwilling to investigate and prosecute. Furthermore, international and hybrid tribunals are often unlikely to be able to adjudicate more than a small number of cases due to logistical and other constraints. The Special Court for Sierra Leone, for example, was established to prosecute those who “bear the greatest responsibility”.<sup>217</sup> The Prosecutor of the ICC has announced that, while not legally bound to do so, he will

<sup>215</sup> Ibid., Art. 17(2).

<sup>216</sup> Ibid., Art. 17(3).

<sup>217</sup> Statute of the Special Court for Sierra Leone (2002), Art. 1(1).

follow a similar policy. Where international or hybrid criminal tribunals have been established or exercise jurisdiction, they should impart skills and experience to domestic justice actors as part of their “legacy” in the country concerned.

In recent years, foreign national courts have increasingly exercised universal jurisdiction over serious crimes under international law. The prospect of prosecution in foreign courts has opened up new possibilities for securing justice in countries such as Argentina or Chile where amnesties and other immunities previously barred prosecution. The recourse to foreign jurisdiction has, in turn, raised issues with regard to the application of official immunities. However, as recognized by the Nuremberg tribunal and affirmed in numerous international instruments, including the statutes of international criminal tribunals,<sup>218</sup> official immunities *ratione materiae* may not encompass conduct defined as a serious crime under international law.<sup>219</sup>



### What is the role of informal justice mechanisms in transitional justice?

**Traditional and informal justice mechanisms are neither suitable nor acceptable for adjudicating serious crimes under international law.<sup>220</sup> In some contexts, however, informal justice mechanisms can contribute to broader transitional justice goals of accountability and reconciliation. It is important to ensure that such mechanisms do not violate international human rights laws, norms and standards, and that they ensure protection and respect for the rights of women and children.**

## 4. Truth-seeking

Truth-seeking bodies undertake investigations of past violations of international human rights and humanitarian law. Truth-seeking is usually undertaken by truth commissions and commissions of inquiry, and through fact-finding and mapping exercises.

### • Truth commissions

Truth commissions are official, temporary, non-judicial or quasi-judicial fact-finding bodies that investigate a pattern of human rights abuses or humanitarian law violations committed over a number of years, taking a victim-centred approach and concluding with a final report of findings of fact and recommendations,<sup>221</sup> including the responsibility of individuals as well as the root causes of the violations. They have the potential to help post-conflict societies foster accountability; preserve evi-

<sup>218</sup> See, for example, Rome Statute of the International Criminal Court (1998), Art. 27.

<sup>219</sup> Diane Orentlicher, *Independent Study on Best Practices, including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity* (2004), E/CN.4/2004/88, paras. 49–52.

<sup>220</sup> Human Rights Committee, General Comment No. 32 on Article 14 of the International Covenant on Civil and Political Rights (2007), para. 24.

<sup>221</sup> *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies* (2004), S/2004/616, para. 50.

dence and pave the way for future prosecutions; support the process of reconciliation; facilitate reparations; and trigger institutional reforms. They can also provide a public platform for victims to address the nation directly with their personal stories and generate public debate about how to come to terms with the past. To date, more than 30 truth commissions have been established, including those in Argentina, Chile, South Africa, Ghana, Morocco, Timor-Leste and Sierra Leone.

### • Commissions of inquiry

Commissions of inquiry similarly seek to uncover the truth behind allegations of past human rights abuses. In contrast to truth commissions, commissions of inquiry generally operate under more narrowly defined mandates, usually limited to a specific incident, time period, or category of violation; are focused on establishing the responsibility of individuals, rather than the broader causes of the conflict; and often have a shorter life span. In Kenya, for example, a commission of inquiry was established to investigate the facts and circumstances surrounding the violence following the 2007 general elections. Another example is the international commission of inquiry established by the Security Council in 2004 to investigate alleged violations of human rights and humanitarian law in Darfur, and to determine whether or not acts of genocide had occurred.

### • Fact-finding and mapping exercises

Fact-finding and mapping exercises aim to document gross violations of human rights and serious violations of international human rights law as a preliminary step in realizing the right to the truth.

In the Democratic Republic of the Congo, the Office of the High Commissioner for Human Rights (OHCHR) led a mapping exercise to document serious violations of human rights and international humanitarian law which were committed between March 1993 and June 2003.<sup>222</sup> In accordance with the mandate of MONUC/MONUSCO, this mapping exercise is being used to assist the Congolese authorities to devise a transitional justice strategy

Similarly in Nepal, OHCHR is conducting a mapping exercise to document serious violations of human rights and international humanitarian law which were committed during the ten-year Maoist insurgency from 1996 to 2006, in support of a Commission of Inquiry on Disappearances, and a Truth and Reconciliation Commission proposed to be established by the Government of Nepal.

Truth-seeking mechanisms and processes usually complement rather than replace prosecution initiatives. For truth commissions to be successful, it is vital that strong natio-

<sup>222</sup> Available at <http://www.ohchr.org/EN/Countries/AfricaRegion/Pages/RDCProjetMapping.aspx>.

nal archival systems, as well as effective victim and witness protection arrangements, are in place. Information collected by a truth-seeking mechanism may be useful for investigations which may lead to eventual prosecutions.

The United Nations Operation in Côte d'Ivoire (UNOCI) supported the work of the Dialogue, Truth and Reconciliation Commission established by the Ivorian Government to promote national reconciliation and social cohesion.

There is a misconception that truth commissions generally involve some kind of amnesty arrangement. In fact, this is almost entirely exceptional, with only the South African Truth and Reconciliation Commission as a relevant example. Amnesties for war crimes, crimes against humanity, genocide and gross violations of human rights are not recognized under international law, even where they are granted in exchange for a confession or apology. To date, only the Truth and Reconciliation Commission in South Africa has had clear powers to grant amnesty to perpetrators for crimes which were shown to be politically motivated – and only after the amnesty applicant fully and publicly disclosed details of the crime. Although South Africa's amnesty was not tested before an international human rights body, it is doubtful whether it would survive scrutiny under the legal standards developed by such bodies as the Human Rights Committee and the Inter-American Commission on and Court of Human Rights. These bodies have found amnesties to be incompatible with States' obligations under relevant treaties even when the State concerned convened a truth commission and provided reparations to victims.<sup>223</sup> In Timor-Leste, the Truth Commission had the power to waive criminal and civil liability for non-serious crimes, conditioned on full admission, apology and community service or symbolic payment to the victim or community. However, this was considered a negotiated plea bargain rather than an amnesty because it required in the first place the exercise of the criminal prosecution authority's decision on whether or not to proceed against the individual by a normal prosecution and any decision not to was contingent on community service or payment and was overseen by a local court.

## 5. Reparations

Reparations programmes seek to redress systemic violations of human rights by providing a range of material and symbolic benefits to victims. Reparations include the following:

- **Restitution**

Restitution restores the victim to the original situation before the violation occurred, for example through the restoration of liberty, enjoyment of human rights, return to one's place of residence, restoration of employment and return of property.

<sup>223</sup> OHCHR, *Rule-of-Law Tools for Post-conflict States: Amnesties* (2009), page 33.

- **Compensation**

Compensation provides for any economically assessable damage as appropriate and proportional to the gravity of the violation and the circumstances of the case, for example lost opportunities, loss of earning and moral damage.

- **Rehabilitation**

Rehabilitation includes medical and psychological care as well as legal and social services.

- **Satisfaction**

Satisfaction ranges from measures aimed at stopping violations, to truth-seeking, the search for disappeared persons, the recovery and re-burial of remains, public apologies, judicial and administrative sanctions, commemorations and memorialization and human rights training.

- **Guarantees of non-repetition**

Guarantees of non-repetition include institutional reforms aimed at civilian control of military and security forces, strengthening judicial independence, protecting human rights workers, human rights training and the promotion of international human rights standards.<sup>224</sup>

Reparations programmes can serve as effective and expeditious complements to truth-seeking processes and prosecution initiatives by providing concrete remedies to victims, promoting reconciliation and restoring public trust in the State.

## 6. Institutional Reform

Public institutions that helped to perpetuate conflict or repressive rule must be transformed into institutions that sustain peace, protect human rights and foster a culture of respect for the rule of law. By reforming or building fair and efficient public institutions, institutional reform enables post-conflict and transitional governments to prevent the recurrence of future human rights violations. Institutional reform includes vetting public employees; the creation of oversight, complaint and disciplinary procedures; the reform or establishment of legal frameworks; the development or revision of ethical guidelines and codes of conduct; and the provision of adequate salaries, equipment and infrastructure.

The process of vetting entails removing or refraining from recruiting public employees who were personally responsible for gross violations of human rights. This may also include the disbandment of military, police or other security units that may have been systematically responsible for human rights violations. The removal of these persons should comply with due process of law and the principle of non-discrimination. Institutional reform should further incorporate comprehensive training programmes for public officials and employees on applicable human rights and international humanitarian law standards.

<sup>224</sup> OHCHR, *Rule-of-Law Tools for Post-conflict States: Reparations Programmes* (2008), pages 7–8.

## 7. National Consultations

National consultations are a critical element of the human rights-based approach to transitional justice, founded on the principle that successful programmes necessitate meaningful public participation. National consultations can help to shape the design of an overarching transitional justice strategy. They can also take place within the context of a specific mechanism, such as during the planning stages of a truth commission or reparations programme.

The United Nations should facilitate the process of national consultations by organizing forums for discussions; providing legal and technical advice; promoting the participation of traditionally excluded groups, such as victims, minorities, women and children; supporting capacity-building; and mobilizing financial and material resources.

The United Nations Integrated Office in Burundi (BINUB) supported the national consultations on the establishment of a truth and reconciliation commission. It also supported the creation of a special tribunal by organizing sensitization and training programmes for target groups such as civil society, religious leaders and students. BINUB also contributed in the development of methodological tools for these consultations.



### How can transitional justice mechanisms be strengthened?

**While a number of transitional justice mechanisms have been established over the past years, they have not adequately delivered justice for many victims, including women and children.<sup>225</sup> Transitional justice mechanisms must ensure that targeted victim/witness protection measures are available, reparations programmes include redress not only for violations of civil and political rights but also for socio-economic violations,<sup>226</sup> and national consultations specifically include marginalized groups. Moreover, these mechanisms must take a more gendered approach and also be informed by consultations with affected groups. For example, the focus on state-level processes misses the need to provide accountability at the community level, where reintegration processes often lead to a rise in violence against women during the post-conflict period.**

<sup>225</sup> Children have an important role to play in transitional justice processes because they are victims and witnesses of crimes committed, and may also be recruited and used in hostilities. See “Key Principles for Children and Transitional Justice: Involvement of Children and Consideration of Children’s Rights in Truth, Justice and Reconciliation Processes”, Outcome of Children and Transitional Justice Conference, Harvard Law School (2009).

<sup>226</sup> *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Reparations for Women Subjected to Violence*, A/HRC/14/22 (2010). See also UN Women, *Making Transitional Justice Work for Women* (2010).

## 8. Transitional Justice and the United Nations System

Within the United Nations system, OHCHR had been designated, under the superseded Decision No. 2006/47 of the Secretary-General on Rule of Law, as the lead entity on transitional justice.<sup>227</sup> At the global level, this meant that OHCHR was responsible for collaborating with United Nations and non-United Nations actors on transitional justice; assessing and ensuring that overall needs and available capacities in the transitional justice area are met; coordinating other United Nations and non-United Nations actors, developing policies, setting standards and identifying best practices; developing and delivering training; and providing substantive guidance to missions and country teams. At the country level within peacekeeping operations, the human rights component is usually responsible for acting as the primary counterpart of national authorities regarding transitional justice issues; identifying key partners including non-governmental organizations (NGOs), bilateral donors, and national and local actors; coordinating planning and strategy development, coordinating programme implementation; ensuring the application of relevant standards; delivering and coordinating training; and mobilizing resources.

Although the lead entities system of Decision No. 2006/47 was superseded by the Decision No. 2012/13,<sup>228</sup> which created the joint Global Focal Point, OHCHR remains a critical actor on transitional justice, engaging on these issues with other United Nations entities, such as the Department of Peacekeeping Operations (DPKO), the Office of Legal Affairs (OLA) and the United Nations Development Programme (UNDP). Within a United Nations peace operation, the human rights component typically takes primary responsibility for transitional justice matters. However, justice components also play a significant role, particularly in supporting the reform of institutions, such as police, other law enforcement agencies or courts, which may have helped to perpetuate conflict.

The Human Rights Section of the United Nations Integrated Peacebuilding Office in Sierra Leone (UNIPSIL) has been actively supporting transitional justice processes in Sierra Leone by assisting the government in implementing the recommendations of the Sierra Leone Truth and Reconciliation Commission. In addition, through the Peacebuilding Fund (PBF), the United Nations in Sierra Leone has supported the establishment of the Reparations Programmes which conducted community symbolic reparations events and delivered partial benefits to 20,000 of the 32,000 registered victims. UNIPSIL’s Human Rights Section has also participated in projects related to the legacy of the Special Court for Sierra Leone which are aimed at building the capacity of national stakeholders, including the agreement on setting up a Residual Special Court mechanism mandated to secure the achievements of the Special Court for Sierra Leone.

<sup>227</sup> Decision No. 2006/47 of the Secretary-General on Rule of Law (2006), Annex 2.

<sup>228</sup> Decision No. 2012/13 of the Secretary-General on Rule of Law Arrangements (2012); see Chapter 2.

In Afghanistan, the United Nations Assistance Mission in Afghanistan (UNAMA), together with the Afghanistan Independent Human Rights Commission, supported the government to develop the 'National Action Plan on Peace, Reconciliation and Justice'. This national plan included five mutually reinforcing Key Actions aimed at providing victims with redress and contributing towards putting in place institutional and legal safeguards to prevent the repetition of heinous crimes in the future. The five actions were: 1) public symbolic measures to acknowledge the suffering of victims and families; 2) institutional reform; 3) truth-seeking and documentation; 4) promotion of reconciliation; and 5) the establishment of meaningful and effective accountability mechanisms.

## 9. References

### International standards on transitional justice

*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* (2006)

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)

Convention on the Elimination of All Forms of Discrimination against Women (1979)

Convention on the Rights of the Child (1989)

Convention on the Prevention and Punishment of the Crime of Genocide (1948)

Geneva Conventions (1949) and Additional Protocols I and II (1977)

International Covenant on Civil and Political Rights (1966)

International Covenant on Economic, Social and Cultural Rights (1966)

International Convention for the Protection of All Persons from Enforced Disappearance (2006)

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### References on reparations

Pablo De Grieff, *Handbook on Reparations* (2008)

OHCHR, *Rule-of-Law Tools for Post-conflict States: Reparations Programmes* (2008)

### References on institutional reform/vetting

Pablo De Grieff and Alexander Mayer-Rieckh, *Justice as Prevention: Vetting Public Employees in Transitional Societies* (2007)

OHCHR, *Rule-of-Law Tools for Post-conflict States: Vetting: An Operational Framework* (2006)

The background of the page is a photograph showing a pair of hands holding a document. The document contains French text, including the words 'Francophonie', 'culturelle', and 'et consolider la paix'. The hands are positioned as if presenting the document. A red vertical bar is on the left side of the page, and a teal semi-transparent box is on the right side.

## CHAPTER 17

### INFORMAL JUSTICE

This chapter addresses informal justice mechanisms and the support that justice components can provide to them, recognizing the reality that such mechanisms comprise the main access to justice for many people in post-conflict settings.



## 1. Introduction

In many countries, including peacekeeping host countries, informal justice mechanisms are more accessible than formal justice institutions, especially outside of the capital and urban areas. In contrast to formal justice institutions which may operate in an unfamiliar language and seem “foreign” and intimidating, informal justice mechanisms are usually more popular as they are part of the community structure, and operate in the language commonly used in the community. Informal justice mechanisms may also be preferred where they adopt a conciliatory approach, or have a focus on restorative justice with an emphasis on social cohesion.<sup>229</sup> In addition, public confidence in informal justice mechanisms may be higher than for formal justice institutions, which may be perceived as more expensive, corrupt, slower and benefiting the “rich and powerful”.<sup>230</sup>

The role of judicial affairs officers with respect to informal justice and the extent to which they will engage directly with informal justice mechanisms will vary from mission to mission. At minimum, however, judicial affairs officers should be aware of the existence and role of informal justice mechanisms in the mission area and understand their relationship to the formal justice system. In some peacekeeping host countries, informal justice may have a direct and significant impact on peace and security, and may therefore be a priority issue for the mission.

This chapter examines informal justice mechanisms and their relationship to the formal justice system, as well as criticisms that informal mechanisms do not comply with international human rights law. It also suggests activities which judicial affairs officers may wish to consider undertaking in support of informal justice mechanisms.

## 2. Definition of Informal Justice

There is no fixed definition of the term “informal justice”. Furthermore, informal justice is often used interchangeably with “traditional justice”, “customary justice”, “community-based justice” and “non-state justice”. In their in-depth study on informal justice, the United Nations Development Programme (UNDP), United Nations Children’s Fund (UNICEF) and UN Women defined informal justice as “(i) the resolution of disputes and the regulation of conduct by adjudication or the assistance of a neutral third party that (ii) is not a part of the judiciary as established by law and/or whose substantive, procedural or structural foundation is not primarily based on statutory law”.<sup>231</sup>

Examples of informal justice mechanisms include traditional and religious authorities, local administrators with adjudicative functions, such as chiefs, customary or local courts and community mediators. Informal justice mechanisms vary widely, from those which are “unofficial” and not recognized by the State and either ignored or tolerated, to those which are “official” and recognized by the State and which may be regulated or fully integrated into the formal justice system. Informal justice mechanisms may also vary greatly within the same country.

<sup>229</sup> UNDP, *Access to Justice Practice Note* (2004), page 8.

<sup>230</sup> UNDP, *Programming for Justice: Access for All* (2005), page 101.

<sup>231</sup> UNDP, UNICEF and UN Women, *Study on Informal Justice Systems: Charting a Course for Human Rights-based Engagement* (2012), page 29.

Informal justice mechanisms are often not set up to deal with criminal matters but are established to ensure that people in a community or neighbouring communities are able to solve problems and co-exist peacefully. However, some informal justice mechanisms, do, in fact, address criminal justice issues. In this regard, the Human Rights Committee, in its General Comment on Article 14 of the International Covenant on Civil and Political Rights (ICCPR), has stated that proceedings before courts based on customary law or religious courts should be limited to minor civil and criminal matters.<sup>232</sup>

## 3. Informal Justice and Human Rights

In many countries, informal justice mechanisms are more popular than formal justice institutions. At the same time, informal justice mechanisms are often criticized for failing to comply with international human rights law. When evaluating such criticisms, consideration should also be given to the ability of formal justice institutions to meet the same standards.

One of the most common criticisms of informal justice mechanisms is that they do not provide sufficient due process protections as required under international human rights law. Such protections include the right to present evidence and witnesses; the right of the parties to be informed about the nature of the dispute and to understand the procedure and rules to be applied; the right to legal assistance and representation; the right to witness protection and support; the right of appeal; and the prohibition against double jeopardy (*non bis in idem*).<sup>233</sup>

In this regard, the Human Rights Committee, in its General Comment on Article 14 of the ICCPR, has stated that courts based on customary law or religious courts cannot hand down binding judgments recognized by the State unless the following requirements are met: 1) the proceedings before such courts are limited to minor civil and criminal matters; 2) the basic requirements of fair trial and other relevant guarantees of the ICCPR are met; and 3) the judgments issued by such courts are validated by State courts in light of the guarantees set out in the ICCPR and can be challenged by the parties concerned in a procedure meeting the requirements of Article 14 of the ICCPR.<sup>234</sup>

While some informal justice mechanisms focus on restorative justice, others have been criticized for operating on principles of harsh retribution or vigilante-style punishments. These include cruel and inhuman punishment such as whipping and other forms of corporal punishment.<sup>235</sup> Such penalties have been challenged as contrary to international human rights law.

Informal justice mechanisms have also been criticized as discriminatory against minority groups. Because they are often community-oriented, they may therefore prioritize

<sup>232</sup> Human Rights Committee, General Comment No. 32 on Article 14 of the International Covenant on Civil and Political Rights (2007), para. 24.

<sup>233</sup> UNDP, UNICEF and UN Women, *Study on Informal Justice Systems: Charting a Course for Human Rights-based Engagement* (2012).

<sup>234</sup> Human Rights Committee, General Comment No. 32 on Article 14 of the International Covenant on Civil and Political Rights (2007), para. 24.

<sup>235</sup> UNDP, UNICEF and UN Women, *Study on Informal Justice Systems: Charting a Course for Human Rights-based Engagement* (2012).

group interests. This means that their decisions and processes may be disadvantageous to members of minority groups. In addition, the social order being protected is often one that is highly hierarchical and discriminates against traditionally marginalized groups.

For similar reasons, informal justice mechanisms have been criticized for their treatment of women, particularly with respect to family law (including marriage and the dissolution of marriage, dowry and bride price, polygamy, custody and maintenance of children), as well as property rights and rights to personal integrity and physical security (including sexual violence). In a number of post-conflict countries, sexual violence crimes are commonly handled by forcing the victim to marry her rapist, in essence punishing the victim and subjecting them to a lifetime of violence at the hands of their perpetrator. A related criticism is the absence or low levels of participation by women as adjudicators, and in some contexts as parties and witnesses, in informal justice mechanisms.

Finally, criticisms have been raised regarding the failure of informal justice mechanisms to respect the rights of children. Such criticisms have centred on issues relating to children's inheritance and property rights, legitimacy and paternity, custody and foster placement, marriage and statutory rape. Some informal justice mechanisms may not recognize the principle of the "best interests of the child" since it is the group (the extended family or community) rather than the nuclear family that protects the child, and the "group" will often have multiple and competing interests as "protector of the child", "party to the dispute" or "decision maker".<sup>236</sup>

#### 4. Supporting Informal Justice

UNDP is the designated lead United Nations entity on customary, traditional and community-based justice and dispute resolution mechanisms.<sup>237</sup> When working on informal justice, judicial affairs officers should therefore coordinate with UNDP and other relevant actors and keep in mind their overall objective, namely to assist national authorities in upholding the rule of law and to facilitate the maintenance of peace and security, as well as to help to address justice-related issues that are highlighted in peace agreements and were core to the conflict, or that are otherwise essential for the successful implementation of the peace process.<sup>238</sup> In some host countries, this may mean that judicial affairs officers work extensively with informal justice mechanisms. In other host countries, judicial affairs officers may have very limited engagement.

In coordination with UNDP and other relevant actors, judicial affairs officers should consider three broad areas of support with respect to informal justice:

- **Mapping and assessment**

When carrying out mapping and assessment exercises, judicial affairs officers should include the various informal justice mechanisms operating in the mission area, the extent to which they are used and accepted by the population and their relationships with formal justice institutions.

<sup>236</sup> Ibid.

<sup>237</sup> Decision No. 2006/47 of the Secretary-General on Rule of Law (2006), Annex 2.

<sup>238</sup> DPKO/DFS, *Policy on Justice Components in United Nations Peace Operations* (2009), para. 7.

- **Compliance with international human rights law**

Judicial affairs officers can assist informal justice mechanisms to develop policies and practices which ensure their compliance with national laws and international human rights standards.

- **Relationship to the formal justice system**

Judicial affairs officers can help to clarify the relationship between informal justice mechanisms and formal justice institutions (e.g. the possibility of appealing judgments rendered by informal justice mechanisms before the courts or re-trying a case in a formal court),<sup>239</sup> as well as their respective jurisdictions (e.g. jurisdiction over criminal cases).

Officers from the United Nations Mission in Liberia (UNMIL) assist in harmonizing the formal and traditional systems, recognizing the challenges to accessibility of justice in each of these systems. UNMIL facilitated consultative meetings with national stakeholders, organized a national conference on access to justice, and established a committee to address issues and ensure implementation of the recommendations. Specific recommendations were made regarding structure (determining how customary and formal courts relate); jurisdiction (conferring jurisdiction on customary courts that is distinct from that of formal courts); and procedure (procedures to be followed in customary courts regarding arrest and adherence to international human rights standards).

- **Codification of customary laws**

Judicial affairs officers can assist in the codification of customary laws.

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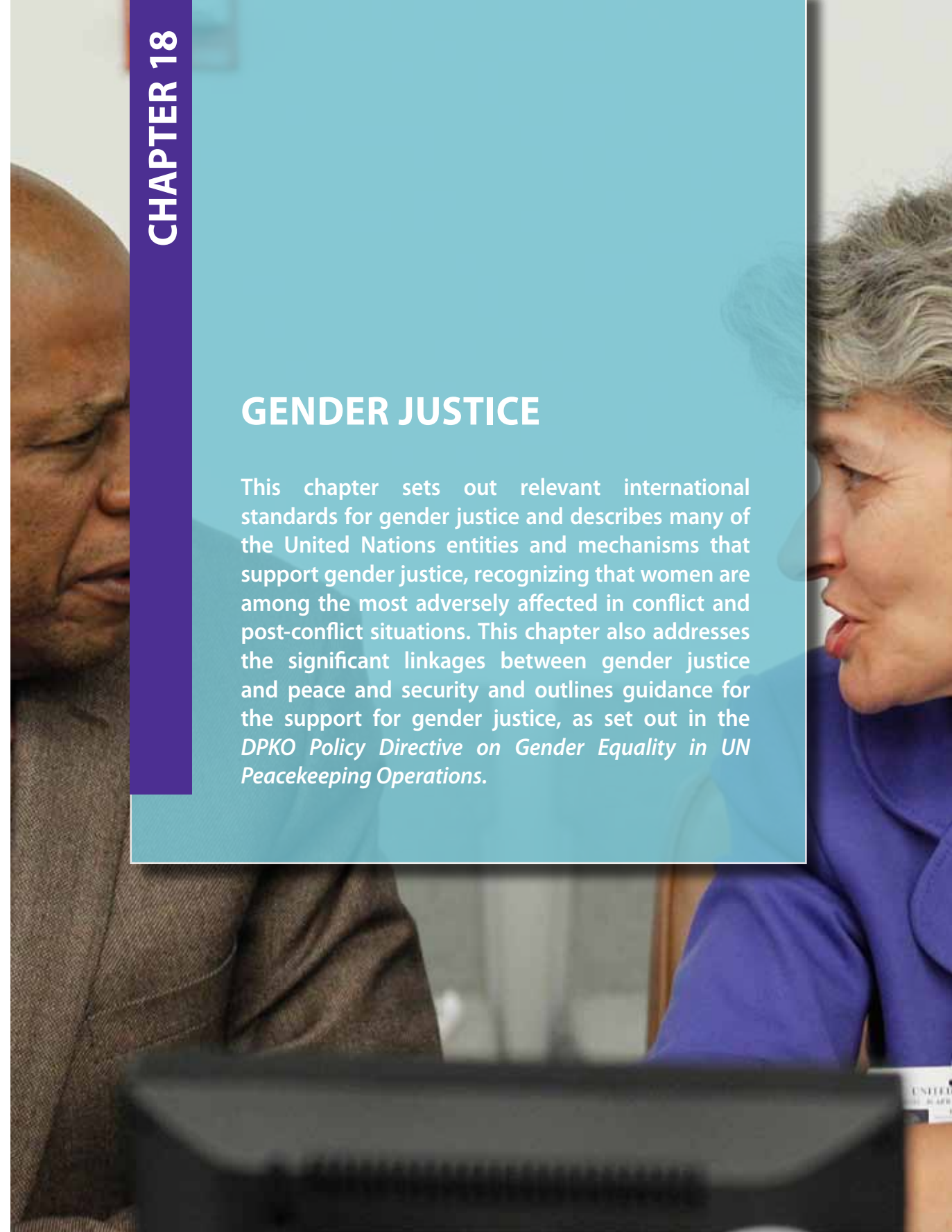
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## CHAPTER 18

### GENDER JUSTICE

This chapter sets out relevant international standards for gender justice and describes many of the United Nations entities and mechanisms that support gender justice, recognizing that women are among the most adversely affected in conflict and post-conflict situations. This chapter also addresses the significant linkages between gender justice and peace and security and outlines guidance for the support for gender justice, as set out in the *DPKO Policy Directive on Gender Equality in UN Peacekeeping Operations*.



## 1. Introduction

Women are among the most adversely affected in conflict and post-conflict situations. In the context of conflict, sexual violence is one of the most serious protection concerns facing women and girls. During conflict, the parties to the conflict may use sexual violence systematically for political or military objectives. After conflict, sexual violence may continue due to continuing insecurity and impunity. Women and girls are also at an increased risk of trafficking, enforced prostitution and other violence. Under such circumstances, exacerbated by discrimination and inequality, many women are prevented from pursuing an education, working and taking part in governance and peacebuilding. Other gender justice issues which are common in peacekeeping host countries include child marriage and property rights.

Judicial affairs officers should ensure that women's issues are fully integrated into efforts to strengthen the justice system, and that special attention is given to the needs of women, including women in detention. In working on gender justice, judicial affairs officers should coordinate with the mission's women protection advisers and the gender, police, corrections and human rights components, as well as other United Nations partners, such as the Department of Economic and Social Affairs (DESA), the Office of the High Commissioner for Human Rights (OHCHR), the United Nations Development Programme (UNDP), United Nations Population Fund (UNFPA), the Office of the United Nations High Commissioner for Refugees (UNHCR), the United Nations Children's Fund (UNICEF), the United Nations Office on Drugs and Crime (UNODC) and UN Women. Judicial affairs officers should also work with relevant coordination mechanisms such as the United Nations Action against Sexual Violence in Conflict (UN Action) and the United Nations Inter-Agency Network on Women and Gender Equality (IANWGE), and humanitarian coordination mechanisms such as the Gender-based Violence Area of Responsibility Working Group. As always, efforts to strengthen the rule of law must be undertaken in close partnership with national counterparts, including non-governmental organizations (NGOs).

This chapter highlights the importance of gender justice in post-conflict contexts, and provide a brief overview of relevant international law and United Nations mechanisms. It also suggests ways in which judicial affairs officers can support efforts to promote and advance gender justice.

## 2. Definitions

There is no official definition of "gender justice". However, it is commonly understood that gender justice entails the protection and promotion of all civil, cultural, economic, political and social rights on the basis of gender equality.<sup>240</sup> For the purposes of this Handbook, gender justice refers to issues relating to laws or access to justice that affect women. Gender justice requires an assessment of: 1) the rights concerned;

<sup>240</sup> Gender equality refers to "the equal rights, responsibilities and opportunities of women and men and girls and boys" (OSAGI, *Gender Mainstreaming: Strategy for Promoting Gender Equality*, 2001, page 1).

2) the specific obstacles to accessing these rights faced by women, men, girls and boys; and 3) strategies which further equal protection and promotion of rights for all.

Within gender justice, two key areas of particular concern are sexual violence and gender-based violence.

- **Sexual violence** is a serious crime that occurs in all societies in times of conflict or peace. Sexual violence refers to "any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting".<sup>241</sup>
- In peacekeeping settings, conflict-related **sexual violence** may be common. Conflict-related sexual violence refers to "incidents or patterns of sexual violence, i.e. rape, sexual slavery, forced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, against women, men, girls or boys ... [which] occur in conflict or post-conflict settings or other situations of concern (e.g. political strife),... [and] have a direct or indirect nexus with the conflict or political strife itself (i.e. a temporal, geographical and/or causal link)."<sup>242</sup> In addition to the international character of the suspected crimes (that can, depending on the circumstances, constitute war crimes, crimes against humanity, acts of torture or genocide), the link with conflict may be evident in the profile and motivations of the perpetrator(s), the profile of the victim(s), the climate of impunity/weakened State capacity, cross-border dimensions and/or the fact that it violates the terms of a ceasefire agreement.<sup>243</sup>
- **Gender-based violence** is an umbrella term for any act that is perpetrated against a person's will and that is based on socially ascribed (gender) differences between men and women, boys and girls.<sup>244</sup> The nature and extent of specific types of gender-based violence vary across cultures, countries and regions. Examples include sexual violence, including sexual exploitation and abuse, and forced prostitution; domestic violence; trafficking; and harmful traditional practices including forced/early marriage, female genital mutilation, honour killings and widow inheritance.

While sexual violence and gender-based violence are often associated with women and girls, men and boys may also be victims of both sexual violence and gender-based violence. Judicial affairs officers should therefore ensure that men and boys are not excluded from efforts to prevent and respond to sexual and gender-based violence.

<sup>241</sup> WHO, *World Report on Violence and Health* (2002), page 149.

<sup>242</sup> UN Action, *Analytical and Conceptual Framing of Conflict-Related Sexual Violence* (2011), page 3.

<sup>243</sup> Ibid.

<sup>244</sup> Inter-Agency Standing Committee (IASC), *Guidelines for Gender-based Violence Interventions in Humanitarian Settings* (2005), page 7.



### What is the difference between “gender” and “sex”?

The concept of gender and sex are often confused. As described by the World Health Organization (WHO), “sex” refers to the biological and physiological characteristics that define men and women.<sup>245</sup> “Gender”, on the other hand, refers to the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for men and women. Therefore, while aspects of sex are the same in different societies, aspects of gender may differ greatly. Examples of gender (instead of sex) differences include the fact that women earn significantly less than men for the same work in the United States and most other countries, and that women are prohibited from driving in Saudi Arabia.

## 3. Relevant International Law

### International Human Rights Law

There are a number of international and regional human rights instruments which are exclusively focused on issues relating to women, including gender justice. These include the following:

- **Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)**

CEDAW was adopted by the United Nations General Assembly in 1979 and entered into force in 1981. The Convention defines discrimination against women,<sup>246</sup> and requires States Parties to adopt all appropriate measures required for the elimination of such discrimination. The Committee on the Elimination of Discrimination against Women is the body of independent experts that monitors the implementation of CEDAW. States Parties to the treaty are obliged to submit regular reports to the Committee on the implementation of CEDAW. In accordance with the Optional Protocol to CEDAW, the Committee is mandated to: 1) receive communications from individuals or groups of individuals submitting claims of violations of rights protected under the Convention to the Committee; and 2) initiate inquiries into situations of grave or systematic violations of women’s rights. The Committee also formulates general recommendations directed to States concerning articles or themes in the Convention.

<sup>245</sup> See [www.who.int/gender/whatisgender/en/index.html](http://www.who.int/gender/whatisgender/en/index.html).

<sup>246</sup> The Convention defines discrimination against women as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field” (Convention on the Elimination of All Forms of Discrimination against Women, 1979), Art. 1).

- **Declaration on the Elimination of Violence against Women**

This was proclaimed by the United Nations General Assembly in 1993. It was adopted in response to the need for a clear and comprehensive definition of violence against women, a clear statement of the rights to be applied to ensure the elimination of violence against women in all its forms, a commitment by States in respect of their responsibilities, and a commitment by the international community at large to the elimination of violence against women. According to the Declaration, States should “exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons”.<sup>247</sup> States Parties are also required to take comprehensive preventative approaches, including the targeting of social attitudes through education initiatives.<sup>248</sup>

- **Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children**

This supplements the United Nations Convention against Transnational Organized Crime, and was adopted by the United Nations General Assembly in 2000 and entered into force in 2003. The Protocol requires States Parties to criminalize the trafficking of victims, including women, and to effectively investigate and prosecute such cases.

- **Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women**

This was adopted by the Organization of American States in 1994. Under the Convention, States Parties undertake to pursue, by all appropriate means and without delay, a number of measures to prevent, punish and eradicate violence against women, for example by applying due diligence to prevent, investigate and impose penalties for violence against women, and adopting legislation requiring perpetrators to refrain from harassing, intimidating or threatening women.<sup>249</sup> States Parties also agree to undertake progressively specific measures, including programmes to promote the education and training of all those involved in the administration of justice, police and other law enforcement officers.<sup>250</sup>

- **Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa**

This was adopted by the African Union in 2003 and entered into force in 2005. The Protocol provides broad protection for women’s human rights, including access to justice and equal protection before the law, and participation in the political and

<sup>247</sup> Declaration on the Elimination of Violence against Women (1993), Art. 4(c).

<sup>248</sup> Ibid., Art. 4(f).

<sup>249</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994), Art. 7.

<sup>250</sup> Ibid., Art. 8.

decision-making process.<sup>251</sup> It also requires States Parties to undertake to respect and ensure respect for international humanitarian law applicable in armed conflict situations which affect the population, particularly women.<sup>252</sup> The Protocol further requires States Parties during armed conflict to protect women against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction.<sup>253</sup>

### International Criminal Law

Sexual violence is now recognized as a crime under international law, namely as a war crime, crime against humanity, form of torture and a constituent element of genocide. There have been a number of landmark court rulings in recent years with regard to sexual violence.<sup>254</sup> These include the following:

- In October 1998, the International Criminal Tribunal for Rwanda found rape to constitute a form of genocide and torture.<sup>255</sup> In that case, the judges defined rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”. It noted that coercive circumstances did not need to be evidenced by a show of physical force, and that threats, intimidation, extortion and other forms of duress which prey on fear or desperation could also be coercion. In addition, the judgment specifies that “sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact”.
- In November 1998, the International Criminal Tribunal for the former Yugoslavia convicted three individuals of rape as torture, as a grave breach of the Geneva Conventions and a violation of the laws and customs of war.<sup>256</sup>
- In February 2008, the Special Court for Sierra Leone became the first international criminal tribunal to recognize “forced marriage” as a distinct crime.<sup>257</sup>

## 4. United Nations Entities and Mechanisms

There are several United Nations entities and mechanisms which work exclusively or extensively on issues relating to gender justice. These include the following:

<sup>251</sup> Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (2003), Arts. 8 and 9.

<sup>252</sup> Ibid., Art. 11.

<sup>253</sup> Ibid.

<sup>254</sup> DPKO, *Review of the Sexual Violence Elements of the Judgments of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone in the Light of Security Council Resolution 1820* (2009).

<sup>255</sup> International Criminal Tribunal for Rwanda, Prosecutor v. Akayesu, Judgment (1998), ICTR-96-4-T.

<sup>256</sup> International Criminal Tribunal for the former Yugoslavia, Prosecutor v. Delalic, Judgment (1998), IT-96-21-T.

<sup>257</sup> Special Court for Sierra Leone, Prosecutor of the Special Court v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, Appeals Judgment (2008), SCSL:2004-16-A.

- **United Nations Entity for Gender Equality and the Empowerment of Women (UN Women)**

UN Women was created by the United Nations General Assembly in 2010, and merges and builds on the work of four previously distinct parts of the United Nations system – the Division for the Advancement of Women (DAW); the International Research and Training Institute for the Advancement of Women (INSTRAW); the Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI) and the United Nations Development Fund for Women (UNIFEM). Additional details about UN Women can be found in Chapter 2 on the United Nations structure.

- **Special Rapporteur on Violence against Women, its Causes and Consequences**

The Special Rapporteur reports to the Human Rights Council and is mandated to seek and receive information on violence against women, and recommend measures to eliminate violence against women and its causes, and to remedy its consequences. The Special Rapporteur transmits urgent appeals and communications to States regarding alleged cases of violence against women; undertakes fact-finding country visits; and submits annual thematic reports.

- **Special Representative of the Secretary-General on Sexual Violence in Conflict**

The Special Representative was appointed in 2010 pursuant to Security Council resolution 1888 (2009). The Special Representative is tasked with strengthening existing United Nations coordination mechanisms, and engaging in advocacy efforts, inter alia with governments, including military and judicial representatives, as well as with all parties to armed conflict and civil society, in order to address sexual violence in armed conflict, while promoting cooperation and coordination of efforts among all relevant stakeholders.

- **United Nations Inter-Agency Network on Women and Gender Equality (IANWGE)**

IANWGE is a network of United Nations offices, specialized agencies, funds and programmes. IANWGE supports and monitors the implementation of the Beijing Platform for Action adopted at the Fourth World Conference on Women; the outcome of the 23rd United Nations General Assembly special session on “Women 2000: gender equality, development and peace for the twenty-first century”; and gender-related recommendations emanating from other recent General Assembly special sessions, conferences and summits. IANWGE also monitors and oversees the mainstreaming of a gender perspective in the programmatic, normative and operational work of the United Nations system.

- **United Nations Action against Sexual Violence in Conflict (UN Action)**

UN Action unites the work of 13 United Nations entities with the goal of ending sexual violence in conflict. It is aimed at improving coordination and accountability, amplifying programming and advocacy, and supporting national efforts to prevent sexual violence and respond effectively to the needs of survivors. UN Action’s activities include: 1) country-level action (supporting joint strategy development and

programming by United Nations Country Teams (UNCTs) and peacekeeping operations, including building operational and technical capacity); 2) advocating for action (raising public awareness and generating political will to address sexual violence as part of a broader campaign to “Stop Rape Now”); and 3) learning by doing (creating a knowledge hub on the scale of sexual violence in conflict, and effective responses by the United Nations and partners).

- **Gender-based Violence Area of Responsibility Working Group**

This Working Group was established under the auspices of the global Protection Cluster Working Group (PCWG), and is comprised of United Nations agencies as well as NGOs active in humanitarian assistance.



**What is the Team of Experts:  
Rule of Law – Sexual Violence in Conflict?**

Security Council resolution 1888 (2009) requested the Secretary-General to establish a team of experts who could be rapidly deployed to “situations of concern” to assist national authorities to strengthen the rule of law with respect to sexual violence in armed conflict. More specifically, the resolution tasks the team of experts to work closely with national legal and judicial officials to:

- address impunity;
- identify gaps in national response and encourage a holistic national approach to address sexual violence in armed conflict, including by enhancing criminal accountability, responsiveness to victims, and judicial capacity; and
- make recommendations to coordinate domestic and international efforts and resources to reinforce the government’s ability to address sexual violence in armed conflict.

In October 2009, UN Action requested the Department of Peacekeeping Operations (DPKO), OHCHR and UNDP to serve as co-lead entities responsible for developing and establishing the team of experts to implement Security Council resolution 1888. The Criminal Law and Judicial Advisory Service (CLJAS) has been the lead office within DPKO engaged in this effort. The team of experts became operational in early 2011 with the appointment of the Team Leader and three members, representing DPKO, OHCHR and UNDP respectively. A CLJAS staff member serves as the DPKO member of the team.

## 5. Gender Justice and Peacekeeping

### Security Council Resolutions

Over the last decade, the Security Council has adopted a number of resolutions on “Women, Peace and Security” that deal with gender justice issues. These resolutions

are significant, as they reflect the significant linkages between gender justice and peace and security, as well as the international community’s commitment to addressing gender justice in conflict and post-conflict settings. Judicial affairs officers should be aware of the following key resolutions:

- **Security Council resolution 1325 (2000)** was the first resolution from the Security Council to require parties in a conflict to respect women’s rights and support their participation in peace negotiations and in post-conflict reconstruction. The resolution addressed the disproportionate impact of war on women, and women’s contributions to conflict resolution and sustainable peace. It also called for States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity and war crimes, including those relating to sexual violence against women and girls.
- **Security Council resolution 1820 (2008)** condemned the use of rape and other forms of sexual violence in conflict situations, and recognized that rape can constitute a war crime, a crime against humanity or a constitutive act with respect to genocide. The resolution called for steps to be taken to prevent and respond to acts of sexual violence, with the broader aim of maintaining international peace. It also urged Member States to prosecute perpetrators of sexual violence, and ensure that victims of sexual violence, particularly women and girls, have equal protection under the law and equal access to justice.
- **Security Council resolution 1888 (2009)** specifically mandated peacekeeping missions to protect women and children from sexual violence during armed conflict, including through assistance to national actors in undertaking comprehensive legal and judicial reforms. As noted above, it also requested the Secretary-General to appoint a special representative to coordinate a range of mechanisms to fight sexual violence in conflict, and to establish a team of experts who could be rapidly deployed to “situations of concern” to assist national authorities to strengthen the rule of law with respect to sexual violence in armed conflict.
- **Security Council resolution 1889 (2009)** was adopted with the aim of strengthening the implementation and monitoring of Security Council resolution 1325. It called for the establishment of global indicators on Security Council resolution 1325, reiterated its mandate for increasing women’s participation, and reinforced calls for mainstreaming gender perspectives in all decision-making processes, especially in the early stages of post-conflict peacebuilding.
- **Security Council resolution 1960 (2010)** called for the publication of a list of armed groups that perpetrate sexual violence as well as the establishment of a monitoring and reporting system on sexual violence in conflict, and better cooperation among United Nations actors for a system-wide response to sexual violence. The *Provisional Guidance Note on the Implementation of Security Council Resolution 1960 (2010) on Women, Peace and Security (Conflict-Related Sexual Violence)* provides guidance on the monitoring, analysis and reporting arrangements (MARA) and on commitments by parties to a conflict to prevent and address sexual violence.<sup>258</sup>

<sup>258</sup> Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, *Provisional Guidance Note on the Implementation of Security Council Resolution 1960 (2010) on Women, Peace and Security (Conflict-Related Sexual Violence)* (2011).

## Gender Advisers and Women Protection Advisers

Gender advisers and gender focal points in peacekeeping missions are responsible for promoting and supporting gender-sensitive approaches to mandate implementation.<sup>259</sup> They play a critical role in guiding staff working in the different functional areas of United Nations peacekeeping, including justice, corrections, disarmament, demobilization and reintegration (DDR), police, military, human rights and mine action. They also provide capacity-building and training support to counterpart institutions in government and civil society in host countries. While gender advisers are not themselves implementing or programming actors, they facilitate the achievement of the gender aspects of mission mandates in line with Security Council resolution 1325.<sup>260</sup>

In its resolutions 1888, 1889 and 1960, the Security Council called for the deployment of women protection advisers (WPA) to peacekeeping operations and special political missions. In September 2011, the Department of Field Support (DFS), Department of Political Affairs (DPA), DPKO, OHCHR and the Office of the Special Representative of the Secretary-General for Sexual Violence in Conflict adopted the Terms of Reference for WPAs. According to the Terms of Reference, WPAs will be located in the Office of the Special Representative of the Secretary-General (OSRSG) and will have direct access to meetings of mission senior management.<sup>261</sup> The WPAs in the OSRSG will work closely with WPAs designated within the human rights and gender components, where present.<sup>262</sup> The specific tasks of the WPAs (OSRSG) include: monitoring, analysis and reporting regarding conflict-related sexual violence; engaging in dialogue with the parties to the conflict in order to gain specific commitments regarding conflict-related sexual violence; and contributing to the integration of sexual violence considerations in UN policies, planning, operations and training.<sup>263</sup>

### Supporting Gender Justice

According to the DPKO Policy *Directive on Gender Equality in UN Peacekeeping Operations* (2006), all peacekeeping personnel, including civilian, police and military, are required to integrate a gender perspective into their work. With respect to the rule of law, the Policy specifically calls for missions to support:

- rule of law and reform of state security services that support explicit recognition in law and practice of women's and girls' economic, social and cultural rights and protections;
- the amendment of laws which impede protection of women and girls' rights;
- the development of family law;
- the prevention of all forms of violence against women;

<sup>259</sup> DPKO/DFS, *Guidelines for Gender Advisers and Gender Focal Points in United Nations Peacekeeping Operations* (2008), para. 7.

<sup>260</sup> *Ibid.*, para. 8.

<sup>261</sup> DFS, DPA, DPKO, OHCHR and Office of the Special Representative of the Secretary-General for Sexual Violence in Conflict, *Terms of Reference for Women Protection Advisers* (2011), page 1.

<sup>262</sup> *Ibid.*

<sup>263</sup> *Ibid.*, pages 2–4.

- the incorporation of mechanisms to ensure an end to impunity for all forms of gender-based violence;
- the creation of strong, unbiased and transparent judicial systems;
- the recruitment of a critical mass of women to the justice and security sectors; and
- the promotion of gender-sensitive reforms of Correctional Systems, including the provision of separate facilities for male and female prisoners, and the adoption of measures that respond to the specific needs of female prisoners.<sup>264</sup>



### What is “gender mainstreaming”?

In 1993, the United Nations General Assembly issued the Vienna Declaration and Programme of Action, which stated that pursuing “the equal status of women and the human rights of women should be integrated into the mainstream of United Nations system-wide activity”.<sup>265</sup> In 1997, the United Nations Economic and Social Council stated that “mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes in all areas and at all levels. It is a strategy for making women’s as well as men’s concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.”<sup>266</sup>

Gender mainstreaming includes two aspects. First, gender mainstreaming requires the inclusion and representation of women in equal numbers in all official forums. This is relevant for both externally reviewing the role of judicial affairs officers in promoting gender mainstreaming in the host country and for internally reviewing the United Nations goal of increasing the number of women peacekeepers. Second, gender mainstreaming requires a lens which scrutinizes policy and practice to assess the differential impact on men, women, boys and girls. As a result, gender roles should be considered at all stages of programming, with the aim of achieving gender equality.

While a gender perspective should be incorporated into all aspects of mission planning and operations, judicial affairs officers should also consider undertaking activities that are explicitly designed to help address the specific needs of women and girls.<sup>267</sup> These activities fall into three broad areas. First, judicial affairs officers can help to ensure the inclusion of women’s voices and concerns in all reform initiatives. In post-conflict

<sup>264</sup> DPKO Policy *Directive on Gender Equality in UN Peacekeeping Operations* (2006), para. 10(ix).

<sup>265</sup> Vienna Declaration and Programme of Action (1993), A/CONF.157/23, para 37.

<sup>266</sup> Economic and Social Council, Agreed Conclusions 28 (1997), A/52/7.

<sup>267</sup> DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law* (2006), page 69.



environments, a number of new organizations including women's NGOs providing legal advice and representation of women often proliferate. Judicial affairs officers can help not only to develop and empower such organizations, but can also facilitate their inclusion in working groups, committees and other mechanisms for consultation and participation. They can also reach out to individual women and encourage them to act as "change agents" for reform initiatives as well as peace and peacebuilding processes more generally.

Second, judicial affairs officers can help to increase the representation and capacity of female professionals in all aspects of the administration of justice. For example, tools such as specific outreach to female professionals, targeted recruitment, formal reservations and quotas can be used to ensure an increase in the number of female professionals in the administration of justice. Specialized training courses can also improve the substantive expertise and skills of female judicial and legal professionals.

Under the National Legal Assistance System Programme in Haiti, the United Nations Stabilization Mission in Haiti (MINUSTAH) implemented a training and sensitization project for legal assistants on issues related to women and minors who were victims of domestic or sexual violence.

Third, judicial affairs officers can use capacity-building, legislative reform and technical assistance projects to address the particular needs and circumstances of women and girls. For example, training courses could be organized for both female and male justice actors to raise their awareness of the rights and needs of women and girls, and/or provide them with practical skills on ensuring gender sensitivity in investigations and court proceedings. Consideration could also be given to the creation of a special judicial panel or chambers to adjudicate sexual violence cases. With respect to legislative reform, judicial affairs officers can help to review and amend laws which are outdated and inconsistent with international human rights standards in areas such as sexual violence and property rights. For this purpose, tools such as the model laws and model codes may be useful.<sup>268</sup>

In the United Nations Integrated Mission in Timor-Leste (UNMIT), judicial affairs officers provided technical support to national actors in drafting and advocating for the promulgation of the Law against Domestic Violence, which came into effect in July 2010 and which functions in conjunction with the criminal code. The objectives of the law are to prevent, protect and give assistance to victims of domestic violence. One of the most significant elements of the law is that domestic violence is categorized as a public crime, thereby raising the seriousness of the crime, obligating police and prosecutors to investigate, and rendering it unnecessary for the case to be based on a victim's complaint.

<sup>268</sup> See Chapter 13 on legislative reform and constitution-making.

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## CHAPTER 19

### JUSTICE FOR CHILDREN

This chapter sets out relevant international standards concerning justice for children, describes many of the relevant United Nations entities and mechanisms, and outlines guidance for strengthening justice for children, as set out in the *Guidance Note of the Secretary-General on the United Nations Approach to Justice for Children*.

## 1. Introduction

In armed conflict, many children become victims, witnesses, participants in hostilities and/or perpetrators of war crimes.<sup>269</sup> Children are often recruited as child soldiers and subjected to targeted attacks, including sexual violence. Many children are also forced to witness or participate in horrifying acts of violence. Many lose their families, as well as education opportunities and a chance to enjoy their childhood and be part of a community. A very small number of children are also involved in committing crimes.

Judicial affairs officers should help to ensure that the rights and best interests of children are met during and after conflict. They should advocate for child-friendly and child-sensitive justice, with special attention to children in detention, children alleged to have committed crimes, and child victims and witnesses. In doing so, they should work closely with the mission's child protection, police, corrections and human rights components, and collaborate with other United Nations partners, such as the United Nations Children's Fund (UNICEF), which is the lead United Nations entity on juvenile justice.<sup>270</sup>

This chapter underscores the importance of justice for children in post-conflict contexts, and provides a brief overview of relevant international law and United Nations mechanisms. It also suggests ways in which judicial affairs officers can support efforts to protect children who are victims, witnesses or perpetrators of crimes.

## 2. Definitions

The Convention on the Rights of the Child defines children as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained”.<sup>271</sup> The Committee on the Rights of the Child, which is the monitoring body for the Convention, has encouraged States to increase the age of majority if it is below age 18, and to increase the protection of all children under the age of 18.<sup>272</sup>

“Justice for children” and “juvenile justice” are different, though related, concepts. “Juvenile justice” refers to children in conflict with the law as a result of being suspected or accused of committing a crime.<sup>273</sup> Juvenile justice requires that sufficient attention be given to positive measures that involve the full mobilization of all possible resources, including the family, volunteers and other community groups, as well as schools and other community institutions, for the purpose of promoting the well-being of the juvenile, with a view to reducing the need for intervention under the law, and of effectively, fairly and humanely dealing with the juvenile in conflict with the law.<sup>274</sup> Juvenile justice systems must emphasize the well-being of the juvenile and en-

<sup>269</sup> Office of the Special Representative of the Secretary-General for Children and Armed Conflict, *Working Paper No. 3 on Children and Justice During and in the Aftermath of Conflict* (2011), pages 9–10.

<sup>270</sup> Decision No. 2006/47 of the Secretary-General on Rule of Law (2006), Annex 1.

<sup>271</sup> Convention on the Rights of the Child (1989), Art. 1.

<sup>272</sup> UNICEF, *Fact Sheet: A Summary of the Rights under the Convention on the Rights of the Child* (2005), page 1.

<sup>273</sup> Committee on the Rights of the Child, General Comment No. 10 on Children's Rights in Juvenile Justice (2007), para. 1.

<sup>274</sup> *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (“Beijing Rules”) (1985), Rule 1.3.

sure that any actions taken with respect to juvenile offenders are always in proportion to the circumstances of both the offenders and the offence.<sup>275</sup> No capital punishment or life sentence should be sought for children.<sup>276</sup>

“Justice for children” is a broader concept than juvenile justice. Justice for children refers to the application of international norms and standards for all children who come into contact with the justice system, whether as victims, witnesses or alleged offenders.<sup>277</sup> It also includes children for whom judicial intervention is needed for other reasons, such as for their care, custody or protection. Thus, justice for children includes juvenile justice, but they are not the same.

## 3. Relevant International Law

There are a number of international instruments – both “hard” and “soft” laws – concerning justice for children. Those which are most relevant to the work of judicial affairs officers include the following:

- **Convention on the Rights of the Child (CRC)**

The CRC was adopted by the United Nations General Assembly in 1989 and entered into force in 1990. The CRC contains a wide range of protections for children and sets out the fundamental principle that the “best interests of the child” must be a primary consideration in all actions concerning children.<sup>278</sup> Under the CRC, States Parties are required to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.<sup>279</sup> It also includes a range of due process rights for children who are accused of or recognized as having infringed criminal law.<sup>280</sup> The Convention is supplemented by two optional protocols: the first on the sale of children, child prostitution and child pornography, and the second on the involvement of children in armed conflict. The implementation of the CRC is monitored by the Committee on the Rights of the Child, which is made up of independent experts. All States Parties are obliged to submit regular reports to the Committee on the implementation of the CRC. The Committee examines each report and addresses its concerns and recommendations to the State Party in the form of “concluding observations”. Although the Committee cannot consider individual complaints, child rights may be raised before other committees with competence to consider individual complaints. The Committee also publishes authoritative interpretations of the CRC called “General Comments” on thematic issues such as juvenile justice.<sup>281</sup>

<sup>275</sup> *Ibid.*, Rule 5.1.

<sup>276</sup> International Covenant on Civil and Political Rights (1966), Art. 6.5; Convention on the Rights of the Child (1989), Art. 37(a).

<sup>277</sup> UNICEF, *United Nations Common Approach to Justice for Children* (2008), page 4.

<sup>278</sup> Convention on the Rights of the Child (1989), Art. 3(1).

<sup>279</sup> *Ibid.*, Art. 19(1).

<sup>280</sup> *Ibid.*, Art. 40.

<sup>281</sup> Committee on the Rights of the Child, General Comment No. 10 on Children's Rights in Juvenile Justice (2007).

- **United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“Beijing Rules”)**

The Beijing Rules were adopted by the United Nations General Assembly in 1995. They include general principles on juvenile justice, and also contain provisions relating to investigation and prosecution, adjudication and disposition, and non-institutional treatment. These include provisions on age of criminal responsibility, conditions of detention and procedural safeguards.

- **United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (“Havana Rules”)**

The Havana Rules were adopted by the United Nations General Assembly in 1990. They were developed in response to “alarm” at the conditions and circumstances under which juveniles are deprived of their liberty worldwide. The Havana Rules are also based on the recognition that, because of their high vulnerability, juveniles deprived of their liberty require special attention and protection, and that their rights and well-being should be guaranteed during and after the deprivation of their liberty.

- **Guidelines for Action on Children in the Criminal Justice System (“Vienna Guidelines”)**

The Vienna Guidelines were adopted by the United Nations Economic and Social Council in 1997. They provide a framework for implementing the CRC and pursuing the goals set forth in the Convention with regard to children in the context of the administration of juvenile justice. They also provide guidance on using and applying the United Nations standards and norms on juvenile justice and other related instruments.

- **Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime**

These Guidelines were adopted by the United Nations Economic and Social Council in 2005, and provide a practical framework to assist governments, international organizations, public agencies, non-governmental organizations (NGOs), community-based organizations and other interested parties in designing and implementing legislation, policy, programmes and practices that address key issues related to child victims and witnesses of crime.

- **Paris Commitments**

*The Paris Commitments to Protect Children Unlawfully Recruited or Used by Armed Forces or Armed Groups* and the *Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups* were elaborated and endorsed in 2007 by 76 Member States at the Paris Conference on “Free Children from War”. These documents seek to secure commitments by the parties to conflicts, in order to obtain more releases of children and ensure improved programming for the reintegration of children within their families and communities.<sup>282</sup> The Paris Commitments is a po-

licy document aimed at strengthening political action to prevent the association of children with armed forces and armed groups and ensure successful reintegration.

- Additional international instruments which may be of relevance to judicial affairs officers include the *United Nations Guidelines for the Prevention of Juvenile Delinquency*; the Convention concerning Minimum Age for Admission to Employment; and the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.

There are also several regional instruments relating to children. These include the following:

- African Charter on the Rights and Welfare of the Child, adopted by the Organization of African Union (now the African Union) (1990);
- Marrakesh Declaration on the Rights of the Child, adopted at the Fourth High Level Conference of the Rights of the Child (2010);
- Declaration on the Commitments for Children in ASEAN, adopted by the Association of South East Asian Nations (2001);
- *Guidelines on Children and Armed Conflict*, adopted by the European Union (2003);
- *Implementation Strategy for the Guidelines on Children in Armed Conflict*, adopted by the Organization of American States (2002); and
- *Cape Town Principles and Best Practices*, adopted at the symposium on the prevention of recruitment into the armed forces and on demobilization and social reintegration of child soldiers in Africa (1997).



**Why do children have additional guarantees when they are already protected under international human rights law and international humanitarian law?**

Children are given extra guarantees because of their vulnerable status. The development of special legal instruments specifically with regard to children is rooted in society’s interest to protect and guide its youngest members as well as to ensure their active participation in justice processes. Children also have a special status because they may be developmentally unable to understand issues relating to crimes, such as intent, consequences, or right from wrong. In addition, in some situations, they may have been forced to commit crimes.

#### 4. United Nations Entities and Mechanisms

There are several United Nations entities and mechanisms which work exclusively or extensively on issues relating to justice for children. These include the following:

<sup>282</sup> See also *United Nations Integrated Disarmament, Demobilization and Reintegration Standards (IDDRS)*, Module 5.30 on “Children and DDR”, available at [www.unddr.org/iddrs.aspx](http://www.unddr.org/iddrs.aspx).

- **United Nations Children’s Fund (UNICEF)**<sup>283</sup>

UNICEF supports governments and civil society to implement the CRC and other international standards concerning children. UNICEF’s rule of law work includes support to child rights legislative reform; justice for children; disarmament, demobilization and reintegration (DDR) of children associated with armed forces and armed groups; monitoring and reporting of grave violations against children pursuant to Security Council resolution 1612; and protection against abuse, exploitation and violence including trafficking and sexual and gender-based violence. Further details can be found in Chapter 2 on the United Nations structure.

- **Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography**<sup>284</sup>

The Special Rapporteur is mandated by the Human Rights Council to analyse the root causes and new patterns of the sale of children, child prostitution and child pornography; identify, exchange and promote best practices on measures to combat the sale of children, child prostitution and child pornography; and promote comprehensive strategies and measures on the prevention of the sale of children, child prostitution and child pornography.

- **Special Rapporteur on Trafficking in Persons, Especially in Women and Children**<sup>285</sup>

The Special Rapporteur is responsible for taking action on violations committed against trafficked persons and on situations in which there has been a failure to protect their human rights; undertaking country visits in order to study the situation; and formulating recommendations to prevent and/or combat trafficking and protect the human rights of its victims in specific countries and/or regions.

- **Special Representative of the Secretary-General for Children and Armed Conflict**<sup>286</sup>

The Special Representative of the Secretary-General (SRSG) advocates for the protection and well-being of children affected by armed conflict. The SRSG works with partners to propose ideas and approaches to enhance the protection of children in armed conflict and to promote a more concerted protection response; build awareness and give prominence to the rights and protection of children in armed conflict; and undertake humanitarian and diplomatic initiatives to facilitate the work of operational actors on the ground with regard to children and armed conflict.

- **Special Representative of the Secretary-General on Violence against Children**<sup>287</sup>

The SRSG advocates for the prevention and elimination of all forms of violence against children. The SRSG chairs the United Nations Inter-Agency Working Group on Violence against Children and collaborates closely with a wide range of partners within and beyond the United Nations system.

<sup>283</sup> [www.unicef.org](http://www.unicef.org).

<sup>284</sup> [www.ohchr.org/EN/Issues/Children/Pages/ChildrenIndex.aspx](http://www.ohchr.org/EN/Issues/Children/Pages/ChildrenIndex.aspx).

<sup>285</sup> [www.ohchr.org/EN/Issues/Trafficking/Pages/TraffickingIndex.aspx](http://www.ohchr.org/EN/Issues/Trafficking/Pages/TraffickingIndex.aspx).

<sup>286</sup> [www.un.org/children/conflict](http://www.un.org/children/conflict).

<sup>287</sup> [www.srsg.violenceagainstchildren.org](http://www.srsg.violenceagainstchildren.org).

- **Interagency Panel on Juvenile Justice (“Juvenile Justice Panel”)**<sup>288</sup>

The Panel serves as the repository of information for the issue of justice for children. It was established by the United Nations Economic and Social Council in 1997 as a coordination mechanism for technical advice and assistance in juvenile justice. DPKO is a member of the Panel.

## 5. Children and Peacekeeping

### Security Council Resolutions

As noted above, a number of Security Council resolutions regarding children have been adopted in recent years. This reflects increasing recognition that conflicts have far-reaching and devastating consequences upon children and that the protection of children in conflict situations is not just a human rights and humanitarian issue, but also a significant peace and security concern. The following are key resolutions:

- **Security Council resolution 1261 (1999)** affirmed the protection of children as a peace and security concern. This resolution provided the first critical link between child protection and peacekeeping operations.
- **Security Council resolution 1379 (2001)** recommended that the Secretary-General lists parties recruiting and using children in armed conflict in the annual report he presents to the Security Council. It also called upon the Secretary-General to incorporate child protection in mission planning and, where appropriate, to include child protection staff in peacekeeping operations.
- **Security Council resolution 1460 (2003)** called on parties committing grave violations against children to prepare and implement concrete, time-bound action plans for the cessation of all violations against children.
- **Security Council resolution 1612 (2005)** established a monitoring and reporting mechanism on grave violations against children. It tasked the Office of the SRSG for Children and Armed Conflict to coordinate the reports from the Secretary-General to the Working Group of the Security Council on Children and Armed Conflict. The Working Group’s reports serve as “triggers for action” by the Council and other relevant policy-level actors, resulting in pressure upon parties to conflict to halt violations against children.
- **Security Council resolution 1882 (2009)** designated the killing and maiming of children, as well as rape and other sexual violence, as additional “triggers for action” by the Security Council, and called on parties to armed conflict to prepare and implement action plans to address these violations.
- **Security Council resolution 1998 (2011)** designated two additional “triggers for action” – recurrent attacks on schools and/or hospitals, and recurrent attacks or threats against protected persons in relation to schools and/or hospitals.

<sup>288</sup> [www.juvenilejusticepanel.org](http://www.juvenilejusticepanel.org).

## Child Protection Advisers

Child protection advisers<sup>289</sup> in peacekeeping operations focus specifically on child protection and child rights, and advise the SRSG and other mission leadership to ensure that child protection issues are addressed and integrated into all stages of the peace process. Child protection advisers also work with other mission components on the integration of child protection concerns in all aspects of the mission's work. In addition, child protection advisers are responsible for training all recently deployed peacekeepers on child protection.

Child protection advisers monitor and report violations that are committed against children during conflict. In addition, by establishing a dialogue with parties to conflict, child protection advisers play a key role in talking to perpetrators and developing action plans to end grave violations committed against children, in particular the recruitment of child soldiers, killing and maiming, and sexual violence. In addition, child protection advisers are responsible for training all peacekeeping personnel on child protection.

In addition to child protection advisers, some peacekeeping operations include child protection units within the police component which are trained to address children's issues and to serve as focal points on gender and children's issues throughout the country. These units provide a sensitive and integrated response to victims of gender-based violence, such as rape and other sexual violence, incest, indecent assault, abduction and physical abuse. They are often comprised of professionals such as doctors, nurses and social workers who provide medical services and counselling support to victims.

## Supporting Justice for Children

Judicial affairs officers should base their efforts to strengthen justice for children on relevant international standards described above, as well as the *Guidance Note of the Secretary-General on the United Nations Approach to Justice for Children*.<sup>290</sup> The Guidance Note, which draws upon international standards, sets out the following guiding principles for justice for children activities carried out by the United Nations:

- ensure that the best interests of the child are given primary consideration;
- guarantee fair and equal treatment of every child, without discrimination;
- advance the right of the child to express his or her views freely and to be heard;
- protect every child from abuse, exploitation and violence;
- treat every child with dignity and compassion;
- ensure respect for all legal guarantees and safeguards at all stages of any judicial process;

<sup>289</sup> DPKO/DFS, *Policy on Mainstreaming the Protection, Rights and Well-being of Children Affected by Armed Conflict within United Nations Peacekeeping Operations* (2009).

<sup>290</sup> *Guidance Note of the Secretary-General on the United Nations Approach to Justice for Children* (2008).

- use deprivation of liberty of children only as a measure of last resort and for the shortest appropriate period of time;
- mainstream children's issues in all rule of law efforts; and
- prohibit the imposition of the death penalty for children under any circumstance.

There are two ways in which judicial affairs officers can support justice for children. First, judicial affairs officers should mainstream justice for children issues in all areas of their work, from peace agreements to criminal justice institutions.<sup>291</sup> It is particularly important that justice for children issues are systematically integrated into national planning processes, such as national development plans and national justice strategies. Furthermore, judicial affairs officers should help to ensure that assessments and programmatic planning undertaken by the United Nations in the host country take full account of issues relating to justice for children.<sup>292</sup>

Second, judicial affairs officers can also support efforts which are specifically targeted to strengthen the legal and judicial protection of children. The following are examples of such support:

- **Alternatives to detention**

Judicial affairs officers can support the development and implementation of restorative justice measures, diversion mechanisms and alternatives to deprivation of liberty.<sup>293</sup>

- **Detention conditions**

Judicial affairs officers can assist in monitoring, reviewing and improving conditions for children who are detained or imprisoned, in full coordination with the mission's corrections, police, child protection and human rights components.

- **Juvenile justice panels/benches**

If appropriate, and after a thorough assessment of needs, judicial affairs officers can assist in developing a separate juvenile justice system where none exists. Where not feasible, juvenile justice panels can be established within the court structure, comprised of judges who specialize in dealing with children.

- **Child victims and witnesses**

Judicial affairs officers can help to ensure that court proceedings and court staff are sensitive to the needs of child victims and witnesses in accordance with guidelines such as the United Nations *Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crimes*. In addition, the United Nations Office on Drugs and Crime (UNODC) and UNICEF have developed a model law,<sup>294</sup> a *Handbook for Profesio-*

<sup>291</sup> Ibid., section B.2.

<sup>292</sup> Ibid., section A.9.

<sup>293</sup> Ibid., section A.8.

<sup>294</sup> UNODC/UNICEF, *Justice in Matters Involving Child Victims and Witnesses of Crime: Model Law and Related Commentary* (2009).

nals and Policymakers,<sup>295</sup> and a training module on *Justice in Matters involving Child Victims and Witnesses of Crimes*.<sup>296</sup> The *Model Codes for Post-conflict Criminal Justice* also contain provisions on addressing the needs of child victims and witnesses.<sup>297</sup>

In the United Nations Mission in the Sudan (UNMIS), the Child Protection Unit provided in-depth training to United Nations Police and Sudanese Gender, Child and Vulnerable Persons Protection Officers to promote the integration of children's concerns and to strengthen their capacity to work with children in contact with the law.

- **Birth registration and identity documents**

To facilitate children's access to justice, judicial affairs officers can support the production of birth registration records and identity cards. In post-conflict situations, proper registration records may not formally exist or may have been destroyed. Such documents not only establish a child's identity, but also confer rights and privileges, including access to education, food and health care. Birth registration and identity cards are also important tools for preventing human rights violations, such as forced military recruitment, forced marriages and child labour. In addition, registration and certification may be essential for documenting the relationship between a child and his or her parents and the place of birth, as well as for establishing nationality.

- **Legislative reform**

Judicial affairs officers can assist in efforts to establish a legal framework for juvenile justice in line with international norms and standards. In particular, children's issues should be integrated into constitutional reform and/or constitution-making processes and legislative and policy reform efforts at national and regional levels, as well as codes of conduct, standards for recruitment and standards of practice for justice actors. With the support of the Interagency Panel on Juvenile Justice and legal experts, UNODC is currently developing a model law on juvenile justice which would be adaptable to different types of justice systems.

<sup>295</sup> UNODC/UNICEF, *Handbook for Professionals and Policymakers on Justice in Matters involving Child Victims and Witnesses of Crime* (2009).

<sup>296</sup> UNODC/UNICEF, *Justice in Matters involving Child Victims and Witnesses of Crime: Training Modules* (forthcoming).

<sup>297</sup> United States Institute of Peace, *Model Codes for Post-conflict Criminal Justice*, Vol. 2.

The United Nations Integrated Peacebuilding Office in Guinea-Bissau (UNIOBIS) and UNICEF, in collaboration with the Ministry Justice, organized a workshop on child protection aimed at creating synergies among justice and child protection actors, and strengthening the legal and institutional framework for child protection in Guinea Bissau. The event was attended by, among others, representatives from the Prosecutor General's Office, the judiciary police, magistrates, civil society organizations, and other international partners.

### Children and Transitional Justice

Children have an important role to play in transitional justice processes because they are victims and witnesses of crimes, and may also be recruited and used in hostilities as combatants. In addition, as family members and citizens of their communities, children are key partners in reconciliation and peacebuilding processes. The concerns of children should therefore be included from the outset when establishing transitional justice processes and mechanisms in accordance with the *Key Principles on Children and Transitional Justice* (2010), developed by UNICEF in collaboration with the Office of the High Commissioner for Human Rights (OHCHR) and other United Nations and NGO partners. In all processes and mechanisms, children have a right to express their views in matters and proceedings affecting them.<sup>298</sup>

There is an emerging consensus that children associated with armed forces or armed groups who may have been involved in the commission of crimes under international law shall be considered primarily as victims, and that criminal proceedings are not appropriate. Nonetheless, children accused of crimes under international law must be treated in accordance with the CRC, the Beijing Rules and related international juvenile justice and fair trial standards. Accountability measures for alleged child perpetrators should be in the best interests of the child and should be conducted in a manner that takes into account their age at the time of the alleged commission of the crime, promotes their sense of dignity and worth, and supports their reintegration and potential to assume a constructive role in society.

In determining which process of accountability is in the best interest of the child, alternatives to judicial proceedings should be considered wherever appropriate. In addition, no child should be tried in a military justice system. Neither the death penalty nor life imprisonment should ever be imposed against children. Detention should be used only as a last resort and for the shortest appropriate period of time. Children who are detained should be separated from adults, unless it is not in their best interests to do so. Children should never be detained solely due to their alleged association with an armed force or group.

Children's participation as victims and witnesses in investigations and court proceedings for crimes under international law should be voluntary, with the informed consent of the child and a parent or guardian. Before interviewing or obtaining tes-

<sup>298</sup> Convention on the Rights of the Child (1989), Art. 12.



timony, a careful assessment should be undertaken of the child witness to determine that the interview or appearance in court is in the best interests of the child, and what special protective measures are required to facilitate the testimony. All investigators and prosecutors involved with child witnesses should be trained in child rights and child-friendly interviewing techniques.

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