



OFFICE OF THE UNITED NATIONS
HIGH COMMISSIONER FOR
HUMAN RIGHTS



RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES

Monitoring legal systems



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NOTE

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The Office of the United Nations High Commissioner for Human Rights (OHCHR) has increasingly recognized the need to enhance its assistance in United Nations-wide efforts to work quickly and effectively to re-establish the rule of law and the administration of justice in post-conflict missions. Countries emerging from conflict and crisis are vulnerable to weak or non-existent rule of law, inadequate law enforcement and justice administration capacity, and increased instances of human rights violations. This situation is often exacerbated by a lack of public confidence in State authorities and a shortage of resources.

In 2003, OHCHR, as the United Nations focal point for coordinating system-wide attention for human rights, democracy and the rule of law, began to develop rule-of-law tools so as to ensure sustainable, long-term institutional capacity within United Nations missions and transitional administrations to respond to these demands. These rule-of-law tools will provide practical guidance to field missions and transitional administrations in critical transitional justice and rule of law-related areas. Each tool can stand on its own, but also fits into a coherent operational perspective. The tools are intended to outline the basic principles involved in: *Mapping the Justice Sector*, *Prosecution Initiatives*, *Truth Commissions*, *Vetting* and *Monitoring Legal Systems*.

This publication specifically addresses human rights monitoring of the justice system through the creation of a methodology. This tool is intended to reflect a comprehensive overview of the principles, techniques and approaches involved in legal systems monitoring, principles which have been primarily garnered from previous experience and lessons learned from United Nations, Organization for Security and Co-operation in Europe and NGO legal systems monitoring programmes. The objective of this tool is to provide a framework for developing a monitoring programme to analyse institutions and the justice system as a whole from which good practices can be reinforced and bad practices or deficiencies addressed.

Clearly, this document cannot dictate strategic and programmatic decision-making, which needs to be made in the field in the light of the particular circumstances within each post-conflict environment. However, the tool is meant to provide field missions and transitional administrations with the fundamental information required to develop a legal systems monitoring methodology, in line with international human rights standards and best practices.

The creation of these tools is only the beginning of the substantive engagement of OHCHR in transitional justice policy development. I wish to express my appreciation and gratitude to all those who have contributed to the preparation of this important initiative.



Louise Arbour

United Nations High Commissioner for Human Rights

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Post-conflict justice systems are characterized by severe dysfunction, low levels of human and material resources, destroyed infrastructure and lack of public trust. The past failure of the legal system to protect individual rights, prosecute violators and balance executive power is often either a direct cause of, or a substantial contributing factor to, the conflict. A history of corruption, discrimination and abuse of power within the institutions of justice can destroy public confidence and perpetuate lawlessness and chaos.

Developing a justice¹ system that protects human rights and promotes the rule of law² is a critical aspect of securing peace and preventing future conflict. As such, it can form a vital part of any peacekeeping operation and its mandate. The effective transformation of a dysfunctional justice system into one that meets fundamental international standards is an extremely long and difficult process. Effective reform requires a detailed and ongoing assessment of the functioning of the system and a clear picture of its problems. Consistent monitoring of the legal system for compliance with the domestic law and international standards of fairness provides decision makers with the accurate and specific information they need to strategically target resources for reform based on real rather than perceived challenges.

Transforming dysfunctional justice systems requires comprehensive institution-building and reform. Monitoring legal systems implies a holistic approach that looks at the overall functioning of the system and its institutions. The police, the prisons, lawyers and the courts, among others, each have a critical and autonomous role to play to ensure a fair and effective process. Every justice institution must function efficiently and provide just results while working interdependently with the others. If one institution or actor fails, the system is damaged and balancing mechanisms are needed to ensure recourse and redress.

¹ The term “justice” refers to “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. The international community has worked to articulate collectively the substantive and procedural requirements for the administration of justice...” Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies (S/2004/616, para. 7).

² The “rule of law” is defined as “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.” (S/2004/616, para. 6).

Monitoring of the legal system is aimed at identifying widespread patterns or trends in violations of international standards and the systemic issues that hinder compliance in order to support effective reform initiatives. To assess compliance with the international human rights and relevant standards it is necessary to analyse the domestic law and daily practice in cases. The right to a fair legal process, access to justice and fair treatment, the independence of the judiciary, and the proper administration of justice lie at the heart of a fair and effective justice system.

High levels of insecurity in post-conflict or transitioning environments can hamper a whole reconstruction and peacebuilding effort. Establishing a base for the rule of law, beginning with public safety and accountability, is a foremost concern. Consequently, the monitoring of the justice system may focus primarily on the criminal justice process, particularly in the initial stages of a peacekeeping operation. Areas of civil-law protection are also often integrally linked to just and equitable development. Property law and family relations, including child protection, can have particular relevance for insecure post-conflict contexts and the use of informal or alternative (usually unregulated) traditional methods and practices for resolving otherwise criminal and civil disputes can be prevalent.

Publicizing well-documented human rights concerns and systemic problems within the justice system, and informal justice mechanisms, can be essential not only for targeting reform and resources but also for generating the political will to do so. Monitoring should provide a comprehensive picture of the strengths and weaknesses of the functioning of the justice system and assess the impact, positive and negative, of the reform efforts made. This will assist the authorities, civil society and the peacekeeping operation to evaluate progress towards the establishment of the rule of law and the protection of human rights.

The objective of monitoring legal systems is to provide an analysis of the institutions and the system as a whole so that good practices can be reinforced and bad practices or deficiencies addressed. Monitoring is a tool not an end. Its value is reflected in the integrity and coherence of the information, the accuracy and depth of the analysis, and the relevancy and practicality of the recommendations. The recommendations should detail ways in which problems facing the justice system may be effectively addressed, for instance through legal and policy reform, setting up and developing institutions including accountability mechanisms, the provision of remedies, training and capacity-building, administrative and logistical support, and resource allocation.

This publication covers the following elements of monitoring legal systems, particularly in the context of peacekeeping:

- Monitoring methodology and objective, applying a human rights analysis, using the international and domestic legal standards, and identifying trends and systemic issues in practice

- Developing a monitoring capacity, including the mandate and role of monitors, qualifications and training, and knowledge and information resources
- Establishing a monitoring programme, including selecting priorities and approaches, maintaining relationships, case tracking and systems that support effective monitoring
- Case monitoring, including formulating a strategy, collecting and verifying information through interviews, case file reviews and attending court or other proceedings
- Analysis, reporting and recommendations, including the development of internal and external reporting, formulating recommendations and ensuring appropriate follow-up and support to other rule-of-law aspects of the peacekeeping operation

It is important to recognize that this publication reflects a comprehensive overview of the principles, techniques and approaches involved in monitoring legal systems. While it is focused on the monitoring of a legal system as a whole, the principles, techniques and approaches can be applied to the monitoring of a discrete judicial mechanism, such as the Special Court for Sierra Leone, the Iraqi Special Tribunal or the Extraordinary Chamber in the Cambodian court system. It may not be possible to use or meet all aspects of this guidance in every situation or in every monitoring programme, although significant efforts should be made to strive to meet these standards. Ultimately, those responsible for legal system monitoring programmes in post-conflict settings should set their priorities and goals based on the situation and implement these with professionalism, integrity and respect for the national context.

I. MONITORING METHODOLOGY

A. The objective of monitoring legal systems in post-conflict contexts

The objective of monitoring is to improve the legal system's compliance with the law, including applicable international and regional standards, and to support the rule of law. International and regional treaty, non-treaty and other standards provide the legitimate benchmarks by which to evaluate progress in the (re-)establishment or strengthening of a justice system in a post-conflict environment. For the United Nations, the universally applicable standards adopted under its auspices must serve as the normative basis for activities in support of justice and the rule of law.³ The fundamental principles include non-discrimination and equal treatment, such as access to justice and fair treatment of victims, access to judicial remedy and/or redress established by law and treatment according to the domestic law, substantive and procedural fairness of proceedings, no impunity for crimes under international law, and the independent and impartial administration of justice.

Post-conflict environments suffer from devastated and often completely dysfunctional or discriminatory legal frameworks and institutions of justice. In many cases, the justice institutions, police, judiciary, prosecutorial and defence services, may need to be restructured or developed from scratch. In any post-conflict situation, it is unrealistic to expect immediate compliance by the institutions of justice or informal mechanisms with all international standards. However, there may be genuine efforts on the part of the Government and the society to move towards compliance and to integrate these standards into legal and justice reform plans. The monitoring of legal systems is a tool both to highlight for the authorities, society and other interested groups where specific issues with compliance lie and to evaluate the genuineness and effec-

³ The Secretary-General has stated in his report "The normative foundation for our work in advancing the rule of law is the Charter of the United Nations itself, together with the four pillars of the modern international legal system: international human rights law; international humanitarian law; international criminal law; and international refugee law. This includes the wealth of United Nations human rights and criminal justice standards developed in the last half-century. These represent universally applicable standards adopted under the auspices of the United Nations and must therefore serve as the normative basis for all United Nations activities in support of justice and the rule of law." (S/2004/161, para. 9).

tiveness of the efforts made to address these. The conclusions drawn from reliable monitoring are intended to assist Governments and the relevant authorities to produce targeted and meaningful changes that will make the justice system overall fairer and more effective. Without an accurate, in-depth and coherent picture of the actual functioning of the system, it is difficult to formulate reform strategies that are targeted and effective while maximizing limited resources.

A part of this work is identifying the obstacles that post-conflict justice systems face in their efforts to achieve compliance with national law and international standards. Systemic institutional or administrative problems, such as insufficient or misused financial or material resources, can effectively hinder compliance. Although improved infrastructure, telecommunications, personnel and material resources do not guarantee that the system will be fair and effective, they are necessary. For instance, effective and fair administration requires court clerks and others with the skills to manage files, keep adequate records, process timely summons and so on in order to ensure that a case goes to trial within a reasonable time, evidence is provided to the defence in a timely manner, and witnesses appear at trial to provide testimony and to be examined by the accused. Another example is that disproportionately low salaries for judges can contribute to corruption, affecting the impartiality of judicial processes.

Legal system monitoring should therefore cover the whole array of issues involved in establishing justice institutions that can function in accordance with the domestic law and in compliance with fundamental international standards of justice. This includes monitoring budgetary and financial allocations, administrative oversight and accountability or disciplinary mechanisms, judicial appointment processes, human resources policies and staff allocation and training, law dissemination to justice officials and general publication, methods for ensuring appropriate interaction between the institutions and actors involved in justice, including the police, prosecutors, defence counsel and judges, as well as with related institutions and groups, such as referral networks for victims and witnesses, hospitals and protection programmes. All of these affect the ability of the formal justice system to provide the public with a fair, efficient and just resolution of cases.

In many post-conflict contexts, traditional practices are commonly used to resolve disputes. The monitors should be in a position to examine the extent to which these function, how and for which purposes or cases, and using which practices and norms. They should report on these practices and make recommendations on the ways in which the authorities and communities can address issues of concern, including whether these practices can be legalized as alternative dispute mechanisms, if not regulated, or be brought into conformity with domestic law protections and guarantees and compliance with basic international principles of justice. Although these are complex issues which may be raised through a monitoring programme, it should be recognized that changes to deeply embedded traditional practices may come about only as a result of broad-scale public and community consultation (including with traditionally

disempowered groups such as women) and firm commitment on the part of the authorities, community and religious leaders, and civil society.

B. Using a human rights analysis

The human rights approach to legal system monitoring involves analysing both *domestic law* and *domestic practice* for compliance with international standards. Where the domestic law meets international standards, the focus is on whether the actual practice conforms to the domestic law.

1. Analysis of the *law* (de jure) for compliance with standards. This involves determining whether:

- The guarantees provided in the law meet international or regional standards. For example, the domestic criminal procedure law states that an accused person may be detained for three months before being brought before a judge or judicial authority, but this length of time does not meet the requirements under international law of prompt review by a judicial authority. Another example may be that the law requires judges to be appointed by the executive branch for limited durations, which can violate international standards concerning judicial independence.
- The law lacks the guarantees or remedial responses that are required by international human rights standards. A common example is if the law does not provide for a habeas corpus mechanism to ensure the right to challenge one's detention.

2. Analysis of the *practice* (de facto) of the law or its application to a particular case involves examining whether:

- A failure to apply the domestic law violates international human rights standards. Such would be the case, for example, if the domestic criminal procedure code provides that witnesses must be present at trial for their testimony to be used as evidence and the accused is entitled to examine them, but in practice no witnesses are presented at trial, only their out-of-court statements are considered by the court and used against the accused. This practice fails to apply the domestic law and may constitute a violation of the right of the accused to challenge the witnesses against them under international human rights standards.
- The misapplication of the domestic law constitutes a violation of international human rights standards. For example, if the law states that the prosecutor and the accused shall be present for the review of detention orders, but in practice only the prosecutor attends, possibly resulting in the violation of the equality-of-arms principle under international law.

C. International and regional standards

Four sources of international and regional standards may be used to monitor the legal system: international treaty standards; regional treaty and non-treaty standards; international customary law; and international non-treaty standards.

International treaty standards. It is necessary to identify the treaties to which the host country is a party—which means that the Government or persons acting in a governmental capacity are bound to uphold the obligations established in them.⁴ In addition, it is important to identify the role of international law within the national legal system, i.e., whether treaties once ratified form part of national law.

International humanitarian, criminal and human rights law are all relevant for legal system monitoring. Monitoring teams may be operating in areas where conflict persists and international humanitarian law will apply. It is critical to note that international human rights law always applies, including during conflict, although many rights can be derogated from in these circumstances.

Many of the human rights instruments and their articles reinforce each other, and the monitoring team should use all relevant sources to strengthen the analysis of whether a human rights violation exists. The key international human rights treaties establish committees to monitor their implementation by the States that are a party to them. The *general comments* of these committees provide authoritative guidance on the interpretation of the standards detailed in the conventions. As such, knowledge of these comments and of the findings of the committees can be useful in understanding the standards and in developing an in-depth analysis of whether they have been violated or abused. In addition to the primary human rights conventions used for legal monitoring, other conventions, such as the United Nations Convention against Transnational Organized Crime and its Protocols, should be understood and used where relevant.

Regional treaty and non-treaty standards. Regional instruments cover Africa, the Americas and Europe, but notably not Asia.⁵ Courts and commissions have been created to interpret the regional instruments and provide judgements or opinions on their application. Where applicable,

⁴ International treaty standards include:

- International Covenant on Civil and Political Rights
- Convention on the Rights of the Child
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- International Convention on the Elimination of All Forms of Racial Discrimination

⁵ The primary regional instruments are:

- The African Charter on Human and Peoples' Rights
- The American Convention on Human Rights
- The European Convention for the Protection of Human Rights and Fundamental Freedoms

the jurisprudence of these bodies can be extremely useful in detailing the meaning of these regional standards and how they apply to specific sets of facts. This jurisprudence can contribute to the monitors' substantive analysis of the legal system's compliance with these and similar standards. There may be regional non-treaty standards and principles that can be used, such as in Asia the Beijing Statement of Principles of the Independence of the Judiciary adopted in August 1995.

Customary international law. Monitors may also look to another source of obligations if the Government is not otherwise bound by treaties. Customary international law comprises norms considered to be so widely recognized by the community of nations that they are deemed binding on all States. Some of the rights set forth in the Universal Declaration of Human Rights—which in articles 7 to 11 sets out the rights of equality before the law, an effective remedy for violations and a fair trial—are considered by some international legal scholars to be customary norms. Other customary norms are the prohibitions on genocide, slavery and war crimes.

International non-treaty standards. These are not ratified by States, but are considered to provide some essential guarantees for the administration of justice and fair processes. As a result of their adoption by the United Nations General Assembly, they carry significant political weight. Non-treaty standards should be used by the monitoring team to further develop its analysis of any possible violation or abuse. Since these standards often provide more specific guidelines than those contained in human rights conventions, they can be useful for articulating the precise actions that authorities can take to improve compliance. For example, non-treaty standards specify what guarantees the independence of the judiciary, the procedures, services and actions required to meet the needs of victims of crime, the health and safety measures to be taken for detainees, and the duties that lawyers have to their clients. In this regard, these standards can also serve as helpful guidance for generating specific recommendations to the authorities to improve compliance with human rights norms.⁶ The Basic Principles on the Role of Lawyers,

⁶ The significant non-treaty standards related to monitoring the justice system are:

- The Universal Declaration of Human Rights
- The Declaration on the Elimination of Violence Against Women
- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
- Standard Minimum Rules for the Treatment of Prisoners
- Basic Principles on the Role of Lawyers
- Guidelines on the Role of Prosecutors
- Basic Principles on the Independence of the Judiciary
- Safeguards guaranteeing protection of the rights of those facing the death penalty
- United Nations Guidelines for the Prevention of Juvenile Delinquency
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty
- United Nations Standard Minimum Rules for Non-custodial Measures
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice
- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
- Code of Conduct for Law Enforcement Officials

for example, can be used to recommend the development of a code of ethics and to detail the principles it should contain.

D. Identifying and monitoring the domestic law

The applicable domestic law can be difficult to identify after a conflict. Peace agreements, Security Council resolutions and other transitional framework documents usually provide guidance on what the applicable law should be. However, they often do not address the hard questions, such as which specific versions or amendments of the law and regulations should be considered in effect. The monitor team, and the peacekeeping operation, should have a clear position on what is the applicable law.

Despite the potential difficulties of determining the applicable national law, it must serve as the backbone of the monitoring analysis. Treating individuals according to the law is a fundamental principle embedded in the international standards. In many post-conflict circumstances, the national laws may be relatively compliant with international standards, at least on paper. The substantial problems often arise in the practice, misapplication or failure to apply the law.

Many post-conflict countries suffer from a lack of formal, uniform and integrated legal systems. There are three sources of domestic law that may be relevant to monitoring their justice systems. Some systems may actually be a hybrid of two or three sources of law. These are:

- *Constitutions, statutory or civil law.* A constitution may provide the overall framework for the justice system and the legislative process as well as spell out the status of international law in the national justice system. For the criminal justice system, the primary laws of concern are the criminal law (or code), criminal procedure law and the law on penal sanctions. In addition, there are usually a number of special laws addressing key aspects of the criminal process, including juveniles codes, laws on policing or investigations and special security laws. For the civil-law process, the civil procedure law and administrative laws are critical along with laws on property, landownership and management, family laws, contract and employment and labour laws. To monitor the justice process, it is necessary to know the structure and powers of the courts and the actors. There are usually laws that detail the jurisdiction and administration of the court system and the roles and entitlements of parties to cases, police, prosecutors, lawyers and judges.
- *Religious law.* Forms of religious law may be integrated into legal frameworks or be used outside of the legal context. The use of religious law, both on a procedural and on a substantive level, should be monitored and documented in cases where it is applied inconsistently with the statutory codes and where its application violates international human rights standards.
- *Traditional laws and practices.* The use of customary practices or traditions is common in many countries. The form these practices take depends on ethnicity, tribal affiliation and location of the community. Although general practices vary widely, these traditional

norms usually attempt to maintain community cohesion and structure and disproportionately disadvantage less powerful groups, in particular women. Traditional mechanisms of dispute resolution, often some form of a council of elders or tribal chiefs, can be used to resolve disputes and conflicts that are otherwise characterized in law as criminal offences or civil matters. They may, but often do not, enjoy a formal legal status. Their use can be pervasive and, rather than the formal justice system, can be more commonly relied on within and by individual communities. These practices should be monitored like all other dispute resolution processes for compliance with international standards. In particular, if these practices are unregulated, the extent to which Government structures and official actors participate in or sanction their use should be consistently monitored. It is critical that, despite practical difficulties, the legal system monitors integrate the monitoring of traditional laws and practices into their programme in order to provide a holistic picture of the extent to which basic principles of justice are being complied with in the resolution of disputes or conflicts within communities.

E. Monitoring to identify trends and systemic problems in practice

Legal systems monitoring is a key aspect of the human rights analysis. It is not possible to monitor all aspects of practice, particularly with regard to cases. The approach is to identify emblematic practices, procedures, policies or cases in the legal system and seek to address these. In cases, this requires a methodology that extends beyond monitoring individual cases as single events for the purpose of identifying violations of human rights in the particular case and supporting individual remedies. Violations in individual cases can be the result of an isolated incident or of the behaviour of particular actors, for example, a corrupt judge or an insensitive police officer. To credibly identify systemic problems that require attention or reform, it is necessary to monitor groups of cases and identify trends and patterns within them in order to draw overall conclusions on the functioning of the system and formulate recommendations for widespread reforms.

Identifying trends or practices of violations requires monitoring individual cases of a similar type in a comprehensive manner and then comparing them to identify common abuses or problems. In this process, each case needs to be investigated individually through the collection of sufficient and credible information to draw a conclusion as to compliance with international standards and enable comparison. Such monitoring can have an impact on the conduct of individual cases as the presence and attention of a monitor to an individual case can affect officials' responses to it. By monitoring for systemic problems the monitoring team can have a far wider impact on the human rights and rule-of-law situation as a whole, as well as having a positive effect on individual cases. In this way, similar violations may be prevented in the future.

To conduct such an analysis, as a general rule, every case must be monitored comprehensively. In cases involving a fair trial analysis, "trial" is defined as the entire legal process from the mo-

ment of inception of the case through to its final resolution. It is not only the public proceeding where evidence is presented. Merely attending an actual courtroom trial without studying the case as a whole rarely results in identifying human rights violations, except when the trial practice is clearly and significantly egregious. This narrow approach also fails to address pretrial rights and may raise questions about the depth of the monitoring enterprise. To obtain effective and credible monitoring results, it is therefore important to monitor a case from inception, for instance, in criminal cases from arrests.

It is critical to understand that this type of legal monitoring involves investigating cases from a substantive as well as a procedural perspective in order to assess their overall fairness. This includes assessing the independence and impartiality of the tribunal, the effectiveness of the defence and the prosecution in the light of the evidence in criminal cases, and the independence and impartiality of the tribunal and the remedy in civil cases. It means that the monitoring team needs to evaluate, to a limited degree, the extent of the evidence, its sufficiency and the investigative or legal options in the case. Such an approach stems from the recognition that substantive monitoring is necessary to investigate effectively cases involving possible failures to prosecute or inadequate prosecutions, law enforcement, prosecutorial or judicial bias, misconduct and other subjective factors that can affect the fairness of the proceeding. Such cases are more difficult to monitor and document but they can often be at the root of systemic dysfunction and unfairness in the administration of justice in post-conflict environments. This approach requires a sophisticated legal system monitoring programme with well-trained and highly experienced monitors as their conclusions are, by their nature, more vulnerable to criticism.

II. MONITORING CAPACITY

A. Mandate

Various forms of legal system monitoring, including particular aspects such as fair trial observation, have been undertaken in peacekeeping operations. A monitoring capacity has been located in different institutions in peacekeeping, for example, in the Organization for Security and Co-operation in Europe (OSCE) as a pillar of the United Nations Interim Administration Mission in Kosovo and in the Judicial System Assessment Programme in the United Nations Mission in Bosnia and Herzegovina, and in a hybrid national and international non-governmental organization, the Judicial System Monitoring Programme, in Timor-Leste. In prior missions, the human rights components of United Nations operations would undertake some legal monitoring as part of their broader human rights monitoring mandate. In recent missions, such as in Haiti and Liberia, however, the legal monitoring team has been specifically designated and located within the peacekeeping operation itself. This recognizes that monitoring and reporting on the legal system in post-conflict environments are essential to support the development of the justice system to protect human rights and promote the rule of law.

The mandate is the starting point for any legal system monitoring programme. Ideally, it should be laid out in the Security Council resolution establishing the peacekeeping operation and be reaffirmed and made more specific in the national legal or regulatory system, through either the promulgation of a new law or through the signing of memorandums of understanding (MOUs) between the monitoring team and the relevant authorities (usually the judiciary, ministry of justice, ministry of the interior, etc.). Unlike the use of letters from ministers or other ad hoc means, this provides monitors with a consistent and reliable basis for asserting their authorization to monitor.

The monitoring mandate should address a number of critical issues, such as the parameters of the programme in relation to other monitoring teams, its relative independence, its primary objectives and the obligation to issue public reports, the extent of its access and so on. The mandate will naturally shape the development and establishment of the monitoring programme.

The most important aspect of the mandate is the nature and the extent of the monitors' access. Sound monitoring—the ability to collect accurate and extensive information—can require access to locations (e.g., prisons), people (prisoners), documents (court/police files) and proceedings (closed trials involving accused juveniles) which are often not or not completely open to the public. Access should be as unhindered and unrestricted as possible.

Access to investigatory proceedings and related evidence in cases which are otherwise not public can raise particular problems and reasonable exceptions to unlimited access may be expected. For example, agreements on access may stipulate that judges are entitled to deny access to monitors in hearings where one of the parties raises a reasonable objection to their presence or in cases where, during the proceeding, information may be revealed that could jeopardize the security of the investigations, military operations or the life and safety of one of the parties or persons involved in the case. Exceptions to unhindered access should be narrowly tailored and foresee other ways for monitors to gain the relevant information. Decisions on exceptions should provide appropriate notice and reasoning to the monitors. The monitoring team and individual monitors should have corresponding obligations to ensure the security of confidential information.

Unhindered or unrestricted access is particularly important with regard to prisons or any places of detention (official or unofficial), as detainees are at heightened risk of torture, inhuman and degrading treatment. The mandate should stipulate that monitors have access to all parts of places of detention and to all detainees, and that they may speak with prisoners individually and confidentially. The more clearly monitors' access is laid out, the more authority they will have to reinforce these entitlements when facing opposition. Even where broad access is detailed in binding documents, monitors may still face denials of access or undue restrictions. Such instances should be reported to those responsible for the monitoring team, who should address them immediately.

Severely limited access can hinder the monitoring programme's overall effectiveness and may indicate the need for the peacekeeping operation to take a different programmatic approach, for example to target more resources towards a mentoring programme instead of a monitoring programme, or to develop a more limited legal system observation capacity than a fully fledged monitoring programme.

B. Monitoring qualifications

The trustworthiness of the monitoring conclusions is a reflection of the quality of the monitors and the programme. Monitors need to have a certain level of legitimacy and credibility in the eyes of those they are monitoring and those responsible for the administration of justice. It is important that local governments (or the responsible authorities) should not be able to disregard the conclusions and findings or put off initiatives to target reform that would ad-

dress specific problems because of questions concerning the monitoring team. At the same time, it is for the monitoring programme to decide on its staff and to support their professional development.

Sound and effective monitoring of the legal system requires an integrated knowledge, experience and skill set:

- Knowledge in a range of technical areas relating to the law, in particular the domestic legal framework, the administration of the justice system, particular procedural and substantive laws, the international legal framework and standards, particularly human rights standards, and the ways in which international standards work in practice;
- Practical experience with justice systems, in particular of working within a system at some level and with a dysfunctional justice system, experience working in and sensitivity to post-conflict environments and with traumatized individuals and communities, and with the particular relevant communities, cultures and contexts;
- Specific skills for gathering information through effective interviewing, legal analysis, coherent writing skills and effective diplomacy and communication skills to appropriately and successfully deal with victims, accused persons and Government or justice officials.

The monitoring programme may have international monitors, national monitors or a combination of both. It is critical to have national lawyers or legal experts within the programme even if there are international monitors too. In some cases where there is a national capacity, international monitors may not be needed at all, such as in the OSCE monitoring programme in Bosnia and Herzegovina. The extent of national involvement in monitoring will depend on issues such as the capacity of the monitoring team, perceptions of objectivity and impartiality, safety and guarantees of confidentiality. The approach will depend on the particular circumstances of the host country or territory where the peacekeeping operation is taking place.

If the international monitors do not speak the language, language assistants or interpreters are often a necessary and highly critical part of the monitoring team. Legal language is considered technical in most places and, in post-conflict contexts, usually the province of an elite. Individuals with particular knowledge of technical legal terminology, such as law students, are often necessary for effective legal monitoring interpretation. For the best monitoring results, other considerations should also be taken into account in the selection of interpreters and can be relevant for international and national monitors as well. These include prior history and association with armed groups or perpetrators during conflict, levels of prejudice and sensitivity to rural and other lifestyles, and discriminatory attitudes concerning gender. In order to develop trust with a range of victims and accused persons, it is important to ensure a balance of gender and ethnicity (religious or other social group) within the monitoring staff proportionate to that of the local communities.

C. The role of monitoring

The underlying principle of monitoring the justice system is to reinforce the proper role and response of the system by encouraging those in it and those in authority to fulfil their obligations. It is not, however, to substitute for it where it is inadequate. The reasoning behind this principle should be apparent. It may be less apparent, however, that this has specific implications for the monitoring team and, in particular, monitors' conduct. In post-conflict settings, monitors can feel a natural desire to address injustices directly in the face of a severely dysfunctional and unfair system. As a result, monitors may cobble together ad hoc and temporary solutions to individual problems, which serve to reinforce systemic failure. They can seek to make "right" a court case that they believe was decided unjustly, inappropriately interfering with the independence and impartiality of the tribunal. They can develop a close relationship with a prosecutor and provide legal advice on cases, thus bringing into question the impartiality and objectivity of the monitoring programme. Although monitors may have good intentions, their inappropriate actions can have severe consequences for the monitoring programme, the justice system and the expectations of those seeking redress.

Those responsible for the monitoring team must proactively address these issues through the development of *monitoring protocols or codes of conduct* during the initial establishment of a monitoring programme. Clear protocols or guidelines will serve not only to protect the integrity of the monitoring process, but in many instances can also help to ensure the safety of monitors and those with whom they have contact.

Circumstances in each individual post-conflict or peacekeeping setting will be different and situations that require a regulatory response from the monitoring programme will evolve. Protocols and codes of conduct should be reviewed and updated to reflect changes on the ground.

Based on prior monitoring experiences, particular issues to address in protocols or codes of conduct include:

- *Regulating relations with the media*, this may involve restricting monitors' communications with the press to background information and to information that would otherwise be public, such as the status of a case, verdict or evidence or information stemming from an open court proceeding. Leaking confidential or inappropriate information to the media can severely undercut the credibility of the monitoring team and its entitlement to unhindered or extensive access.
- *Prohibiting the provision of legal advice or guidance to any party to a case, including to officials*. Providing advice will jeopardize not only the credibility of the monitoring endeavour but, more importantly, a party's chances of success or the integrity of the judicial process. It is particularly important that monitors do not advise the accused. It is common for the police, prosecutors or judges to ask monitors for their opinions or suggestions on particular cases. Monitors should never participate in a case or proceeding by offer-

ing information, nor should a monitor provide an opinion during the proceeding or on a case or attend a deliberation, even when asked. Any such action brings into question the monitor's objectivity and neutrality and can be construed as inappropriate interference. Monitors must reinforce that it is the official's role and responsibility to make decisions based on their professional judgement. When dealing with accused persons, victims or other parties, monitors should always make appropriate referrals and assist them in accessing the services they need.

- *Restricting interview formats and guidelines with the accused to facts pertaining to the process*, not to the actual circumstances of the case nor with victims/witnesses who may provide evidence in court. This protects monitors from potentially being called as witnesses, particularly in systems where hearsay testimony is admitted. Monitors should not ask about the circumstances of, for example, the murder, the identity of the perpetrator or the details of what happened, but about when the arrest took place, what the police stated to the person on arrest, how the suspect was treated upon arrest, where he or she was taken, and similar matters. In some cases it may be necessary for the monitor to discuss the circumstances of the alleged crime, not the specifics of the crime itself, in order to assess the accused person's justification in defence or whether the crime stems from prior victimization. For example, in cases of women accused of domestic violence, the crime may stem from their own previous victimization from domestic violence or sexual assault. If cases are proceeding through the formal justice system to trial, monitors should generally not speak to official case witnesses and should limit their interaction with victims.
- *Developing limits on confidentiality for interviews with the accused and with officials*. Generally, confidentiality should be assured for alleged victims of human rights violations. However, there should be clear limitations on this. For example, monitors should inform the accused that they will not keep confidential information about ongoing or planned criminal conduct. Monitors should have an obligation to report knowledge of current or planned criminal conduct. For officials, the general rule is that interviews do not involve any assurances of confidentiality. Exceptions to this rule may be if an official alleges that he is a victim of some misconduct or interference related to his position. For example, a prosecutor may allege that she has received death threats for her work on a case after refusing a bribe. Such allegations should be investigated separately and confidentiality related to those specific allegations may be assured.
- *Setting limitations on relationships with justice officials* (judges, prosecutors, lawyers, etc.). Monitors will spend a considerable amount of time with certain officials and will need to maintain positive working relationships with them. At the same time, monitors need to reinforce their independence by maintaining a professional distance and ensuring that they do not compromise their position. If a close relationship is developed with an official or group of officials, a monitor's independence and objectivity are open to question. It is critical for monitors to understand that they are not mentors or advisers.
- *Regulating relations, communications and information sharing with disciplinary boards, internal affairs mechanisms or other human rights institutions*. Although legal systems

monitoring serves as a mechanism to ensure accountability, it is not an accountability or disciplinary mechanism per se. To protect the legitimacy of the monitoring process, particularly with officials, the monitoring team should have a level of independence and inform officials and others of when and under what circumstances information not available in reports or by other means will be shared with these other accountability mechanisms. Monitors should refer persons with complaints about official misconduct directly to these mechanisms. The response of the authorities to complaints to internal affairs and inspection mechanisms, particularly within the police, should be monitored (as cases) to verify that the investigations and actions taken are adequate.

D. Emergencies, interventions or action in specific cases

The monitoring programme will need to have a policy on whether and under what circumstances monitors will take steps to support a change in the course of a specific case because they are aware of an egregious violation of an individual's rights. Interventions in judicial cases should always be made with caution, professionalism and due regard for the principles of the independence and integrity of the justice system.

The monitoring programme should develop guidelines on monitors' conduct in such cases for inclusion in the code of conduct. The guidelines should spell out whether a monitor can take immediate action by complaining to the appropriate authorities at the moment of observing or uncovering an egregious violation. At a minimum, the monitoring team should be in a position to rapidly document such a violation and ensure that the appropriate authorities are made aware of it and to follow up with them. This can be done through a special action report, written once all possible and easily accessible evidence of the violation has been verified and sent to the other persons concerned. Such specific interventions should be targeted at the appropriate supervising authorities, for example, the chief judge of the relevant court, a supervising judge at the supreme court or chief prosecutor, not at the trial judges or prosecutors. There should be immediate follow-up with the relevant authorities, the mission's leadership and others to ensure that the relevant authorities have received and understood the information. Any action that the authorities take should be monitored and documented.

E. Manuals and internal training

The realities facing peacekeepers, including the lack of local personnel after a prolonged or devastating conflict, mean that most monitors or staff will not have all the knowledge, experience or skills required for monitoring. Monitoring programmes may develop specific manuals which can cover, among other things, the code of ethics for monitors, the domestic legal institutions and framework, the domestic law and practice, and the monitoring methodology and priorities. The OSCE monitoring programme in Bosnia and Herzegovina has developed such a manual.

Monitoring programmes can address such deficiencies and improve capacities within the monitoring team by developing an internal training or capacity-building plan for all monitors (national and international). The most beneficial training plan should result from a specific assessment of the strengths and weaknesses of the staff and the development of techniques and strategies to address these.

The plan should preferably capitalize on the strengths of the individual monitors and seek to support horizontal and equal knowledge and experience sharing within the group. For example, national staff may have considerable expertise in the local legal framework, legal and traditional practices, the functioning of the system before or during the conflict, cultural and linguistic norms and suggestions for conduct which will support more effective information gathering. For international staff, training should focus on the national legal system and the culture, sensitivities and priorities of the society. International staff may have more experience and understanding of international laws and standards, with peacekeeping contexts and international organizations and approaches, and the ways that justice systems can function to meet standards of fairness and efficacy.

For certain skills and knowledge it will be necessary to seek external expertise. For example, university professors or supreme court judges may be needed to explain complicated aspects of the law, forensic or investigation experts to explain the process for medical evidence, women's groups and other service providers to explain the particular ways that trauma manifests itself in certain groups, and international experts to train on particular monitoring techniques, such as interviewing skills or trial observation. The most effective training will promote interactive and participatory learning through the use of audio-visual and other training tools (for example, comparative videos of "fair" and "unfair" trials).

F. Monitoring sustainability and exit strategies

The monitoring team should form, along with the appropriate decision makers and groups, a picture of the long-term sustainability of legal monitoring within the national context after the departure or downsizing of any peacekeeping operation. Such a picture is necessary for the monitoring programme to develop an external capacity-building plan and an exit strategy. Legal system monitoring can be undertaken by a range of groups or institutions, non-governmental organizations, human rights institutions or through other quasi-governmental institutional arrangements. One example is the development of a hybrid national and international non-governmental organization for monitoring in Timor-Leste. The most appropriate solution will depend on the particular circumstances, including existing institutions and funding in the host country or territory.

Once a successor has been identified, the peacekeeping operation's monitoring team should make the development of the professional capacity of that institution, group or programme

one of its principal objectives. A gradual handover from international to national monitors within the peacekeeping operation itself is one important technique for developing monitoring capacity and moving towards an exit strategy for international staff. A decision to hand over to national staff should depend on the particular context, including whether national monitors can be perceived to be impartial and credible. This process in and of itself may not ensure the long-term sustainability of legal system monitoring, however.

G. Knowledge and information resources and development

A legal monitoring team needs information and a number of knowledge tools to support its effective monitoring, analysis and reporting. All information and documentation can be placed in a monitoring library for reference, while some material will need to be available in the relevant languages for each monitor's individual use.

Examples of reference material and knowledge tools that should be collected are:

- Founding documents of the mission, such as Security Council resolutions, mandates and MOUs
- Background information on the administration of the justice system before and during the conflict, which can be found in human rights, media, legal and other reports or documents
- International laws in the relevant languages, including non-treaty standards
- Compilations of relevant jurisprudence of international and regional human rights courts or committees (note that the United Nations Human Rights Committee is discussing a new general comment on fair trial rights)
- International Commission of Jurists materials, Amnesty International fair trials manual and other monitoring assistance tools, interviewing guidelines and best practices⁷
- The domestic laws, including regulations and administrative laws
- Compilation of local court jurisprudence, legal reports, cases or other analyses of the court system in the national context

⁷ Some human rights monitoring and other documents that the monitoring team should have access to:

- Lawyers Committee for Human Rights, *What is a fair trial? A basic guide to legal standards and practice* (New York, 2000)
- International Commission of Jurists, *International Commission of Jurists Trial Observation Manual* (Châtelaine, 2002)
- University of Oslo Norwegian Institute of Human Rights, *Manual on human rights monitoring: an introduction for human rights field officers*, 2nd ed. (Oslo, 2001)
- Office of the United Nations High Commissioner for Human Rights, *Training manual on human rights monitoring*, Professional training series No. 7 (Geneva, 2001)
- Kathryn English and Adam Stapleton, *The human rights handbook, a practical guide to monitoring human rights* (Colchester, University of Essex, Human Rights Centre, 1995)
- Helsinki Foundation for Human Rights, *Human Rights Monitoring* (Warsaw, 2001)
- United Nations Office for Drug Control and Crime Prevention, *Guide for policy makers on the implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and Handbook on justice for victims on the use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (Vienna, 1999)

- Reports, research or studies on the situation in the country and in particular thematic areas, such as gender-based violence, health, etc.
- Policies, codes of conduct and regulations of the relevant institutions of the justice sector
- Media/press reports and articles on the justice system

A monitoring capacity also requires the development of knowledge and information resources for monitors on the ground. If these resources do not already exist or are not developed by other components of the peacekeeping operation, they may need to be collected by the monitoring team itself. These include:

- Maps of the country and identification of locations such as detention centres, courts, police stations, universities and other institutions
- Information on the available services, shelters, counselling and health and medical facilities
- Lists of the human rights organizations, women’s groups and other relevant civil society organizations, their contact information and locations
- Organization charts of the police, courts, prosecutors and bar associations and lists of personnel (levels and ranks, competencies, salaries, etc.)
- Descriptions of the various institutional authorities of the Government
- Contacts of media outlets

In post-conflict contexts these resources will require consistent updating and improvement, as new laws and policies are promulgated, new officials and judges are appointed, and new services and programmes are set up. Although monitors may be expected to know much about the area in which they monitor, they should not be expected to know about all the changes and new developments that take place within the justice and related sectors. Those responsible for the monitoring team need to ensure that, to the extent possible, monitors have the information that they need to monitor the justice system effectively.

III. THE MONITORING PROGRAMME

A. Initial engagement in monitoring

The challenges of initiating a legal systems monitoring programme can be overwhelming, particularly in post-conflict environments experiencing a total lack of resources, destroyed infrastructure, low capacity, no unified justice system and numerous problems with the applicable law. There is often the simple question of where to begin. It is usually impossible to monitor each case and every court in the justice system, including, where relevant, those being decided through informal justice processes. In peacekeeping operations, the personnel and financial resources needed for a comprehensive monitoring programme are rarely available. In these conditions, it is important not to attempt to monitor a large volume of cases or issues simultaneously because this will result in a superficial and less credible analysis of the problems and human rights issues.

Monitoring programmes should be established, where circumstances allow, during the initial phases of the mission for a number of reasons. Firstly, the monitoring programme is critical to observing and revealing the actual functioning of the courts so that sound and thoughtful decisions on resource allocation and reform can be made. Secondly, it is important for officials and others to accept that monitoring takes place and integrate it into their work.

If the justice system is barely functioning when the peacekeeping operation starts, the monitoring team may want to establish itself by conducting an overall assessment or mapping of the system, identifying the actors engaged, the state of facilities and resources, administrative oversight, the extent of dissemination of the applicable laws to justice officials, and the level of overall functioning. This can accomplish a number of goals simultaneously. It will assist the monitors in developing the relationships and knowledge resources they need to do their work effectively. It can support a positive and cooperative perception about monitoring among the officials and actors in the system. Moreover, the results can provide donors and the operation's leadership with needed information for identifying initial targeted or quick-impact projects. Before undertaking such an assessment, the monitoring team should ensure that there have not been similar assessments before. Prior assessments should be used and built upon; duplication of effort should be avoided.

It is important that, once an initial assessment of administrative and structural issues has been undertaken, these issues continue to be monitored within the context of cases and not separately, if the justice system is processing cases. By focusing on the conduct of cases, the monitoring team reinforces the notion that improved resources, technology and infrastructure help the system to be more efficient, effective and fair. This link needs to be reflected in the monitoring approach by assessing, through examining the conduct of cases, whether the system has the resources and materials it needs to do the job properly.

Another useful tool in the initial phases is to undertake public opinion surveys to assess what the common perceptions and beliefs are concerning the institutions of justice and the functioning of the legal system. Such surveys can also track to what extent the population or certain groups use formal mechanisms or, alternatively, traditional practices and for which disputes and problems. The results of such initial surveys can then provide the baseline for comparison and evaluation as the programme develops and seeks to monitor the effectiveness of reform efforts and changes in public perception, reliance and use of the legal system and the justice institutions. (The use of statistics and the collection of data are discussed in section III.D below.)

All justice systems in post-conflict contexts suffer from a number of ills. These are usually poor administration of justice, corruption, executive interference or lack of independence, and/or bias in the judiciary. These types of endemic problems severely jeopardize the legitimacy of the rule of law and can be at the root of institutional dysfunction. If inappropriate legislation or administrative and financial mismanagement are contributing factors, they can be fairly easily tracked, analysed and diagnosed through the monitoring of budgetary allocations, judicial and prosecutorial oversight and appointment mechanisms, and administrative laws and regulations. However, if these problems are endemic on the level of individual practice in particular cases, they can be extremely difficult to monitor systematically.

Monitors may receive individual complaints about such problems in cases which should be investigated and verified. However, it is rare that enough cases of this type will be collected through individual complaints to illustrate that there is a pattern or practice. These issues can be uncovered more systematically through the regular monitoring of priority cases, as discussed below, particularly “regular” crimes. Once identified, incidents of corruption, executive or other improper interference should be investigated in their own right and compared to draw conclusions on systemic practice.

B. Selecting and updating priorities for monitoring

The monitoring team need not monitor every case or every law in order to draw useful and valid conclusions on systemic human rights and rule-of-law problems. The key is to strategically identify and prioritize the types of cases and legal issues to monitor and then to undertake

comprehensive monitoring to uncover exactly what is happening with these cases and with the implementation of the law.

Identifying and prioritizing cases can enhance the monitoring programme in several ways. The process of selecting priorities assists in grouping cases in order to compare, identify and report on systemic issues and patterns or trends in human rights violations. Prioritizing cases can focus monitors who might otherwise be overwhelmed by the number of cases and the particular human rights issues they need to address. Setting clear priorities for the allocation of their time and resources enables monitors to develop more comprehensive and credible information, enhancing the integrity and value of their conclusions. In general, selecting priorities can ensure more effective monitoring and clearly defined aims in terms of reporting and making recommendations for change.

The selection of priority cases and issues will depend on a number of factors particular to the peacekeeping context, including the caseload and the functioning of the justice system and the resources of the monitoring programme. The establishment of particular transitional justice⁸ mechanisms, such as hybrid courts, truth commissions or reparations programmes, may have an impact on monitoring priorities. Non-judicial mechanisms, such as truth commissions, can be monitored for compliance with their statutes and international standards (e.g., due process, witness protection, naming of perpetrators) and reported on. In addition, the prevalence of the use of informal or traditional or customary mechanisms for justice will depend on the peacekeeping context. Where these practices are pervasive, such as the traditional dispute resolution mechanisms, *gacacas*, in Rwanda, monitoring of them should be factored into the establishment of priorities.

There are a number of factors that should be considered and synthesized to create a list of monitoring priorities. Some serve as indicators of cases where human rights violations are more probable. All are relevant to post-conflict contexts:

- *Membership of a vulnerable group as victim or perpetrator or party to a case.* Vulnerable groups are populations that are particularly susceptible to human rights abuses in all societies, particularly those emerging from conflict. Typically they are: children, ethnic or religious minorities, refugees and internally displaced persons, and persons with mental disabilities. Other vulnerable groups include immigrants, the elderly and persons with a non-traditional sexual orientation. Due to gender inequality women as a group may be considered vulnerable to particular violations based on their sex, such as sexual exploita-

⁸ See the report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies (S/2004/616, para. 8). "Transitional justice" is defined as comprising "the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof."

tion or gender-based violence. In addition, women who are members of vulnerable groups experience a heightened (or twofold) risk of human rights violations. Due to their vulnerability or status, these groups tend to be discriminated against and require enhanced or distinct responses by the authorities under human rights principles. This discrimination often manifests itself in criminal, property and family law cases. For many of these groups, the Government may have specific international human rights obligations.

- *Cases that stem from the human rights history of the country.* The identification of cases in this category will depend on the particular circumstances of the country's history of violations of humanitarian law and gross violations of human rights. The clearest cases are those concerning accountability for past violations, such as cases for war crimes, genocide and crimes against humanity, including violations particular to women. Other such cases may be harder to identify and may include current human rights violations by persons believed to be former perpetrators, politically motivated proceedings, property disputes related to the return of refugees and ethnic violence against returning groups. These issues can be found in both criminal- and civil-law cases. Naturally, there can be an overlap between these cases and others based on membership of a vulnerable group, such as with ethnic minorities associated with the previous regime.
- *Types of crimes/civil cases.* To obtain a clear picture of systemic violations in the justice system, it is usually necessary to monitor "regular" cases, that is, those that may not have particular indicators of human rights issues. With this approach, cases involving certain types of crimes with particular significance—such as murder, grave assault or injury, rape, trafficking or other severe criminal conduct—may be designated for monitoring. In the civil-law realm, certain types of cases such as property and landownership cases, divorce and child custody may be designated as priorities. Some of these crime designations will clearly overlap with those connected to vulnerable groups and, in some instances, reflect the human rights history of the country. For example, rape is usually perpetrated against women and often as a tool of war, or trafficking in persons is perpetrated against women and children during and after the conflict.
- *Classification by human rights standard.* It can be helpful to prioritize cases for monitoring on the basis of a particular human rights standard. This may be a preferred approach during the initial establishment of the programme and/or the initial functioning of the new justice system. This is especially true in the area of fair pretrial rights, which are often the most pressing issues in the immediate aftermath of conflict and where there are specific guarantees compliance with which is easy to monitor. For example, a number of detainees' cases can be monitored for their compliance with pretrial rights, such as the prohibition of unlawful arrest and detention, the right to be brought promptly before a judge, the right to a defence lawyer and to prepare a defence, and the right to be free from torture, inhuman and degrading treatment.

Priorities for monitoring should be consistently reviewed and updated to ensure that the monitoring programme is taking into account changes in the system, developments and actions taken by

Government and others, in particular training programmes, and the human rights environment. Monitoring of priority cases does not end with an intervention, the publication of a report or the advocacy of particular recommendations. The effectiveness of the authorities' actions taken in response to concerns raised by the monitoring team creates new monitoring priorities. Using this approach will ensure that the monitoring team is consistently following up and assessing improvements or changes in the system's fairness and efficiency based on reform initiatives.

C. Developing and maintaining relationships

The success of legal system monitoring depends largely on maintaining regular contacts and relationships with the key actors engaged in and responsible for the system. These relationships should be mutually beneficial; for the monitoring team to be able to accomplish its work and for the actors to work towards improving the system's functioning. Such relationships should be maintained by the monitoring team at all levels. At a central level, these actors are leaders and decision makers (minister of justice, interior, defence), chief justices and administrators of courts, police commissioners and chief prosecutors, large human rights and victim support groups, bar associations and chief medical and related professionals and religious or tribal leaders, where relevant. For monitors in the field, they are police investigators, military or other law enforcement groups or officials, prosecutors, judges, prison governors and, where relevant, community elders or other political actors active within the geographic area covered by the monitoring. They also include defence lawyers, advocacy and victims' NGOs, community groups and medical professionals. Positive working relationships with these non-governmental actors can be essential for gathering information that officials may be unwilling to provide as well as to gauge civil society's perception of the justice system.

Official actors, such as the police, prosecutors and judges, are sources of information critical to the monitoring process and are also responsible for compliance with the law and international standards. Similarly, their supervisors or Government authorities are not only responsible for the overall system's human rights record but also key leaders and allies in efforts to effect reform and change to improve compliance with international standards, including through the promotion of fundamental principles such as transparency and accountability. These dual functions can create a certain tension in their relationships with monitoring teams. Monitoring is particularly sensitive for officials directly involved in a case who, like witnesses, can provide relevant information, but also usually play a role in the specific violations. Consequently, maintaining positive working relationships with officials at all levels involves a substantial degree of subtlety, diplomacy and good judgement on the part of programme supervisors and monitors.

To maintain these good relationships with all institutions and actors within the system while effectively monitoring official conduct, it is critical for the monitoring team to have a clear understanding of exactly how the institutions and the system should ideally function and the parameters of each official's role. The monitoring team needs to address appropriately the common tendency of

officials in a dysfunctional post-conflict justice system to exaggerate the limits of their own role and to blame other components of the system. This tendency is usually system-wide; between police and prosecutors, prosecutors and judges, judges and administrators, and so on.

Monitoring should serve to reinforce the integrated functioning of the system as a whole rather than assess specific and targeted culpability. For example, a judge may rightly claim that an inadequate investigation is the fault of the prosecutor requiring monitoring and analysis. At the same time, the monitoring team needs to acknowledge and address the fact that the judge may also be responsible where he or she has the authority to remedy the inadequacy by, for example, returning the case for further investigation or releasing the accused from detention if an investigation is not completed within a certain time limit.

The monitors must also recognize good practices and areas of progress and regularly communicate these to the authorities, officials and other actors. This can serve a number of purposes. It illustrates that the monitoring programme is impartial and objective and that it exists for the purpose of assistance, not obstruction. Praising good practices reinforces the credibility of the monitoring programme and can make it easier to raise concerns regarding bad practices or regressive actions.

The most important aspect of maintaining positive working relationships with key actors is for the monitors to be consistent and clear with officials and non-governmental groups about their activities, assessments and reports. In particular, officials who are either directly involved in a specific case or who supervise it should be informed, through meetings and similar means, of the monitoring process, any interventions, the timing and purpose of reports, and any other significant action. Supervisors of the monitoring programme should ensure regular meetings with the justice system authorities, chief judges, ministers of justice, police commissioners, chief prosecutors and others to discuss issues raised through the monitoring process and to follow up on recommendations and actions taken in response.

D. Case tracking and formulating indicators

Tracking cases, trends or other information statistically can be a key part of a successful monitoring programme. Such tracking should be used to support credible and sound monitoring and evaluation, not to collect data and information for the system itself. The ministry of justice, the police, detention authorities and others should be responsible for collecting and maintaining data and producing statistics on cases, detainees, crime reporting, etc. Any needs, issues or obstacles that the authorities face in meeting these obligations (for example, capacity-building needs in data and information management) can be identified and changes recommended through effective monitoring.

For the monitoring programme, collecting data and tracking cases can serve a number of important purposes:

- Representing the number and kind of cases monitored. This assists in illustrating the number of cases being monitored in the light of the total caseload and the extent to which the concerns identified may represent systemic or structural problems because of their prevalence.
- Supporting assertions of trends and systemic human rights concerns. Collecting and analysing statistics on cases can provide a quantitative picture of the functioning of the justice system. Hard numbers can be used to refute allegations that each case is different or assumptions that certain issues are not critical. Statistics can be particularly important for Government institutions and donors that do not like to base allocation of resources on anecdotal evidence and, as such, help to target resources towards the concerns that have been clearly and firmly established through monitoring.
- Evaluating the impact of monitoring and any improvements in the system's compliance over time. From its inception, the monitoring programme should be seeking to evaluate its impact on the system's compliance with international standards. This can be done through the development and use of indicators. Clusters of indicators, including quantitative ones, such as case tracking data or salaries and resource allocation, and qualitative or subjective indicators should be used to monitor particular sets of results. Accessing a variety of information is often difficult in environments where there are few data, such as in post-conflict situations. If the monitoring team has additional resources and the necessary capacity, it may plan to undertake surveys, facilitate focus groups and use other techniques to assess impact and the functioning of the justice system. These techniques should be used across different target groups, the general public, legal actors and those working in the system, and others, such as parties, defendants, victims and witnesses.

As with case monitoring, it is very difficult to track every case. Therefore, it may be preferable to track only cases that lie within the priorities set for monitoring. A case tracking system can take a number of forms. However, at its simplest it can be a database with basic information on the cases of persons detained and being monitored. This information can be collected and updated through the regular monitoring of detention facilities and the files of detainees and accused persons. For example, the information tracked can include the identity of the accused person or party (given either by name or code), date of birth, gender, residence, defence counsel, date of alleged offence or claim, type of offence or claim, date of arrest or detention, place of detention, dates of extension of detention, detaining authority, date of indictment or charge, hearings or trial dates, verdict, sentence and appeal outcome.

The data can then be compiled and statistically analysed to reflect a number of human rights issues and indicators. For instance with the above information, reports can address the length of pretrial detention, disproportionately high conviction rates, appropriateness and proportionality of sentences, and percentages and trends in groups detained or prosecuted (e.g., numbers

of juveniles facing serious charges or women in detention for sex-related offences) or vulnerable groups filing property or other claims, and in offences or claims, such as high numbers in sexual violence or kidnapping prosecutions or high numbers of property cases. Other types of data may be collected through a range of means, including surveys, focus groups, anecdotal research and so on, if the monitoring team has access to the particular expertise and resources needed.

E. Systems for monitoring

The initial stages of post-conflict or peacekeeping operations tend to be characterized by chaotic institutions, debilitated infrastructure and telecommunications, and insecurity. In such an environment, it is important for the monitoring team to establish systems to ensure that it has the basic information needed to do the job. For example, the monitoring team needs to be aware of any court proceedings, of their nature, their dates and times, but often there is no official court scheduling process or none is functioning. To address this, a system needs to be developed which, to the extent possible, is consistently and clearly defined so that the monitoring team can learn about proceedings. The type of system developed, e.g., whether a particular official agrees to contact the team or whether the team regularly checks with a certain official, court clerk or other, will depend on the circumstances.

The monitoring team needs to address systematically the identification of cases, visits to prisons or police detention facilities, the process for collecting case tracking information, the scheduling of court proceedings, whether pretrial or trial, and the incidences of informal dispute resolutions, where relevant. If the use of informal dispute resolution based on customary or traditional law or practices is prevalent, the monitoring team may need to develop a specific strategy to ensure access to the processes and information, and to be aware of any proceedings or meetings in advance. It may be necessary to use only national monitors. If access to these traditional decision-making practices is extremely difficult for any staff of the monitoring programme, the team may need to establish a system for monitoring and reporting with national non-governmental organizations.

Visits to prisons or police detention facilities can be critical for investigating compliance with the pretrial rights of detainees. They can also serve as an important source of information on and identification of new cases, particularly those which have not yet proceeded to the court. Much case tracking information can be gathered through regular and systematic visits to detention facilities, particularly in the first phases of establishing a programme. It is important for visits to be regular (weekly, biweekly, etc. depending on the circumstances), but ideally not scheduled in advance with prison authorities. Detention visits with individuals can raise expectations and cause significant confusion and disruption for detainees. Legal system monitoring teams may forgo individual detainee interviews if they can collect the necessary information from other sources, such as human rights monitors, defence lawyers or NGOs.

F. Protection of information and information sharing

A legal system monitoring team needs to be able to secure its confidential and sensitive information. This is particularly true if it has broad access to documents and information that are not otherwise public. This requires establishing a system that tracks and secures case files and other information.

The information collected through legal system monitoring, including its reports, are products of the peacekeeping operation. They can be extremely useful to the mission's leadership, including the Special Representative of the Secretary-General, and can assist in raising the political profile of efforts in the justice sector and in the promotion of the rule of law. Ensuring that the Special Representative has credible information can be especially important with regard to issues and cases that may have particular significance, politically and socially, for the host country or any of its communities' efforts to support ongoing peace. In addition, the monitoring team's assessments of the development of the legal system and the promotion of the rule of law may be critical information for the Secretary-General and the Security Council, for instance in the review of the mission's mandate. The monitoring team should seek to ensure an appropriate mechanism to feed its information and analysis to the Special Representative and into the Secretary-General's reports on the mission to the Security Council. In determining the type of information that is used for these purposes, the supervisors of the monitoring programme need to take into account the impact of any publication on the monitoring team's access entitlements and on the politicization of the monitoring process.

Furthermore, as part of a United Nations peacekeeping operation, the monitoring programme's information may be subject to information-sharing arrangements with other international institutions, in particular the International Criminal Court. Based on the principle of complementarity, the Court may need to make specific assessments of the ability or willingness of a national justice system in a country hosting a peacekeeping operation to prosecute persons accused of crimes under international law in a manner consistent with international due process standards. In such circumstances, the information and analysis of the monitoring programme may be particularly useful to the Office of the Court's Prosecutor. The supervisors of the legal system monitoring programme should know what arrangements the United Nations has made with the International Criminal Court and, where indicated by the particular circumstance of the peacekeeping operation, establish contact with an appropriate representative of the Court.

IV. CASE MONITORING

A. Case monitoring strategy

There are no rigid rules for monitoring cases. It is not possible to foresee the nuances and variations that characterize each individual case. Cases will vary widely in all respects: in terms of the facts, what stage the case is at, the relevant law, the extent and adequacy of the system's response and so on. All these factors will affect what sources of information exist and the selection of techniques to collect the information. As a result, monitors need to decide in each individual case what the monitoring strategy will be. A case monitoring strategy should include: identifying which sources of information are available, in which order these sources should be tapped, which techniques for information collection to use, what facts to elicit, which proceedings should be observed and so on. The formulation of a particular case monitoring strategy will be up to the individual monitors and depend on any constraints on their work. It should be updated and modified throughout the monitoring process, for example, after key interviews, review of the case file and attendance at critical court or other proceedings.

The actual monitoring of cases is highly challenging and involves collecting substantial information from multiple sources, assessing the credibility of statements and evidence, and integrating and analysing the information obtained. The integrity of a monitoring team is based primarily on the accuracy and veracity of its information and its conclusions. Conclusions about violations of international standards by the authorities, or persons acting on their behalf, that are based on insufficient or partially reliable information can severely undermine the credibility of the monitoring programme itself. The more credible the monitoring conclusions of violations of the law, the more likely it is that they can bring about positive changes.

Collecting information from multiple sources makes for more comprehensive monitoring and serves to verify individual sources. The reliability of the information collected depends on the extent to which it is consistent with material collected from independent or unrelated sources. There are three principal ways to gather the information needed to monitor a legal systems case effectively: interviewing; reviewing case files and collecting other documentation; and attending trials or other proceedings.

In some cases, not all these approaches will be available, and only certain techniques can be used to collect information, such as interviewing victims and witnesses and assessing the credibility of the victim's story through witness testimony. However, if a number of sources are available, it is critical for monitors to gather information from every source. For example, detainees' claims that they are unlawfully detained should be verified by a review of their court case files. Likewise, claims by officials, such as prosecutors, police and judges, need to be checked and corroborated. In many cases the simplest way to do this is to review the court or police file for documentation of the fact asserted by the official.

To the extent possible, monitors should make every effort to collect all available information from different sources, using a range of techniques for fact-finding, before drawing any conclusions as to compliance in a case. Monitors should always be able to identify the source of their information and the process used for verification.

B. Interviewing

Collecting information through interviewing is a core monitoring technique. Interviewing victims, including the accused, and witnesses is the most common way to gather first-hand information about a case involving violations of international standards. Interviewing officials directly involved in a case, such as prosecutors, judges, defence lawyers and police officers, is equally important. This can include other actors, such as community elders, in cases that proceed through a traditional process. Interviews of other persons with second-hand information concerning the case, such as victim counsellors or NGOs, can be helpful to assess the credibility of the other information gathered and to develop leads for other interviews.

Monitoring the legal system demands the highest standards of accuracy and credibility of the information relied on. When choosing whom to interview and how to assess the information, legal systems monitors need to recognize that indirect information is less reliable than direct testimony, and be particularly careful of regarding hearsay or indirect information as fact. Widespread allegations of violations or causes of system dysfunction based on rumours, hearsay and assumptions can be common in post-conflict contexts. If such information is repeated by a number of unrelated sources, this may lend it more credence. However, indirect testimony should always be confirmed through other fact-finding techniques, such as reviewing case documentation or police investigations, unless this is impossible.

Gathering accurate and credible information depends on the use of sound interviewing techniques. Such techniques assist in eliciting the necessary information, internally verifying the interviewee's statements, corroborating independent information and creating leads to other sources of information. The techniques used for interviewing will depend on the interviewee and the circumstances of the interview. Some common guidelines exist for conducting any general type of interview, but there are special techniques for interviewing victims, witnesses,

accused persons, Government officials (including judges, prosecutors and police) and other experts or actors with knowledge of the case (such as medical experts, doctors, defence lawyers or other advocates and NGOs).⁹ Special considerations apply to interviews with victims, witnesses and accused persons who are members of vulnerable groups, such as women victims of sexual violence or exploitation, children or the mentally ill.

The monitoring team may consider developing standardized formats for certain types of interviews that are undertaken in all cases or for certain issues. For example, formats may be useful for interviews with detainees or for interviews seeking information solely on the lawfulness of arrest and detention. Although formats cannot be strictly followed due to unforeseeable variations in every interview, they can assist in ensuring consistency of the information gathered in similar cases. Such consistency is important for integrating and analysing information to develop conclusions on trends or patterns of practice.

With or without formats, monitors should be trained in good practices for interviewing particularly vulnerable groups in order to ensure the reliability of the information elicited and the integrity of the monitoring process. There are a number of human rights monitoring guides which detail good practices for interviewing.¹⁰ As legal system monitoring focuses on the way that the system and the institutions within it work, it requires rigorous fact checking and cross-checking against any files, documentation, evidence or other proof of the system's or individual actors' conduct or inaction.

C. Detention visits

Visits to prisons or detention facilities can be a crucial aspect of legal system monitoring. Their purpose is to assess whether detainees are unlawfully arrested and detained and whether they have been given access to justice in the ways provided for by domestic and international human rights law. The pretrial rights of accused persons include the right to humane conditions of detention and to be free from torture, inhuman and degrading treatment. Investigating the use of torture or inhuman treatment may be directly related to the detainee's case, for example, if a confession used in the legal case was a result of such treatment.

However, monitoring conditions of detention and treatment generally is a specialized part of human rights monitoring that is not specifically covered here. Often the International Committee of the Red Cross (ICRC) will undertake visits to assess detention conditions and treatment, as will other human rights monitoring components of the peacekeeping operation. Overlaps in mandate should be addressed by the legal system monitoring team in a cooperative manner

⁹ See Office of the United Nations High Commissioner for Human Rights, *Training manual on human rights monitoring...*

¹⁰ *Ibid.*

to maximize the use of scarce mission resources and minimize confusion and inconvenience for detainees and detention authorities.

However, in many instances, visiting detention centres to collect information will be necessary. The first step is for monitors to request to review the register of the prison. Registers should include important information such as the date of detention, the detaining authority, the dates of review or extension of detention and any trial or other court hearing dates. In addition, registers should have information regarding medical examinations of the detainees. Monitors will probably want to review the register again after interviewing specific detainees to note the information for their cases.

Monitors should interview a prison authority about the functioning of the prison and the prison's interaction with the other components of the justice system, such as the police, other detaining authorities, prosecutors, etc. Monitors should include questions on whether judges or other responsible authorities visit the facility and, if so, how often and what the visits consist of. Particular questions should be asked about the frequency of family or other visits, the detainee's access to the outside world and the provision of medical treatment. Contact information for any doctor or other professional who visits the prison should be noted. Monitors should also ask about access to defence counsel, facilities for defence communication and conduct of counsel. The particular assertions of prison officials should always be checked in interviews with detainees. A general assessment of the number, attitude and conduct of prison guards should be undertaken.

Interviews with detainees should take place only in confidential settings (out of the hearing of, but not necessarily the sight of, prison guards). Monitors should be particularly careful not to place detainees at risk of reprisal from the prison officials for speaking with monitors. Regular monitoring should ensure continual observation of this important issue.

When allegations of torture or other inhuman or degrading treatment while in detention arise, monitors should make sure to ask specific questions about any medical or other treatment provided and about the medical professional involved. Allegations concerning such treatment need immediate verification and, where appropriate, action according to the monitoring programme's protocols. If allegations concern other victims, immediate access to these individuals should be sought.

Accused persons should be interviewed about their criminal cases to assess the lawfulness of their detention and whether their rights to a fair trial have been respected. Most accused persons want to convince monitors that they are innocent and therefore deserve assistance. Monitors should explain that all detainees and accused persons are entitled to these rights regardless of the question of their culpability.

Monitors need to ask specific questions about the details of the arrest and police questioning, the detention of the persons and the criminal case against them, as well as the information they

have received and the opportunities they have to meet their defence counsel in a confidential setting and/or to develop an adequate defence. These inquiries should include asking detainees to show the monitor any written documentation they have been given. Their description of the events should always be checked with their defence counsel and against the information in the prison register and the court or police file. Questions should also focus on whether the detainee, his or her family or others have been subject to pressure, requests for bribes or “favours” or other inappropriate conduct from any justice officials (including prison guards) or any defence lawyer.

Communicating with the authorities to support the release of an unlawfully detained individual can be an important function. Monitors should therefore take immediate action to corroborate credible and serious allegations of unlawful arrest and detention by reviewing documentation on the case and, if necessary and mandated by the monitoring programme’s protocols, take appropriate steps to raise official attention to the case with a view to supporting the individual’s release.

D. File investigations and collecting documentation

There are multiple reasons for reviewing case files of the police, the court and the defence in cases proceeding through the formal justice systems. They include:

- Confirming facts and assertions made by interviewees, such as accused persons and justice officials.
- Verifying the system’s compliance with domestic law and international standards, including the pretrial rights of accused persons in criminal cases (as detailed in article 9 of the International Covenant on Civil and Political Rights and, for juveniles, in article 37 of the Convention on the Rights of the Child).
- Assessing whether the authorities are investigating crimes or processing cases that have been reported or any indications of unequal treatment. (There can be many reasons for a failure to investigate, including inadequate work ethics, corruption, discrimination or inappropriate interference into the process, and all possibilities need to be investigated and analysed.)
- Obtaining information from other persons with knowledge of the case who may be interviewed.
- Preparing for the observation of hearings or trials.

Files will usually have a wide range of documents, including orders of the court or other officials, official decisions and evidentiary documentation, such as statements or medical reports. Monitors should review files in criminal cases to assess compliance with procedural guarantees for the accused under domestic law, compliance with substantive justice issues such as adequacy and legitimacy of investigation by the authorities and timeliness of actions, and compliance with equality of arms and right to defence.

Police files or records of others with the authority to arrest should be reviewed for indications of any basis for an arrest, the circumstances of the arrest and any safeguards provided to the arrested individual, or any other investigative actions undertaken at the police stage. In cases where there has been no formal prosecution, police files can be critical. The police file should reveal what information or evidence the police had that could have led to a prosecution and where the case ended. Such information can be essential for following up cases where the authorities failed to adequately investigate and prosecute alleged perpetrators. For example, there is often a trend in failures to investigate and prosecute incidents of domestic violence in post-conflict contexts. Such trends may be monitored by reviewing the files to investigate the complaints made to the police and the police's investigative actions as well as by interviewing victims, NGOs, witnesses and others, if appropriate.

Depending on the programme's mandate and access entitlements, monitors may be able to review court or police case files but not make copies. So the monitor will need to take copious notes of their contents, particularly names, contact information and important dates, orders and decisions. These notes or exact copies of case files should then be organized, and any gaps in the information should be filled through interviews with officials, medical experts or other relevant actors.

The collection of other documentation in particular cases is possible, but unusual. Under certain circumstances, monitors may have the opportunity to gather critical documentation or assess the physical scene of an alleged violation, such as a private home or a prison cell where torture is alleged to have taken place, and observe the extent to which the physical surroundings corroborate the testimony of the victim or witness. In particular, this may occur if the system is failing to respond to a case. However, as the purpose of legal systems monitoring is to observe the adequacy of the response of the system itself (or the lack of it), the monitoring team needs to be careful not to collect and keep confidential documentation that would otherwise be evidence in a case or to disturb any evidence at a scene that may be the subject of a criminal investigation.

E. Observing trial and investigatory proceedings

Where cases are being processed through formal justice institutions, directly observing legal proceedings is essential to drawing conclusions on the legal system's compliance with national law and international standards.

All proceedings should be monitored to ensure compliance with both the procedural and substantive aspects of justice based on national law and international standards. Criminal proceedings can be monitored to assess a number of human rights issues, including most commonly compliance with the national law and fair trial standards as articulated in article 14 of the International Covenant on Civil and Political Rights and, for juveniles, article 40 of the Conven-

tion on the Rights of the Child. Other concerns may be observed such as a failure to adequately prosecute the accused, indicating a bias and concerns of impunity. These concerns can include inappropriate or unequal treatment of victims and witnesses by the court, particularly in sexual offence cases. In criminal and civil proceedings, one of the fundamental principles is equality before the law and equal treatment. Particularly in cases involving women, proceedings should be assessed for compliance with this principle. In civil cases, the independence and impartiality of the tribunal are equally imperative.

All proceedings are important. Monitors should plan to be present at all of them, including any pretrial hearings and continuing trials. However, in complex cases, there may be several pretrial hearings and it may not be possible to attend them all. Identifying the hearings that may be important, such as those of critical witnesses or the victim, and attending these are judgements that monitors need to make based on the information they have—and should form part of their monitoring strategy. Before attending, monitors should already have obtained significant information about the case from interviews of the parties to the case, the accused and the prosecutor, reviews of the case file and so on.

When attending a proceeding, monitors should sit in a position that reflects their independence and impartiality, that is, a position that clearly demonstrates that they are not a party to the proceeding. If appropriate, monitors may want to have their role explained to all those present, particularly in pretrial hearings which are not open to the public. They should ensure that they are able to hear and see everything.

Monitors should take notes of everything that is said and presented during the proceedings. This practice demonstrates their professionalism and indicates that an independent record of the proceedings is being made. As there may be no formal record of the details of such proceedings in post-conflict justice systems, monitors must ensure that their notes are comprehensive and accurate.

Conduct outside of the courtroom, before and after the trial or hearing, can be important in terms of assessing the case as a whole. This conduct includes interactions between prosecutors and witnesses, defence lawyers, police officers, victims and witnesses, accused persons, family members, between judges themselves and between judges and prosecutors. Monitors should be constantly observing such interactions and noting anything that raises concerns.

V. ANALYSIS, REPORTING AND RECOMMENDATIONS

A. The value of reporting

Information has limited usefulness unless it is disseminated. In legal system monitoring, facts of case proceedings should be collected, actions of the authorities analysed against the domestic law and then the case as a whole viewed against the relevant international standards. These different aspects of monitoring should all be contained in a report that lays out clearly the basis for the conclusions about any violations of international standards by the justice system or its institutions. Specific recommendations should be made to remedy them and prevent future occurrences. The value of these reports naturally depends on the integrity and coherence of the information, the accuracy and depth of the analysis, and the relevance and practicality of the recommendations.

Reports should provide a comprehensive picture of the strengths and weaknesses of the functioning of the justice system. This means that they should clearly detail the positive steps that the authorities are taking or particular areas where compliance with recognized standards is relatively good. Acknowledging such achievements or positive practices reflects well on the integrity and sincerity of the monitoring team and reinforces the maintenance of the system's good practices. An example of this is the inclusion, in a report documenting widespread violations of pretrial rights, of the conclusion that detainees have consistent and mostly unfettered access to the outside world and family in line with international standards.

B. External report publication and dissemination

Publishing external monitoring reports can be a sensitive process. Special considerations apply in determining whether a report should be made public or remain internal (confidential) in so far as it is distributed only to the Government and other relevant justice actors or authorities. The mandate of the monitoring programme should indicate whether it is responsible for publishing public reports. Such an option can provide the team with certain leverage with the authorities and, more importantly, it can be a useful tool for raising public awareness about the justice process and human rights. To appropriately fulfil these functions, public reports need

to be formulated carefully and differently than those purely for Government consumption. In particular, they should be drafted with an awareness-raising perspective, providing technical information and analysis in plain language and visual formats which are attractive to laypersons. Any public reports should be sent to the relevant Government institutions for response and comment before publication, and changes should be made if appropriate.

It is important, where appropriate, for external reports (whether public or internal) to be provided to all relevant actors and institutions within the justice system and related to it, for example, the justice ministry, the supreme court, the interior ministry, the defence ministry, the attorney general, the president's or prime minister's office—even if the reports do not directly address violations by some of these particular components of the system. It is also important to provide these reports to the donor community. The widespread dissemination of reports can, in itself, reinforce both the interconnected nature of a properly functioning system and the responsibility of all actors within the system to ensure compliance with international standards. The timing of publication or dissemination of any reports needs to be handled carefully and involve a consideration of the potential impact on the individual cases mentioned in them should they still be proceeding through the justice system.

A simple procedural mechanism for the dissemination of reports to, and follow-up meetings with, these institutions should be established. Ensuring follow-up on reports, and, in particular, on the implementation of the recommendations with all relevant actors and institutions in the peacekeeping context is critical and can form the basis for the monitoring programme's overall success.

C. Internal reporting

Internal reporting methods within the monitoring programme and peacekeeping operation should generally be developed to ensure that monitors are collecting the same types of information, verifying that information and using a consistent legal analysis. Standardized requirements contribute to a commonality of approach, consistency and accuracy of information. Critically, they facilitate the comparison of similar cases to identify trends. Monitors' internal reports are vital as they usually form the basis of the programme's external reports.

The monitoring programme should establish a regular internal reporting schedule. It is important, however, that monitors are required to write only reports that can be used, and not to create a substantial amount of unread and unnecessary documents. Legal monitoring reports should *not* be summaries of cases, as is often the case in human rights monitoring programmes. Reports on legal monitoring need to be specific in their presentation of the compliance of the justice system with law and standards based on a comprehensive examination of the facts, evidence, proceedings and so on. It is best for monitors to complete their internal reports soon after collecting and verifying the information.

For case monitoring, it is recommended that monitors keep complete files containing all the information collected, interviews, case file reviews, observations of proceedings and other documentation or information, and an internal report (or series of reports) compiled on the individual case.

One example of an internal report is an individual case monitoring report which reflects the monitoring of the entire case, entailing an analysis of the treatment of the case as a whole, based on the monitor's complete investigation. A case report should contain basic elements such as background, facts of the case, case analysis, conclusions, any interventions made and comments or recommendations. The case analysis should indicate the domestic law (standards used or standards missing from domestic law) relevant to the case, apply the facts of the case to domestic standards (Did the facts support the use of the law? Was the law ignored or violated? Etc.) leading to conclusions as to whether these constitute a violation of international standards or otherwise a failure to meet standards. Of course, the content of the report will vary considerably and depend on the particulars of the case and also on its nature as a whole (namely, whether it has proceeded through the formal justice system or the informal mechanisms, or whether the justice sector has failed to respond to it). A case monitoring report can be written before the case comes to a final conclusion, for example, to cover violations of pretrial rights up until indictment. Once cleared by monitoring supervisors, these reports may be disseminated outside the programme as a part of interventions in individual cases with the authorities, if appropriate.

D. Individual case or issue reports

An external individual case or issue report should be compiled in significant cases or on substantial issues and published soon after the conclusion or at some other specific stage (e.g., once the verdict is pronounced, during a parliamentary review of a new piece of legislation). These reports analyse the authorities' compliance with international human rights standards in an individual case.

They are especially useful in cases that have a particular significance for society and reflect the challenges of ensuring justice in the transitional period or after the conflict—commonly known as landmark cases. Obvious examples are prosecutions for genocide, war crimes or crimes against humanity or first prosecutions for significant cases of trafficking, incest or property disputes.

Individual issue reports can highlight *de jure* violations concerning existing or draft laws. For example, the report may analyse a law going through the parliament for its compliance with international standards and highlight the ways in which it violates human rights norms.

Because of the nature of individual reports, naming names and giving specifics of the case is what lends them weight. Recommendations can be targeted at remedying violations in the

particular case or, if appropriate, in similar cases. In issuing reports on draft legislation, the recommendations should lay out the specific ways in which the draft law can be brought into compliance with international standards. Decisions on the timing of these reports are important and should take into account their potential impact on the process in question, particularly on court cases if there may be appellate proceedings.

These reports are similar to an individual case report compiled by the monitor, except that they provide more synthesized information, and more detailed analysis and recommendations. The format of an external individual case or issue report should vary from the internal report by detailing first the international standards and then the domestic law at issue. In case reports, these sections should be followed by the facts and analysis of the particular case and then recommendations.

E. Thematic reports

A common type of legal systems monitoring report is a thematic report which centres on a comparison of the conduct of similar cases and draws conclusions on a set of systemic problems or violations (for example, rights in detention, juveniles in serious crime cases, women defendants, the conduct of sexually related cases, the administration of justice, the treatment of property cases concerning returnees). These reports can be formulated at any time when a suitable number of similar cases have been monitored and the violations documented. Thematic reports involve a more sophisticated analysis than individual reports, and they are more difficult to write. Formulating a thematic report entails going through a substantial number of individual cases, each with its own analysis of violations in law and practice, and identifying trends in these cases.

These types of reports do not focus on naming names, but on the general conduct of groups of cases and identified patterns. Accordingly, they can be more appropriate for groups of cases that are highly sensitive or involve considerable security concerns. Although the facts of the cases remain important, pseudonyms should be used for the victims and general titles for the actors, such as police officer, prosecutor, judge, community elder or governor. In most instances, other identifying factors such as the location where certain cases arose should be included to indicate regional or other similarities or distinctions.

These reports can be particularly useful in highlighting both de jure and de facto violations. Some examples of violations that can be covered by thematic reports are: trends in cases where the system fails to respond (e.g., property crimes and civil cases are reported by returnees but the cases are not investigated, prosecuted or taken through the system); identifiable widespread systemic problems in ensuring certain rights (e.g., lack of defence counsel and no provision for detainees to develop a defence); absence of a law to prosecute for a commonly occurring offence (e.g., the law does not provide for the prosecution of domestic violence);

a law exists but is inadequate to address a commonly occurring crime (e.g., the law covers smuggling but not trafficking); a widespread practice of not enforcing the law (e.g., failure of courts to review the basis for pretrial detention according to law); the use of other practices that supplant the use of law in groups of cases (e.g., domestic violence is resolved by informal customary methods rather than through the justice system); widespread unlawful arrests and detention and so on.

Case tracking information can be an important aspect of thematic reports and serves to support conclusions drawn. For example, if the theme is pretrial rights, the statistics on lengths of pretrial detention should support allegations that prolonged pretrial detentions are taking place.

The conclusions of thematic reports are based on the identification of widespread trends, patterns and practices. Accordingly, the recommendations in thematic reports should be broader than those in individual reports and include ways to systemically address violations, issues and concerns.

F. Periodic reviews

Periodic monitoring reviews of the justice system can be published to cover a particular time period, such as every 6 or 12 months, to provide an overall picture of the functioning of the justice and related systems and track the development of the justice system over time. This type of report can provide a critical tool to highlight progress made or areas of declining compliance, the impact of policy, legal or other developments over the time period monitored, and the extent to which recommendations made by the monitoring team in previous reports have been implemented. The use of indicators and statistical information, including quantitative and qualitative data and the results of surveys, in these reports is very important.

These reviews usually cover the work of the monitoring team within that period and include its conclusions on the general compliance of the system with international standards. Their preparation is similar to that of thematic reports, but they take longer due to their comprehensive nature.

Periodic reviews should include:

- General developments in the justice system, such as new legislation or policies, newly established courts, newly appointed judges
- Case tracking information during the time period, any trends supported by statistics
- Cases monitored and violations or issues observed and documented within the period (essentially a collection of the substance of thematic reports)
- Reviews of any reform initiatives or actions undertaken by authorities or others in response to concerns raised by monitors

- Assessments of the impact of those actions, both on individual cases and on systemic problems
- Assessment of the progress made by the justice system in complying with international standards using indicators and other benchmarks
- Recommendations for further action

G. Formulating recommendations

Recommendations which lay out ways in which identified problems may be realistically addressed can be the most critical aspect of the legal systems monitoring report. In short, they should be constructive and practical. Ideally, specific recommendations should be formulated for each of the concerns or issues raised in the report. In general, the scope of the recommendations as a whole should be broad enough to address all aspects of ensuring justice in line with international standards. For example, recommendations may be targeted at:

- Remedies for egregious violations or unethical conduct in particular cases or groups of cases
- Legal reform initiatives that bring domestic law into compliance with international law or create legal remedies to provide a human rights-based response (the formulation of new laws or reform of old laws or internal regulatory and administrative frameworks)
- Policy reform initiatives, governmental plans and strategies, the creation of Government structures and positions, task forces and working groups to address areas in need of reform in the justice sector
- Institutional or programmatic development, new courts (e.g., juvenile, family) and alternative dispute mechanisms and institutions (e.g., property and housing directorates), ministries and departments, health and medical forensic institutions, social and economic institutions, specialized detention facilities, including juvenile centres, and witness protection facilities or programmes
- Mechanisms of accountability, discipline, professional ethics (e.g., internal affairs components, judicial inspection units, anti-corruption commissions), internal accounting and monitoring mechanisms, bar associations, codes of ethics, standards of practice
- Training and awareness-raising, academic curricula development, capacity-building initiatives, human rights training programmes, public information campaigns, advocacy and media institutions
- Services and treatment development (psychosocial, legal, social and medical), funding and support of non-governmental or governmental social and child-protection services and networks, shelters and alternatives to detention
- Administrative support systems, structural mechanisms or resource development and allocation to overcome obstacles to human rights compliance (transcription services, renovations of prisons, courts, police stations, hiring and training of clerks, security services, etc.)
- Legal education and police training, capacity-building and training programmes and institutions for judicial, police and legal actors to enhance knowledge of domestic law and international law

- Special or hybrid courts, institutions and mechanisms (tribunals, commissions) that support the justice system, or extend it, and thereby improve compliance

Recommendations may be addressed to all sectors of society and all actors, including non-governmental actors, intergovernmental actors, donor Governments and communities. It is important that they cover essential independent components of the system that assist in its functioning, such as the stimulation of an active defence bar, the creation and funding of a wide range of services to victims, and an increase in medical and forensic expertise.

Recommendations should be clear and comprehensible. They should address each authority or actor by name, explain the actions that should be taken and provide a clear time frame for those actions. Due to the holistic nature of justice systems, there should be corresponding recommendations for all components so that the overall functioning of the system is improved.

In order to be meaningful, recommendations should reflect the reality of the situation and take into account the practical needs of officials in terms of achieving compliance with recognized standards. Although recommendations on such matters as resource allocation and practical necessities (building reconstruction, computers, case files, etc.) will not directly improve compliance with international standards, they are essential for making compliance more likely.

The impact and consequences of recommendations must be thought through clearly and completely, with consideration given to all possible requirements for implementation and the results. This includes realistically assessing the financial and budgetary implications of the recommendations, individually and taken as a whole.

Moreover, international standards concerning human rights and the administration of justice are complex, and what may seem to provide a remedy for one situation may well give rise to other concerns. For example, in recommending the creation of a special court, related matters—such as equality before the law, treatment and processes for appeals—must be taken into account. Similarly, in the development of policy recommendations, potential consequences must be addressed. For example, the imposition of stricter policies on borders to control trafficking in human beings has shown to potentially result in infringements of women's rights to travel and freedom of movement. In sum, all possible human rights-related consequences should be anticipated in the development of recommendations.

H. Follow-up and support to other rule-of-law aspects of peacekeeping

The release of reports and recommendations requires follow-up consultations with the authorities and with other relevant actors, including civil society, the media, educational institutions and donors. This follow-up serves to explain the monitoring process and its findings to relevant actors, including the public if relevant, and to support the implementation of recommendations

for reform initiatives. As previously mentioned, the extent to which the report is recognized and the recommendations are implemented should be integrated into the monitoring programme's priorities moving forward.

The primary responsibility of a legal systems monitoring programme is to monitor, report and make recommendations. The programme is, however, uniquely positioned to support other aspects of the peacekeeping mission in its joint efforts with the Government to undertake reforms in the area of justice. This can take place through the provision of up-to-date information on the justice system to other components of the operation and its partners, participation in working groups, task forces and other mechanisms of coordination, strategic and action planning and, if appropriate, policy development, support to training efforts, particularly through the provision of concrete case examples and information from which effective and meaningful training materials and approaches can be formulated, and through comments on draft legislation and regulations to ensure conformity with international standards and cohesion with domestic law and practice. Supervisors should plan for the monitors to participate in these activities, where necessary and relevant, and should ensure appropriate time and resource allocation which does not substantially impact on the success of the monitoring programme.

ANNEX

SUGGESTED GUIDELINES FOR MONITORING THE JUSTICE SYSTEM IN A PEACEKEEPING OPERATION

The following are guidelines for peacekeeping operations to follow in attempting to monitor and report on the local legal system. They are not rigid rules, but rather seek to orient and guide a legal system monitoring team and its interaction with representatives of the legal system and with international donors. Their underlying principle is that the operation's primary objective regarding legal reform is to reinforce the justice system in its functioning, not to attempt to replace it with the operation's own actions.

1. A monitoring programme should have representatives at the headquarters and each regional or field office. The headquarters should have a programme chief and at least one reporting and analysis officer. Each regional or field office should have designated monitors who are responsible for evaluating the performance of the judicial system in the area covered by the office. The monitors should be lawyers, ideally with experience as practitioners in a judicial system and in working in a post-conflict environment.

2. The chief of the programme and each of the field monitors should meet every local judicial official and legal actor in their area of responsibility and introduce themselves and explain that they will be observing the workings of the justice system with the goal of identifying ways to improve and reinforce the administration of justice. The mandate of the monitoring programme should be clearly explained to all local stakeholders and, based on this, the extent of access to documentation and information should be determined. The tone should not be confrontational or judgemental, but rather one of concern, interest and willingness to help. The monitors should also regularly ascertain the views of local human rights or other organizations about how the justice system functions: its weaknesses and problems or its strengths and successes.

3. The chief of the programme should ensure that all monitors have the basic legal texts and an understanding of the laws and the history of the legal system. The basis for the analysis of the legal system monitoring team should be compliance with the domestic law and its compliance with international standards for the administration of justice. Systems should be established at the headquarters and field levels to support a regular pattern of identifying and tracking cases entering and proceeding through the system, attending court sessions, and talking to judicial officials and local legal actors and organizations.

4. Determining the legality of arrests, the judicial status of prisoners and their access to justice must also be included in the work programme. If the operation contains an inter-

national police component (United Nations Civilian Police (CIVPOL)) and/or prison officers, then lines of communication, including regular sharing of information, must be established and maintained with them.

5. The monitoring team, after gaining an overview of the system, should select priority types of cases, issues or implementation of legislation for all monitors to follow systemically. The priorities should be based on an analysis of key challenges within the system, particularly with regard to ensuring law and order in the post-conflict environment and the political situation and ramifications of cases for the peace or transitional process. Such cases could involve prosecutions for serious human rights abuses or violations of the laws of war. These priorities should be regularly reviewed and modified to reflect changes on the ground and to move the programme's analysis to other issues. The monitoring team should not attempt to cover all courts and all cases within the system at one time.

6. Field monitors should be responsible for regularly sending standardized information and analysis to headquarters. Reporting templates can facilitate standardized information collection. The headquarters should be responsible for synthesizing the reports, highlighting key issues, patterns and trends, and incorporating this into the operation's regular reporting (daily, weekly or monthly). Once sufficient information is gathered to draw systemic conclusions on certain cases, concerns or themes, the monitoring team should be responsible for publishing thematic or periodic review reports either for judicial and Government and international donor consumption or, if appropriate, for the public at large.

7. The chief of the monitoring programme should have regular meetings with the chief of the judiciary, the minister of justice and other officials in the Government to discuss issues raised by the legal system monitors. The team should seek to provide immediate feedback to the minister and the chief of the judiciary based on information from the field. In the field, monitors should, at appropriate moments depending on the judgement of the chief and the head of the field office, set up meetings with local judicial officials and legal actors to convey the operation's concerns, questions or suggestions. This should be done in a way that seeks to reinforce the proper application of the law.

8. The monitoring team needs to be in a position to assess for the peacekeeping operation and the international donor community whether ongoing problems in the administration of justice arise principally from a lack of will or from outside interference/intimidation, or from a lack of knowledge or resources necessary for judges and legal actors to fulfil their obligations. This is valuable as various training efforts aim first of all to improve the capacity and performance of judicial officials and legal actors. The monitors will be uniquely placed to evaluate whether the training of judges and prosecutors is taking root or whether adjustments need to be made.

9. It is important to note any progress in the administration of justice. If the courts are working more efficiently, if judges are truly free to decide cases on the merits, and if the prosecutors and police are following the law on arrest and detention, then the peacekeeping operation should make this known. If the system has improved in some aspect, then recognizing this will increase the operation's credibility and relationships because it cannot be accused of only highlighting problems or criticizing the host Government. More importantly, the operation should seek to reinforce those in the Government, in the judiciary or legal community desiring change and encourage them to take even further measures to improve the administration of justice.

10. Periodic reports on the justice system should reflect the operation's assessment of the needs of the legal system, personnel and the impact that assistance efforts are having, positive or negative. Reports should focus on substantive issues and seek to identify the problems that prevent the justice system in each region from functioning properly. Reports should contain specific examples with as much detail as possible to describe the real state of the justice system. *Within the framework of the priorities of the monitoring programme*, some potential issues to be spotlighted in the periodic or thematic reports are:

- (i) Lack of trained judicial officials; assess the impact of any training given to judicial officials: performance improved, same, worse. How? Why? Try to identify reasons for any change or failure to change.
- (ii) Lack of infrastructure, materials or equipment necessary to perform duties. Are the materials appropriate to the environment, e.g., have computers been sent to a court that does not have electricity? Are there vehicles or are they in need of repair?
- (iii) Lack of will to fulfil obligations, conduct investigations, create dossiers, show up for work on time.
- (iv) Interference by the military, police, local officials or other Government agents in judicial matters.
- (v) Corruption/extortion, bribery or other inducements intended to affect a judicial decision.
- (vi) Evidence of bias (ethnic, religious, racial, national or social class) in any judicial decisions. Are people from different groups treated differently for the same acts/offences?
- (vii) Threats against judicial officials, from whom and for what reasons.
- (viii) Access by defence lawyers to their clients: immediate, in conditions respecting confidentiality.
- (ix) Are arrest warrants legally issued and executed? Is it possible to challenge pretrial detention decisions in a court and to have this decision reviewed by a higher court? Are pretrial or pre-charge detention periods longer than the law allows and, if so, why?
- (x) Timeliness and conduct of trials and other judicial proceedings.

- (xi) Number of judges and prosecutors serving, vacancies, transfers and salaries and working conditions and number of available lawyers to defend the indigent (structures for legal aid?).
- (xii) Appropriate use of Government resources for the court system and comparative analysis between budgetary allocations to the ministry of justice and the judiciary as opposed to other Government functions.
- (xiii) Involvement of and oversight by the authorities, such as the ministry of justice or the chief of the judiciary. Does anyone from the ministry of justice ever come to inspect the courts, prosecutor's office or prisons? Is there any sign of the inspector general from the justice minister exerting some control or oversight over judicial officers' performance? Have any judges, prosecutors or lawyers been punished for failing to perform their professional duties?

11. The monitoring team should gather and use statistics whenever possible to illustrate problems, trends or improvements in its reports. Ideally, it should identify specific indicators to measure any progress made in the administration of justice. Public surveys can be very useful to evaluate and track the perception of the justice system by the population at large.

12. Reports should combine a diagnosis based on a comparison of a number of similar cases or issues with a proactive, problem-solving approach, and include practicable and appropriate recommendations to address the problems identified. Identifying the root causes of the deficiencies should usually take priority over focusing on incidental manifestations of malfeasance. The recommendations made in reports require follow-up by the monitoring team. The development of programmes by the peacekeeping operation, the donor community and technical organizations that are feasible and achievable, based on available resources, should also be an outgrowth of solid reporting.

