



# Trial-Monitoring

*A Reference Manual for Practitioners*

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# Foreword

OSCE participating States have undertaken a number of significant commitments to comply with a set of rules and principles in the administration of criminal justice. Foremost among these is the commitment to ensure the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal. In order to effectuate this commitment and others relating to fair trials, OSCE states have agreed to permit trial-monitoring.

Trial-monitoring is widely regarded as a powerful tool to support the process of judicial reform consistent with domestic and international guarantees of a fair trial. It is used across the OSCE area today by a host of programmes staffed by professionally trained monitors, both domestic and international. By systematically gathering reliable information about how trials are conducted, these programmes aim to assist participating States in developing functioning justice systems that adjudicate cases consistent with the rule of law and international fair-trial standards. Like any other tool, trial-monitoring has its advantages and limitations. Understanding them will help organize trial-monitoring programmes that deliver useful and reliable results, and avoid poorly conceived activities.

This manual is intended for practitioners involved in trial-monitoring. It accumulates the OSCE experience for the benefit of professional communities within and beyond the OSCE region. Anyone interested in setting up and running a trial-monitoring programme, or simply learning more about trial-monitoring, will find here useful information, advice, and lessons learned.

The concept of this manual began to take form at several trial-monitoring meetings organized by ODIHR between 2002 and 2005. These meetings focused on monitoring methodologies, common operational dilemmas, and specific strategies to assist OSCE field operations and institutions define and achieve their trial-monitoring objectives. The experience of these meetings was that, while programmes operated in different domestic contexts, the operational challenges involved in running effective trial-monitoring programmes were often much the same. This manual has taken stock from these meetings. It also relies on a detailed assessment of several OSCE trial-monitoring programmes, provides examples of common approaches to operational issues, and contains many good practices. The manual includes information available through March 2008. As always, ODIHR is looking forward to receiving feedback and input that would help us improve this publication.

ODIHR would like to express its appreciation to Thomas Chaseman, the key expert responsible for drafting this manual. The assistance of Katy Thompson is also appreciated. ODIHR would like to thank the OSCE field operations for continued assistance and support in relation to this undertaking. Finally, ODIHR is grateful for the gener-

ous contributions of the Governments of Germany, Norway, and the United States of America, which made this manual possible.

A handwritten signature in black ink, appearing to read 'C. Strohal', written in a cursive style.

Ambassador Christian Strohal  
ODIHR Director

# List of Abbreviations

ABA-CEELI	American Bar Association-Central European and Eurasian Law Institute ( <i>now known as ABA-ROLL, i.e., American Bar Association Rule of Law Initiative</i> )
CoE	Council of Europe
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EU	European Union
FBiH	Federation of Bosnia and Herzegovina, Bosnia and Herzegovina
ICTY	International Criminal Tribunal for the former Yugoslavia (ICTY)
ICCPR	International Covenant on Civil and Political Rights
LSMS	Legal System Monitoring Section, OSCE Mission in Kosovo
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Co-operation in Europe
OTC	Office of the Prosecutor, International Criminal Tribunal for the former Yugoslavia
RS	Republika Srpska, Bosnia and Herzegovina
UN	United Nations



# Introduction

A number of OSCE participating States, in particular the states of the former Soviet Union and of South-Eastern Europe, continue to receive assistance with the development of functioning justice systems that adjudicate cases consistent with the rule of law and international human rights standards. In recent years, OSCE trial-monitoring programmes have proven to be a valuable, multi-dimensional tool to support and even drive the process of judicial reform, and to assist participating States in developing such functioning justice systems.

By increasing the transparency of the judicial process, trial-monitoring is itself an exercise in support of the right to a public trial. When organized as a long-term programme, trial-monitoring is a unique diagnostic tool that enables assessment of the functioning of an important part of the justice system, acting as a spotlight to identify areas in need of reform while also providing a direction for these reforms. Trial-monitoring programmes have also proven to be an effective vehicle to train and engage local lawyers and organizations in the process of justice reform, thereby increasing their capacity in the long term.

Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (Copenhagen 1990), para. 12: “The participating States, wishing to ensure greater transparency in the implementation of the commitments undertaken in the Vienna Concluding Document under the heading of the human dimension of the CSCE, decide to accept as a confidence-building measure the presence of observers sent by participating States and representatives of non-governmental organizations and other interested persons at proceedings before the courts as provided for in national legislation and international law ... .”

## Purpose, scope, and focus of the manual

The purpose of this manual is to serve as a resource for practitioners and representatives of international and domestic organizations, professional associations, and other groups interested in developing a trial-monitoring programme to support justice reform. It provides such groups with the principles and guidance needed to organize and operate a trial-monitoring programme. Based directly on the experiences of 12 OSCE field operations and of ODIHR, it shares field-tested strategies and techniques to enhance the capacities and effectiveness of trial-monitoring programmes. It is not a guide to international fair-trial standards, nor does it suggest how to assess an individual proceeding to determine compliance with such standards.<sup>1</sup> This manual

<sup>1</sup> For a list of published materials providing information on international fair trial standards generally, see Section 7.3 “Legal reference materials”, footnote 18.

begins from the assumption that many programmes will focus on fair-trial standards and related domestic laws, and it aims to provide guidance on how to develop, organize, and support a monitoring programme.

Trial-monitoring takes different forms. Most commonly, it is known as a tool for monitoring an individual case, usually a highly politicized one, for compliance with international human rights standards. The focus of this manual, however, is on implementing a comprehensive trial-monitoring programme to carry out a systematic assessment of parts of the justice system, as this reflects the predominant purpose of OSCE trial-monitoring programmes. While contexts are discussed where trial-monitoring may best serve to provide international oversight where serious violations of human rights and fair-trial standards are suspected, trial-monitoring is first and foremost discussed as a long-term activity that will support justice reform. To this end, special attention is paid to organizing programmes in co-operation with the host state and in partnership with domestic organizations to ensure that trial-monitoring is part of a wider process that will result in lasting reforms.

The focus of most OSCE trial-monitoring programmes has been on monitoring criminal justice rather than civil or administrative justice, and the manual reflects this emphasis. However, the practical advice and tools the manual provides will still be of use for those who are considering organizing any form of trial-monitoring exercise, including civil or administrative justice or cases with strong political overtones or human rights concerns.

The focus on trial-monitoring as opposed to monitoring the entire legal system reflects a primary focus on those stages and aspects of the criminal justice process that involve the judiciary in the public phases of court proceedings. This focus not only correlates with an emphasis on judicial reform and the right to a public trial, but also reflects a methodology that places emphasis on direct observation rather than information-gathering techniques that rely on third-party information. Strategies relating to gaining access to court documents and observing closed judicial hearings are also addressed as a means of expanding direct monitoring activities where consistent with the purpose and focus of individual programmes. On the other hand, for purposes of this manual, the direct monitoring of investigative proceedings, arrests, and detention facilities are largely excluded, as they often require special access agreements to monitor directly or reliance on secondary information such as interviews. It is recognized that this may limit the issues that a trial-monitoring operation may assess using the principles and techniques presented in this manual. However, the advantages of this approach are many, including wider acceptability of a monitoring methodology premised upon international law and not based on special rights of access that is capable of being implemented by any organization.

## Content and organization of the manual

The manual is divided into four sections. Section I, “Overview”, provides an introduction to the general principles underlying OSCE trial-monitoring programmes and the capacities of such programmes to support justice reform. After this initial overview,

the remaining three sections and related chapters correspond generally to phases in the organization and operation of long-term trial-monitoring programmes.

Section II, “First steps and initial considerations”, addresses the planning phase of a trial-monitoring programme in order to assist the organizer in making initial decisions regarding the focus and structure of the programme. In this section, Chapter 2 discusses the importance of conducting a preliminary assessment to evaluate the appropriate focus, scope, and timing of a monitoring operation. Chapter 3 discusses and compares the features of different institutional models for structuring a programme based on the OSCE experience. Chapter 4 provides an overview of the operational structure of a trial-monitoring programme. This is aimed at staffing the programme to fulfil anticipated operational demands.

Section III, “Implementation”, addresses operational and organizational issues that need to be addressed in the course of implementing a programme, including areas that require the development of internal and external capacity and operating procedures. In this section, Chapter 5 presents the critical issue of access, including methods to increase overall acceptance of the programme among local actors, as well as strategies to secure access to individual cases, case information, and other proceedings. Chapter 6 addresses internal reporting and information management, a subject of particular importance to all programmes. Here, a wide variety of topics are addressed, from the development of an efficient case reporting system to establishing an information management system that will support the process of reporting. Chapter 7 addresses other procedures that must be established to ensure programme integrity, including field support mechanisms to support monitors and build local capacity.

Section IV, “Public reporting and other advocacy activities”, addresses the wider challenge of information dissemination and advocacy. Chapter 8 provides an overview of public reporting, including the function of different types of reports. It also addresses the process of drafting and issuing public reports. Chapter 9 address advocacy issues more generally from the perspective of seeking to incorporate the monitoring into wider processes of reform by strengthening links with local authorities and stakeholders. Finally, an appendix provides basic information on OSCE programmes for further reference, including an overview of the focus and singular features of these programmes.





**Section I**

# Overview



## CHAPTER 1

# Trial-monitoring: purposes and basic principles

### 1.1 Trial-monitoring – a multifaceted tool

As states, civil society groups, and international organizations seek to enhance the fairness, effectiveness, and transparency of judicial systems, trial-monitoring programmes may serve as a multifaceted tool in this process. To maximize the effectiveness of this tool, organizations must be aware of the different capacities of trial-monitoring and design a programme that will be most responsive to the needs of a particular domestic context. The capacity of a trial-monitoring programme may be conceptualized in the following manner.

#### *A diagnostic tool to support justice reform*

A trial-monitoring programme is a diagnostic tool to collect and disseminate objective information on the administration of justice in individual cases and to draw conclusions regarding the broader functioning of the justice system. Through focused observation, trial-monitoring programmes systematically collect information about practices and conditions that prevail in the justice system. In the dissemination of information collected, trial-monitoring programmes provide objective findings and conclusions for the consideration of all stakeholders. A programme's recommendations and advocacy efforts also guide and influence state authorities, officials, and other stakeholders to take action and make reforms that are responsive to these conclusions. In this way, trial-monitoring programmes enable an assessment of the functioning of parts of a judicial system to proceed upon a foundation of fact while also providing a direction for justice reform efforts.

#### *The exercise of the right to a public trial*

At its most basic level, the act of monitoring a trial is itself an expression of the right to a public trial and increases the transparency of the judicial process. In individual cases, the exercise of this right may serve to improve the effective and fair administration of justice through the presence of an observer representing the public interest. Over time, trial-monitoring programmes raise awareness of the right to a public trial within the judiciary and among other legal actors, opening the door to wider awareness and acceptance of international human-rights and fair-trial standards.

### *A capacity-building vehicle*

As a capacity-building activity, trial-monitoring provides a vehicle to educate and train local lawyers on international standards and domestic law. By hiring local lawyers as monitors and legal advisers, programmes provide interested legal professionals with an opportunity to indirectly engage in the legal reform process. Programme partnerships and the facilitation of domestic monitoring groups also increase the capacity of interested local organizations and networks to engage in monitoring independently or as partners in a trial-monitoring programme. In this way, programmes may facilitate the creation of a local monitoring capacity that will survive beyond the completion of an organization's own programme.

## **1.2 Basic principles underlying OSCE trial-monitoring programmes**

### *1.2.1 Principle of non-intervention in the judicial process*

The principle of non-intervention underlies and informs the trial-monitoring conducted by all OSCE programmes. The principle of non-intervention derives from the fundamental precept that an independent judiciary is the ultimate authority responsible for maintaining the rule of law. This principle requires that all trial-monitoring programmes respect and enhance the independence of the courts through their design and the activities of the monitors.

Trial-monitoring programmes should therefore avoid interaction with the judiciary, as this can easily undermine the exclusive decision-making authority of the court. Even where objectively fairer outcomes in individual cases might result from interventions, such interventions have the consequence of compromising the judiciary's independence, thereby undermining the rule of law and a system based on fair-trial standards.

In practice, the application of the principle of non-intervention to all trial-monitoring activities is not always straightforward, and there are differences in approach as to how this principle is applied. Nevertheless, it is commonly agreed that non-intervention means no engagement or interaction with the court regarding the merits of an individual case or attempts to indirectly influence outcomes through informal channels. As a result, all OSCE programmes prohibit such activities.

It is also generally agreed that the principle of non-intervention should not serve to limit public criticism of the criminal justice process, nor does it require withholding conclusions regarding problematic practices or procedures. Such conclusions do not improperly interfere with the court's execution of the laws in individual cases, but provide information regarding overall functioning of the system. Similarly, programme advocacy is directed towards institutional change and not towards achieving specific outcomes in individual cases. Therefore, non-intervention does not equate to an absence of criticism, but to criticism directed at promoting institutional reform.

The principle of non-intervention is most tested in those domestic contexts where serious fair-trial and human-rights violations are pervasive. In such situations, the government may be opposed to reform and may not in fact allow the judiciary to function as an independent institution. In such circumstances, monitoring trials for the purpose of supporting long-term reform consistent with the rule of law is unlikely to work.

### *1.2.2 Principle of objectivity*

The principle of objectivity requires that trial-monitoring programmes accurately report on legal proceedings using clearly defined and accepted standards without party or issue bias. The principle derives from the utility of trial-monitoring as a diagnostic tool and the need to produce accurate and reliable information regarding the functioning of the justice system. The principle also serves to encourage the acceptance of a programme's findings, conclusions, and recommendations among the broadest group of stakeholders by minimizing the perception of bias.

In practice, the principle of objectivity seeks to align the programme with the values of an independent judiciary and the standards and rules by which the criminal justice system should operate. To achieve this goal, when reporting, findings must be based upon clearly articulated domestic law and international standards so that the basis for conclusions is objectively enunciated.

Objectivity also implies a balanced approach to the criminal justice process and recognition that the rule of law requires a system to be both effective and fair. To this end, trial-monitoring is neither a policing activity nor a defence-oriented activity, but an exercise that must show equal respect for all rules and values governing the criminal process. While monitoring may sometimes focus on specific rules or standards to the exclusion of others, it must not do so in a manner that appears to align itself with one side on the merits of a prosecution or defence of certain crimes or individual cases. The principle of objectivity therefore requires a balanced approach to a programme's selection of trials, as well as to its formulations of findings, conclusions, and recommendations.

### *1.2.3. Principle of agreement*

OSCE participating States have undertaken commitments to comply with a set of rules and principles in the administration of criminal justice. Foremost among these is the commitment to ensure the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal.<sup>2</sup> In order to effectuate this commitment and others relating to fair trials, participating States have agreed to permit trial-monitoring.<sup>3</sup>

Such commitments reinforce international obligations of all states to a fair trial as set forth in the International Covenant on Civil and Political Rights (ICCPR) and other international instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Taken together, these international legal obligations and commitments serve as both legal and political support for the use of trial-monitoring as a tool to support the development of judicial systems consistent with international standards and principles of justice.

2 See, for instance, Concluding Document of the Vienna Meeting of the CSCE (1989), para. 13.9.

3 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (Copenhagen 1990), para. 12: "The participating States, wishing to ensure greater transparency in the implementation of the commitments undertaken in the Vienna Concluding Document under the heading of the human dimension of the CSCE, decide to accept as a confidence-building measure the presence of observers sent by participating States and representatives of non-governmental organizations and other interested persons at proceedings before the courts as provided for in national legislation and international law ... ."

At the operational level of a trial-monitoring programme, an agreed position with national authorities as the primary stakeholders in the process of reform serves to increase the effectiveness of trial-monitoring. In practice, enhancing such understanding with respect to trial-monitoring operations means achieving a level of mutual understanding with national authorities regarding the purpose and role of monitoring. Effectuating this principle requires: entering into agreements; building working relationships; sharing information; explaining programme goals and methods; making constructive recommendations; and working with officials to support the implementation of recommendations. An agreed position is therefore also an important operational principle for programmes outside the OSCE framework. This manual provides strategies and practices to improve co-operation, co-ordination, and mutual understanding regarding the purpose and role of monitoring.

### 1.3 Limits of trial-monitoring

While trial-monitoring may achieve a wide range of purposes, it has limitations as well. Trial-monitoring may not always be the most appropriate programme option for every context where support is needed for justice reform.

First, trial-monitoring should be distinguished from other activities or tools that support rule-of-law reform. For instance, trial-monitoring should be distinguished from other information-gathering activities that may be employed to assess the conditions of a particular justice system, such as conducting surveys and interviews, or reviewing official court records or statistics. Likewise, trial-monitoring should be distinguished from legal or legislative reviews of domestic law. Such reviews may be useful to identify gaps or areas of the law that are not in strict compliance on their face with international fair-trial standards, as well as identify areas for trial-monitoring. Through such activities, some types of information may be obtained much more directly, efficiently, and inexpensively by methods that do not require trials to be monitored.

Similarly, monitoring to gather information where procedural fairness is not addressed removes trial-monitoring from its connection to fair-trial standards. It should be kept in mind that the unique capacity of trial-monitoring is in its ability to objectively identify and assess how a legal system operates through direct, first-hand observation of legal proceedings. Should monitoring move away from this focus on observing procedure and seek to collect mere statistics or data on types of cases, the full capacities of monitoring will not be realized.

As an example, collecting factual information for the sole purpose of supporting effective criminal prosecutions or to obtain information about types of criminal activity goes beyond the purpose of trial-monitoring. Not only does such a focus remove monitoring from its connection to fair-trial standards, but the methodology of monitoring lends itself to the observation of the judicial process, not to investigative activity, which in large part takes place outside the courtroom. Such a focus may also cast monitors as non-neutral observers inconsistent with the host state's commitment to allow trial-monitoring in furtherance of the state's underlying commitments to ensuring the right to a fair trial.

Finally, as with any tool, trial-monitoring is not always appropriate for every situation

or political context. Where there is no political will for reform, trial-monitoring can achieve little in the way of systemic justice reform. Further, in situations where governments are actively complicit in violations of fair-trial standards, organizations must consider whether they are prepared to undertake the type of political reporting and advocacy necessary to publicize their findings. Where monitoring takes place without such follow-up, it runs the risk of legitimizing a flawed criminal justice process. As a result, organizations must carefully consider both the capacities and strengths of trial-monitoring, as well as its limitations, in determining how a programme will best support a process of criminal justice reform.





## **Section II**

# First steps and initial considerations



## CHAPTER 2

# Conducting a preliminary assessment – identifying the aims and focus

An organization will often start with some idea of how a trial-monitoring programme will serve to support a process of justice reform. Often, specific problems with the administration of justice will already have been identified and some knowledge will have been developed regarding the domestic context. Even when this is the case, however, a thorough preliminary assessment should be undertaken to define what the programme aims to achieve and to evaluate the most appropriate focus, scale, and duration of the programme.

This chapter provides an overview of issues that should be covered in a preliminary assessment, including evaluating various in-country conditions, as well as assessing an organization's own capacities and the resources it possesses to organize and run a successful monitoring operation. Operational issues such as access and how a programme's focus impacts its scale and duration are also addressed. Once completed, a preliminary assessment will provide an informed basis for selecting an institutional model that will best serve a programme's aims and meet its anticipated operational needs (see Chapter 3, "Institutional models"). The preliminary assessment will also serve as the starting point for drafting a programme planning document for internal programme development or to secure external funding.

### 2.1 What should the aims of the trial-monitoring programme be?

It is important that the aims and focus of trial-monitoring not only be clearly defined, but that they also be responsive to the country's specific challenges, so that a programme's findings and recommendations will be relevant to local actors. In the OSCE context, trial-monitoring programmes have largely aimed to carry out a systemic assessment of the functioning of parts of the justice system for purposes of identifying specific areas in need of reform. In this process, a focus on international fair-trial standards and related domestic laws are usually of primary interest. However, a more limited focus on specific legal issues or procedures may also be useful given the country's particular circumstances. In the past, OSCE programmes have focused on specific issues or problems associated with new procedural reforms, the administration of justice in specific types of criminal cases, or other specific practices relevant to the effec-

tive and fair functioning of the system. The following are a few examples of the aims and focus of OSCE trial-monitoring programmes:

- To monitor cases in the justice system and assess their compliance with international standards, including human rights and fair-trial standards, and to report on matters of concern (Legal System Monitoring Section, OSCE Mission to Kosovo);
- To assess whether the courts are prosecuting war-crimes cases impartially with respect to the defendant's national origin (Domestic War Crimes Programme, OSCE Mission to Croatia);
- To compile reliable information on practices of criminal justice with an aim to support ongoing reforms and identify areas of concern to be addressed (Trial Monitoring Project in Kazakhstan and Trial Monitoring Project in Kyrgyzstan, ODIHR and OSCE Centre in Almaty, and ODIHR and OSCE Centre in Bishkek, respectively);
- To monitor and disseminate information on fair-trial standards and raise awareness of such standards among international and national actors, paying special attention to trafficking, domestic violence, and corruption cases (Trial Monitoring Programme, OSCE Mission to Moldova).

In addition to assessing the functioning of the justice system or targeting other specific criminal justice issues, other aims may also be of equal importance. For example, capacity-building may also be a priority. Where this is the case, programmes may seek as a primary goal to employ and train national monitors, partner with domestic NGOs, or facilitate the creation of a domestic monitoring group or network. Each of these methods has been utilized by OSCE field operations to transfer knowledge and skills to local individuals and to support the development of domestic trial-monitoring capacity. Programmes have also used trial-monitoring to increase awareness of the judiciary and of the right to a public trial and other fair-trial standards, as well as to expand the right to a public trial in practice.<sup>4</sup>

## 2.2 Evaluating in-country conditions and organizational capacities

As a first step in a preliminary assessment, both in-country conditions and the internal capacities and resources of the organization seeking to engage in monitoring should be evaluated to help determine a programme's aims and to identify the focus of monitoring.

### 2.2.1 In-country conditions

Most importantly, a needs assessment should evaluate the current situation in-country with regard to the functioning of the criminal justice system. This may include a review of those criminal justice issues that have been previously identified as problematic, including any issues related to compliance with fair-trial standards and other practices

<sup>4</sup> An overview of the different OSCE programmes, including a description of their primary aims and purposes, is provided in the Appendices.

impacting the effective and fair functioning of the system overall or in regard to specific types of cases. An assessment should entail both a “desk-based” review of current laws and previous reports on the justice or court system, as well as external consultations with domestic legal experts and representatives of local organizations engaged in rule of law, police reform, and relevant human rights work. It should be expected that an assessment will lead to a wide range of issues that might be addressed through a monitoring programme.

Assessing in-country conditions also requires programmes to identify the level of political will or interest of authorities in engaging in a process of reform. In some states, a well-defined reform process may already be underway. In others, trial-monitoring may be a first step in identifying specific problems and presenting compelling evidence of the need for reform. Meetings with justice-system officials should be used to preliminarily identify where support may exist in the government for reform, including what type of reforms are considered to be needed, as well as where indifference or resistance may be expected. This process will serve as an initial indicator of how trial-monitoring will feed into a wider reform process, and a gauge of the extent to which the government or specific officials are ready to actively co-operate in a process of reform, or alternatively to resist it.

A needs assessment should also take into account the interest and capacity of local organizations to become partners in a monitoring programme. Consultations may reveal the existence of local organizations able to engage in legal analysis and help with programme development, conduct training, or provide support to meet other organizational needs, including staffing monitors. In addition, meetings with local organizations are also an opportunity to determine whether prior monitoring efforts have been undertaken and whether capacity exists for domestic monitoring groups to conduct monitoring independently (see Chapter 3.5, “Domestic monitoring organizations or coalitions”). This process allows an organization to gauge the past involvement of civil society in justice issues and the corresponding need to build domestic capacity as a potential primary purpose of the programme.

### *2.2.2 Organizational capacities and resources*

An organization should also seek to determine what type of programme or focus is appropriate for the needs and resources of the organization itself. First, the mandate of the organization should be considered in any preliminary assessment relating to a programme’s focus. For some programmes, the mandate may itself shape the focus of its monitoring. Similarly, the nature of an organization’s past work may also limit its ability to engage in effective monitoring. For instance, organizations that have engaged in political advocacy for specific groups or issues may not be perceived as an objective monitoring presence on issues of criminal justice reform, and consequently state officials and judicial actors will be less likely to accept their findings.

In general, the more specifically an organization’s mandate or mission statement supports monitoring or justice reform, the better access will be to observe trials, and it will also be in a better position to make recommendations. However, even if an organization does not have a specific mandate recognized by the state, it may still actively engage in trial-monitoring by relying on the right to a public trial enshrined in international

covenants and treaties. Domestic monitoring groups may have to register and comply with national legislation governing domestic organizations.

The resources available to a programme will also impact the programme's potential scale and duration and therefore impact its ability to meet its declared aims. Decisions regarding scale may be restricted by resources, as programmes requiring a large number of geographically dispersed monitors will be more expensive than a smaller monitoring team covering a few specifically designated courts.

## 2.3 Anticipating operational issues

In order to determine the anticipated scale and duration of a programme, a preliminary assessment should also seek to evaluate the operational implications of a programme's proposed aims and focus. Access issues must also be identified and evaluated during a preliminary assessment to determine the feasibility of a particular monitoring focus. While it is not required that an organization choose a model or select a monitoring methodology during the assessment, generally anticipating scale, duration, and access issues will allow an organizer to avoid proposing aims that are not operationally feasible.

### 2.3.1 Programme scale and duration

The aims and focus of monitoring have direct implications for both the scale and duration of a programme's operation that must be considered in a preliminary assessment. In particular, the focus of the programme will dictate the types and number of cases that will be monitored. This will have implications for the number and location of courts to be monitored, the number of cases or hearings to be monitored, as well as the duration of monitoring operations. These issues have practical consequences for the geographic reach of a programme, the number of monitors that will be needed for operations, and consequently the number of staff and size of operations more generally.

OSCE programmes have alternatively sought to staff monitors to cover a large number of representative courts throughout a host state, assigned monitors to cover priority cases wherever they arise, or staffed monitors only in courts having jurisdiction for specific types of cases. Project programmes have also engaged a surplus of monitors for the purpose of training and capacity-building.<sup>5</sup> Depending on their aims and focus, OSCE programmes have ranged greatly in size, employing anywhere from six to twenty-five monitors. In turn, programmes will have to employ supervisory and other staff consistent with anticipated information management and reporting requirements (see Chapter 4, "Programme structure and staffing issues").

The timing and duration of monitoring efforts will also follow upon a programme's aims. For instance, programmes will have to assess the length of time it will take to monitor enough cases before findings and conclusions related to the programme's focus are able to be made. Again, this may depend on the number of monitors, as well as the monitoring methodology. A programme's aims will also determine whether a

<sup>5</sup> Project programmes, as one of two basic institutional models through which to organize a programme, are discussed further in Chapter 3.2.

programme is part of a longer-term approach to criminal justice reform involving periodic reporting, or is a more limited response to a specific incident or invitation. The issue of duration is also related to the extent to which the programme aims to engage in the capacity-building of local lawyers or organizations to perform trial-monitoring, as such programmes may require longer time frames.

### 2.3.2 Access and focus

Access to courts and to trials is also an issue that must be considered in formulating a programme’s aims and its focus. A limited ability to access trials may greatly hinder the ability of programmes to identify cases related to the focus of monitoring. Similarly, barriers to access may prevent monitors from attending hearings or observing cases in their entirety to assess issues sought to be monitored. As a result, some assessment of access issues is required during a preliminary assessment. Assessing access requires an analysis of the domestic legal framework for provisions governing public access to judicial proceedings, as well as assessing those practical barriers that may impede monitoring. Such barriers may include informal practices that prohibit the public from accessing courtrooms or relate to ineffective case tracking or scheduling systems that prevent regular case identification. Where access is an issue, programmes may have to readjust their focus and efforts to expanding the right to a public trial before seeking to monitor other fair-trial standards and related domestic law that require greater access to observe (also see Chapter 5, “Access”).

To help programmes plan what may be realistically monitored during an assessment, Chart 1 below aims to assist in anticipating the types of legal issues and practices that may be monitored based upon different access levels. Consistent with the focus of this manual on public trials and those aspects of the criminal process involving the judiciary, most OSCE programmes in the past confined their focus to issues that could be monitored at either the first or second level of access. Conversely, the monitoring of investigative, policing, and/or detention facilities is outside the scope of this manual and of the operations of most OSCE programmes due to access limitations, logistical issues, and other concerns associated with such monitoring.

**CHART 1 COMMON ISSUES THAT ARE MONITORED AND RELATED ACCESS NEEDS<sup>6</sup>**

I. Issues that may be monitored through observation of a case at trial stage
• Right to a public hearing;
• Right to a competent, independent, and impartial court;
• Right to be present at trial; right to defend oneself;
• Right to legal counsel at trial (including instruction on this right, right to free legal assistance in certain circumstances, and effectiveness of defence counsel);

6 Chart 1 is not meant to be an exhaustive list of issues related to the subject matter of monitoring, but is representative of fair-trial protections and other issues that have been monitored by past OSCE programmes. While not mandatory, access to court documents will usually expand the ability to monitor issues arising in proceedings at all access levels.

<ul style="list-style-type: none"> <li>• Equality of arms (including right to present evidence, call and examine witnesses, adequate time for preparation of defence);</li> </ul>
<ul style="list-style-type: none"> <li>• Application of the presumption of innocence and burden of proof;</li> </ul>
<ul style="list-style-type: none"> <li>• Right not to be compelled to confess guilt and right to silence at trial;</li> </ul>
<ul style="list-style-type: none"> <li>• Right to be tried without undue delay and overall efficiency of trial proceedings (reasons for delays and other problems related to postponing and adjourning hearings);</li> </ul>
<ul style="list-style-type: none"> <li>• Right to an interpreter;</li> </ul>
<ul style="list-style-type: none"> <li>• Right to a public and reasoned judgement on guilt and punishment;</li> </ul>
<ul style="list-style-type: none"> <li>• Victim's rights issues, including right to a lawyer, compensation, and protection mechanisms;</li> </ul>
<ul style="list-style-type: none"> <li>• Application of other domestic procedures and rules related to the conduct of effective and fair trials;</li> </ul>
<ul style="list-style-type: none"> <li>• Professionalism and performance issues related to legal practitioners;</li> </ul>
<ul style="list-style-type: none"> <li>• Specific victim and/or witness rights, juvenile justice, or the implementation of other laws in open, closed, or non-public hearings (if closed trial hearings are monitored)</li> </ul>

## II. Issues that may be monitored with access to pre-trial judicial proceedings\*

<ul style="list-style-type: none"> <li>• Right to prompt judicial review upon arrest and related issues (legal basis of custody, opportunity of detainee to be heard, and regularity of custody review);</li> </ul>
<ul style="list-style-type: none"> <li>• Right of suspect to information at the time of judicial review of custody (including right to be informed of charges);</li> </ul>
<ul style="list-style-type: none"> <li>• Right to legal counsel at the pre-trial stage, including custody hearing;</li> </ul>
<ul style="list-style-type: none"> <li>• Right to trial within a reasonable time after detention.</li> </ul>
<p>* In many systems, pre-trial judicial proceedings are accessible and may be monitored by the same methods and strategies as trial hearings (although the right to a public trial is not directly applicable to such proceedings). However, this will not usually be the case in many former Soviet systems, where the review of custody may still be undertaken by the state prosecutor's office.</p>

## III. Issues requiring access to investigative (or non-judicial) proceedings, use of secondary information such as interviews, or access to detention facilities

<ul style="list-style-type: none"> <li>• Rights upon arrest (including the right to be notified of reasons for arrest, right to counsel, right not to be compelled to confess guilt, right to silence, and right to an interpreter);*</li> </ul>
<ul style="list-style-type: none"> <li>• Right of detainees to have access to outside world;</li> </ul>
<ul style="list-style-type: none"> <li>• Right to humane conditions and to be free from torture;</li> </ul>
<ul style="list-style-type: none"> <li>• Right to challenge lawfulness of detention.</li> </ul>
<p>* Although records of interrogation often exist as part of an investigative or court file, for monitoring issues related to the accused's rights upon arrest and detention, these records should not be considered determinative of the conduct of the arrest or investigative procedures.</p>



## 2.4 Drafting a programme paper

Once the preliminary assessment has been completed, an organization will have an informed basis to draft a programme paper. This document should define a trial-monitoring programme's aims, as well as its focus, scale, and duration. The programme paper should also set forth the proposed structure, staffing, and operational features of the programme once they have been determined. In addition, the paper should establish a time frame for implementation. At a minimum, a programme time frame should include: 1) a preparatory stage for drafting of programme materials and guidelines, hiring monitors, and training; 2) an implementation phase, including securing access and the period of monitoring; and 3) a final date for publication of a report and a period for engaging in related advocacy activities. A programme paper may also set out the expected role and responsibilities of partner organizations, if applicable.

The creation of a programme paper serves a number of functions, including as a reference for internal programme development and subsequent operations. In addition, a detailed programme paper also may be used to draft a budget for programme operations, to secure external funding from donors, or to serve as a basis for drafting other informational materials. Finally, a programme paper will serve to provide a document for the purposes of institutional memory, as programmes develop over subsequent monitoring terms and changes in a programme's aims, focus, and monitoring methodology are considered.



## CHAPTER 3

# Institutional models

Several institutional models exist through which a trial-monitoring programme may be established and supported. This chapter provides a comparative overview of these institutional models based upon the OSCE's experience with each. In choosing among programme models, the resources available to an organization in a given field setting, including field staff and funding, will heavily influence the choice of an institutional model. Nevertheless, consideration must be given to how the capacities of a particular model will best support a programme's aims, as well as the intended scope and timing of trial-monitoring operations. The results of the preliminary assessment with its evaluation of in-country conditions, organizational capacities, and access will provide the basis for determining the programme model.

Within the OSCE context, two institutional trial-monitoring programme models have predominantly been utilized for long-term programmes: a staff model and a project model. Though used less frequently, a third model has also been used for special-purpose monitoring of limited duration to provide international oversight where serious fair-trial concerns have arisen in relation to a specific group of trials. Although these models are based on OSCE experience, they reflect the options faced by any international organization that operates through field missions or seeks to organize projects within a host state.

In addition to these models, the facilitation of a domestic trial-monitoring organization or network may also be considered where there is an overriding priority to build local capacity and involve civil society in the process of judicial reform. Once established, domestic monitoring groups will also have to select an institutional model through which to operate.

### 3.1 Staff model

A staff trial-monitoring programme operates within, and as part of, an organization's existing field operation. Monitors and other programme personnel are therefore members of the organization and are subject to regular hiring processes, management controls, and other obligations. For some operations, this may also confer an official or quasi-diplomatic status as conferred by the status of the organization. Operationally, staff programmes may benefit from the use of existing support structures such as field offices, means of transport, computers for communicating and reporting, and other resources. Staff programmes are also subject to planning or budgetary cycles within the organization and therefore may be subject to annual review processes.

In the past, the staff model in the OSCE has been used by several field operations primarily in South-Eastern Europe. Overall, such missions have engaged in trial-

monitoring under their specific mandates, which provide a legal basis for human rights monitoring, supporting judicial reform, and/or confidence-building activities. In some contexts, such as Bosnia and Herzegovina and Kosovo, this mandate has additionally been incorporated into the post-conflict domestic legal and governance structure. In addition, the staff model has also been utilized in Croatia, the former Yugoslav Republic of Macedonia, Serbia, and Albania. As a result of the legal status and history of these field operations, monitors are viewed as staff of an international organization pursuing a mandate. Likewise, in issuing reports, making recommendations, and engaging in advocacy, programmes are supported by the mandate and particular political role of the field operation in the host state.

Within the OSCE programme, supervision is usually provided by international staff with monitoring teams comprised of international staff, local staff, or a combination of both. In all OSCE staff models, case reporting is performed in English and final reports are prepared in English and then translated into the local language(s). In addition, training and other field support are usually provided by the field operation out of annual departmental core budgets.

**THE OSCE MISSION TO BOSNIA AND HERZEGOVINA:  
SUPPORTING SYSTEMIC CRIMINAL JUSTICE REFORM EFFORTS**

As part of its transformation from a post-conflict society, Bosnia and Herzegovina made major reforms to its criminal justice institutions in 2003. Foremost among the changes was the adoption of a new criminal procedure code that introduced adversarial features into a system previously based on a civil law model. The changes posed a major challenge to the judiciary and criminal justice system.

In 2004, the OSCE Mission established a trial-monitoring programme aimed at supporting these reform efforts. The programme involved the training of 24 national OSCE staff members to monitor the implementation of the new procedural code. The monitors are members of the Mission's Human Rights Department and are stationed in the Mission's field offices to provide regular systemic court coverage of 36 trial and appellate courts throughout the country. Since its inception, the team has monitored thousands of criminal cases under programme guidelines that provide common case selection criteria, monitoring methods, and case reporting standards.

Through 2007, the programme has published four major reports on the functioning of the criminal justice system. The programme's initial public report provided objective findings on the implementation of the new criminal procedures in support of the reform efforts. A second report focused on issues related to the trial of war crimes, while a third thematic report focused on the new institution of plea-bargaining. A fourth report focused on issues related to ensuring respect for the presumption of innocence in plea hearings and trials. The findings of these reports have provided judges and other legal actors with information on how the justice system is actually functioning, informed the substance of the criminal law curricula in judicial and prosecutorial training centres, and served as a catalyst for amendments to the criminal procedure code. By maintaining its focus on the justice sector's challenges, this large staff programme continues to support state authorities, judicial officials, and legal professionals who seek guidance on improving the effectiveness and fairness of the criminal justice system consistent with international fair-trial standards.

As to their duration, OSCE staff trial-monitoring programmes are subject to both the annual renewal of the mandate of the field operation, internal programmatic decision-making, and the continued budgetary support of the OSCE for the particular programme. In practice, despite some uncertainty regarding funding and mission downsizing, this has resulted in continuity of staff programmes for several years. As a result, the staff model has proven capable of sustaining comprehensive trial-monitoring programmes of extended duration able to support long-term justice-sector reform.

### 3.2 Project model

The defining feature of project programmes is that trial-monitoring activities are done by contracted lawyers and project co-ordinators under the overall supervision of ODIHR or the OSCE field operation. Therefore, in project programmes, monitors are not OSCE staff, but local lawyers who have been trained to take part in the programme as contractors and are subject to a code of conduct in connection with their trial-monitoring responsibilities. Depending on the programme, project monitors are either paid on a case-by-case basis with reasonable expenses reimbursed, or paid a fixed sum with set monitoring obligations. Through the OSCE and ODIHR, project programmes have been organized in Kazakhstan, Kyrgyzstan, Tajikistan, and Moldova.

Similar to the staff model, the project model constitutes a viable option for establishing a programme capable of comprehensive trial-monitoring efforts of extended duration. In contrast with staff models, however, one of the primary aims of project trial-monitoring programmes is to build the local capacity of individual lawyers or involve other local organizations in trial-monitoring. In turn, one of the features of project programmes is a high degree of partnership with local organizations. In the past, these partnerships have involved dividing or sharing responsibility for preparation of reference materials, organization of training sessions, and/or recruiting monitors. However, unlike domestic monitoring groups (discussed below), project programmes are still operated as an official activity under the mandate of the OSCE field operation or ODIHR. As a result, in the OSCE context, project programmes are able to rely on the specific OSCE commitments of the host state in their monitoring activities.

Project programmes may therefore present a useful model for organizations that do not possess a large field presence in a host state or that seek to build the capacity of local lawyers while still retaining institutional control over the monitoring programme. Consistent with the enhanced emphasis on local ownership, all reporting is usually done in the local language(s), with final reports being generated in the local language(s) and then translated into English and/or Russian.

**PROJECT TRIAL-MONITORING IN KAZAKHSTAN AND KYRGYZSTAN:  
INCREASING TRANSPARENCY AND ASSESSING COMPLIANCE WITH INTERNATIONAL  
FAIR-TRIAL STANDARDS**

Beginning in 2004, ODIHR, in co-operation with the OSCE Centres in Almaty and Bishkek, launched long-term trial-monitoring project programmes in Kazakhstan and Kyrgyzstan. These programmes entailed the recruitment and training of 25 local lawyers in each country to systematically monitor criminal trials. Once accepted to the programme as contracted monitors and trained, these recent law school graduates and young practicing lawyers were paid to monitor trials in designated courts in their assigned region. As required by the terms of their individual contracts, monitors worked under the direction of the project co-ordinator in accordance with the methodology set forth in the projects' trial-monitoring guidelines and instructions on monitoring and reporting.

Foremost among the aims of both of the programmes was to obtain reliable information on criminal practices to support ongoing efforts to improve compliance with fair-trial standards and support reform of the judiciary. An aim of equal importance was to train and build the capacity of local lawyers to monitor and report on criminal trials, as well as to widely publish the findings of their monitoring. Among the achievements of these programmes was the attainment of greater access to criminal trials, including an increased openness of criminal courts, judges, and prosecutors to the presence of monitors, consistent with the right to a public trial.

With the dissemination of public reports in 2007, the programmes in Kazakhstan and Kyrgyzstan met another of their primary goals by publishing the first independent and objective findings on the compliance of the criminal justice system with domestic legal procedures and international legal standards. The increased transparency of criminal proceedings combined with the development of a local monitoring capacity and publication of findings demonstrate the important role of these programmes in the process of reform.

### **3.3 Comparison of staff and project models**

Staff and project models both constitute viable options for establishing a programme capable of supporting comprehensive monitoring efforts of extended duration within the host state. Despite differences in organization, both types of programmes are capable of fulfilling the basic functions of trial-monitoring to obtain accurate information regarding the functioning of the criminal justice system to further a long-term reform process. In the OSCE, programmes of both types have monitored individual cases for the application of domestic laws and compliance with international fair-trial standards, provided public reporting on these issues to raise awareness and effect systemic change, and expanded the right to a public trial. Nevertheless, there are operational issues related to different functional capacities of these programme models that should be considered prior to selecting a model for a programme. The following chart provides a comparative overview of some these organizational considerations.

**CHART 2 COMPARATIVE OVERVIEW OF OSCE EXPERIENCE WITH STAFF AND PROJECT PROGRAMMES**

Organizational issue	Overview of OSCE experience
Access to Courts and Case Information	<ul style="list-style-type: none"> <li>• Staff programmes provide better standing to overcome access barriers, as monitors are operating as members of an international organization;</li> <li>• Project programmes may also improve access over time using strategies applicable to both staff and project programmes (see Chapter 5, “Access”).</li> </ul>
Coverage Capacity: Geographic Spread and Number of Cases	<ul style="list-style-type: none"> <li>• Both programme models are capable of staffing and supervising geographically dispersed monitors to provide coverage of regional courts;</li> <li>• Both programme models provide an organizational platform that allows monitors to attend and report on 3-4 hearings a week and monitor cases as needed (see Chapter 4, “Programme structure and staffing issues”).</li> </ul>
Administrative and Logistical Issues	<ul style="list-style-type: none"> <li>• A staff model allows programmes to benefit from a mission’s administrative and other support structures, including field offices, transportation, and availability of computers for communication and reporting;</li> <li>• A project model places additional administrative responsibilities upon programmes, including the obligation to recruit staff, administer contract payments, and provide management in the absence of mission structure.</li> </ul>
Management Issues	<ul style="list-style-type: none"> <li>• Staff programmes provide the advantage of using the existing management structure of a field operation to oversee monitors. Conversely, monitoring staff may have other departmental obligations, thereby limiting full-time availability for monitoring;</li> <li>• Project staff may be held accountable through contractual obligations requiring adherence to a code of conduct, specific guidelines, and other enumerated obligations. As a result, contract monitors may also be effectively managed (see Chapter 4, “Programme structure and staffing issues”).</li> </ul>
Language/Related Staffing Issues	<ul style="list-style-type: none"> <li>• Staff programmes will be subject to the hiring and reporting requirements of the organization, often requiring fluency in English or the official language of the organization. This may limit the pool of qualified national candidates;</li> <li>• Project programmes are usually conducted in the local language(s), given the utilization and aim of training national lawyers. Supervision of project operations by the organization requires a lawyer fluent in English and the local language(s) to perform reporting and engage in other programme functions.</li> </ul>

Partnerships with Other Organizations	<ul style="list-style-type: none"> <li>• Staff programmes have no inherent barriers to partnering. However, as such programmes in the past have been more self-sufficient operationally, there is a tendency for less direct operational partnering with local organizations;</li> <li>• Project programmes have partnered extensively with other local organizations and experts on operational matters such as hiring, training, manual-drafting, and report-writing.</li> </ul>
Capacity-Building and Local Character	<ul style="list-style-type: none"> <li>• Project programmes contract and train local lawyers as monitors, including NGO-affiliated lawyers, and contribute to building local professional capacity;</li> <li>• Project programmes help condition courts to having citizens in court and give the programme an added dimension of local character among legal actors and participants.</li> </ul>
Duration of Programme	<ul style="list-style-type: none"> <li>• Staff programmes have historically shown a high level of continuity, as funding and missions have continued operating;</li> <li>• Project programmes are of fixed duration, making continuation of activities subject to further funding. A few projects have not been renewed, eliminating the possibility of follow-up monitoring on recommendations.</li> </ul>
Sustainability in Absence of OSCE Support	<ul style="list-style-type: none"> <li>• Neither staff nor project programmes provide a platform to continue operations without continued OSCE or ODIHR operational and financial support, given that neither model is aimed at supporting the creation of an independent body capable of continuing co-ordinated monitoring activities (see Chapter 3.5, “Domestic monitoring organizations or coalitions”).</li> </ul>

As Chart 2 indicates, while there are operational differences between the models, these differences are often a matter of degree. Some differences such as access and partnership issues may also be minimized through strategies that are equally applicable to both models, or are a matter of programme choice. Most importantly, both models provide an institutional structure capable of supporting comprehensive trial-monitoring for an extended duration in aid of long-term judicial reform.

### 3.4 Special-purpose projects

A third type of trial-monitoring programme model that exists within the OSCE framework is a special-purpose trial-monitoring operation. Such programmes are usually of specific focus and limited duration in response to invitations from participating States to monitor trials in connection with a specific event that has raised wider human rights concerns in the international community. Such programmes must often deploy quickly without an extended period of time in which to organize.

Special-purpose trial-monitoring projects have been organized by ODIHR on a number of occasions in response to human rights concerns and invitations by participating States. One special-purpose programme involved an ODIHR project to monitor



the trials of 15 men in connection with an incident in the town of Andijan, Uzbekistan, in May 2005 in which civilians and military personnel were killed during a mass gathering. Another special-purpose trial-monitoring project was implemented jointly by ODIHR and the OSCE Office in Baku to monitor the trials of groups of demonstrators accused of participating in election-related violence in Azerbaijan. In both projects, trials were monitored to assess the compliance of proceedings with domestic law and international fair-trial standards where the use of force and coercion in pre-trial stages was of particular concern.

As the atmosphere around such trials is often highly politicized, the primary purpose of such programmes in the past was to provide a measure of international oversight of the trials regarding compliance with fair-trial standards. In turn, these programmes have sought to engage more directly in political advocacy, including making recommendations calling for reconsideration of verdicts, as well as other government action to remedy the identified underlying human rights violations. By their nature, these projects are also usually of more limited scope, focusing primarily on cases related to the human rights incident that served as the catalyst for monitoring, and their duration depends on the cases being monitored. Therefore, while monitoring may reveal issues that may relate to the need for wider judicial reform, both the politicized nature of the trials and narrow subject matter of monitoring make comprehensive analysis of systemic problems with the judicial system difficult. Special-purpose projects with such a focus and scope are therefore not particularly well suited to contribute to a more comprehensive approach to judicial reform. These programmes best serve to provide a measure of oversight and human rights protection through the exercise of the fundamental right to a public trial, as well as through the transparency and political pressure created by the expression of this right.

Given the short time frame for deployment, such programmes often face special challenges in quickly organizing a team, including: becoming well versed on domestic events and legal procedures, hiring monitors, and developing a methodology and strategies that take into account the increased political attention and heightened barriers to accessing case information that may exist in these contexts. Special-purpose projects should also consider using international monitors where political issues or heightened security risks accompany the trials that are the subject of monitoring (see Chapter 4.4, “Staffing monitors”)

### 3.5 Domestic monitoring organizations or coalitions

An alternative to organizing a trial-monitoring programme under one of the above institutional models is for an international organization to provide support for an independent domestic monitoring organization, or, alternatively, a trial-monitoring coalition. Unlike an internationally run trial-monitoring operation, a domestic monitoring organization may operate as a local NGO or coalition of NGOs under domestic law, and is comprised entirely of national citizens. As such, domestic law governs both the legal status and organizational requirements of domestic groups. Relevant local law should therefore be reviewed to determine the need to register an organization.

Domestic observer organizations will generally rely exclusively on the right to a public trial under international law and applicable domestic law. Therefore, in states where this right is not respected, domestic observer groups will have particular difficulty securing access to case information to conduct trial-monitoring in a comprehensive manner. Even where restrictions exist, however, domestic observer groups may still have a significant impact on transparency by effectuating the right to a public trial and raising awareness of international fair-trial standards.

Overall, domestic organizations or coalitions represent the greatest level of local ownership in the process of trial-monitoring in support of judicial reform. Where interest in monitoring exists, such a model also allows for a level of local participation and capacity-building. Like the basic models above, domestic observer groups may employ monitoring staff or engage monitors on a contract basis. Also, while a wide coalition of NGOs has advantages in that such a coalition may provide a wider geographic presence and coverage, decision-making also becomes more complicated with more participating organizations. As a result, initial experience with the facilitation of such groups indicates that organizing the operation as a single NGO may be preferable to a broad coalition of NGOs. In addition, even when domestic groups or coalitions are able to

#### **COALITION ALL FOR FAIR TRIALS, A DOMESTIC OBSERVER GROUP OF THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA**

In 2002, the Rule of Law Unit within the OSCE Spillover Monitor Mission to Skopje began to facilitate the creation of what would later become a formal coalition of 20 NGOs, called All for Fair Trials. On 23 May 2003, the coalition formed pursuant to domestic law, with a general assembly, executive board, and a network of 80 observers throughout the country. Upon its inception, among the primary goals of the coalition was to raise public awareness of international fair-trial standards and increase public trust in the legal system. It also specifically sought to identify inherited problems in the judiciary to point out the need for legal and institutional reform.

With the publication of its report, “Countrywide Observation of the Implementation of Fair Trial Standards in the Domestic Courts and Assessment of the Functioning of the Judiciary” in 2004, the coalition not only took steps forward to achieve these goals, but also provided domestic officials with a constructive and accurate picture of the state of the justice system in key areas relating to the right to a fair trial. Since the publication of its initial report, the coalition has been commissioned to undertake several monitoring projects for the OSCE Spillover Monitor Mission and other international organizations such as the Swedish Helsinki Committee for Human Rights and Soros Foundation. These trial-monitoring activities have included projects and public reports focused on discrete aspects of criminal justice related to the prosecution of trafficking, election-related crime, and organized-crime cases.

Now that its trial-monitoring methodology is fully developed and a permanent supervisory staff is in place, the coalition is working with the OSCE Spillover Monitor Mission to Skopje to strengthen its fund-raising capacity. This includes developing the capacity to independently engage in project development with donors without the need for financial support from the OSCE.

perform monitoring functions independently, they may often require donor or project funding to continue operations. As a result, a domestic monitoring organization may be initially reliant on funding from the sponsoring organization.

The facilitation of a domestic monitoring organization may also be considered as part of an exit strategy for international organizations engaged in staff or project programmes where conditions are appropriate, downsizing is considered, and domestic capacity exists. If no NGO already exists with some trial-monitoring experience or where a coalition needs first to be formed, capacity will usually develop slowly and challenges should be expected. These challenges will relate to both normal monitoring operations and the organization of a new entity requiring management, funding, and the development of expertise.



## CHAPTER 4

# Programme structure and staffing issues

Trial-monitoring programmes are activities that require a structure and staff capable of supporting an often complex system of information-gathering, reporting, and related advocacy. In the field, trial-monitoring requires specialized knowledge, accurate legal reporting, and co-ordinated activity by monitors over sometimes wide geographic areas. At the supervisory level, programmes usually require active channeling of the findings into reform processes, requiring that information be effectively managed and reported to a wide variety of stakeholders, actors, and interests. Whatever institutional model is chosen, the internal structure of trial-monitoring operations must provide the capacity to meet the basic operational demands common to all programmes. The inability of a programme structure to meet these demands will result in a programme with limited capacities. For instance, this may manifest in a programme with the capacity to collect information but having little ability to assess this information or positively impact reform processes.

This chapter first describes the structure and function of the basic components of a trial-monitoring programme in order to provide an overview of programme activities and operational demands. Staffing issues are presented in the context of this structure with a view to meeting these basic operational and organizational demands. Overall, the organizer should keep in mind that experience has demonstrated that well-defined divisions of labour among programme staff provide a key to meeting basic organizational demands.

### 4.1 Trial-monitoring field structure and organization

A trial-monitoring programme is in large part an information-gathering field activity. As such, internal programme structure may be best conceptualized with a broad division of labour between the primary function of monitoring cases and supervisory responsibilities. With a clear division of roles and responsibilities along these lines, a programme may organize a structure that allows for effective and efficient functioning of operations. Chart 3 provides an overview of core programme activities and how these activities may be divided between monitoring and supervisory responsibilities.

**CHART 3 GENERAL DIVISION OF RESPONSIBILITIES IN A MONITORING PROGRAMME**

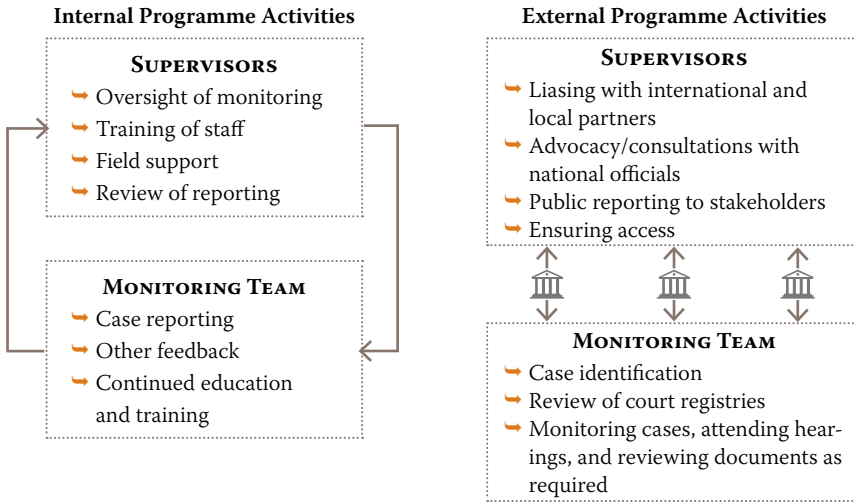
Monitoring activities and responsibilities	Supervisory activities and responsibilities
<ul style="list-style-type: none"> <li>• Case identification, selection, and tracking, including regularly reviewing court registries and other sources of case information;</li> <li>• Monitoring cases, including attending hearings, reviewing documents, and collecting other information as required;</li> <li>• Reporting, including filing regular case reports and other reports as required;</li> <li>• Reviewing programme reference materials, attending scheduled training sessions, and engaging in other educational and capacity-building activities.</li> </ul>	<ul style="list-style-type: none"> <li>• Oversight of monitoring activities and methodology, including ensuring access;</li> <li>• Review, synthesis, and summary of case reports;</li> <li>• Preparation of public reports and other external information-sharing materials;</li> <li>• Advocacy, including meeting with local and international partners to liaise and provide information, lobbying, attending meetings, and addressing the media;</li> <li>• Administrative and other management responsibilities, including overseeing personnel issues such as recruitment, review, and payment;</li> <li>• Provision of regular field support to monitors, including feedback on reporting, periodic training and educational materials.</li> </ul>

By conceptualizing programme activities and responsibilities as above, a division of labour is established that ensures a monitoring capacity separate from supervisory functions. In addition to the usefulness of this separation in assigning responsibilities and staffing positions, this division of labour also serves to operationally maintain the principle of non-intervention. This is because the separation of functions allows monitors to solely engage in monitoring cases in the courtroom while freeing up supervisory personnel to use monitoring data to support systemic change at the appropriate level with local authorities (see Chapter 1.2.1, “Principle of non-intervention in the judicial process”).

Chart 3 also demonstrates that, while monitoring activities may first appear to be the most labour-intensive part of a trial-monitoring operation, the responsibilities and demands on supervisory or head-office operations are significant and must be fully considered when organizing a programme.

With the division of labour between the programme responsibilities of supervisors and monitors in mind, Illustration 1 provides an overview of how a trial-monitoring operation uses this structure to monitor the courts at the individual case level, as well as engage institutional authorities and partners in reform processes.

**ILLUSTRATION 1 OPERATIONAL OVERVIEW OF TRIAL-MONITORING PROGRAMME ACTIVITIES**



**4.2 Supervisory structure and responsibilities**

Supervisory responsibilities in a monitoring programme involve a wide range of activities. To ensure proper attention to all supervisory functions and responsibilities, these responsibilities also require a division of labour. Therefore, each programme should be structured with a programme co-ordinator or head of unit responsible for overall programme management and a legal analyst responsible for legal analysis and reporting. Such a structure allows a basic division of supervisory responsibilities as set forth in Chart 4.

**CHART 4 A USEFUL DIVISION OF SUPERVISORY-LEVEL RESPONSIBILITIES**

Management and advocacy responsibilities	Analysis and reporting responsibilities
<ul style="list-style-type: none"> <li>• Overall responsibility for programme implementation, including setting policies on focus and methodology, developing programme strategy, and approving the content of public reports;</li> </ul>	<ul style="list-style-type: none"> <li>• Regular review of case reports, substantive feedback to monitors on observation of trials and case reports;</li> </ul>
<ul style="list-style-type: none"> <li>• Programme representation and advocacy, including liaising with local and international partners, communicating with stakeholders, lobbying, and addressing the media;</li> </ul>	<ul style="list-style-type: none"> <li>• Synthesis and summary of case reports, including maintenance of statistical data;</li> </ul>
<ul style="list-style-type: none"> <li>• Administrative and other management responsibilities, including overseeing personnel issues such as hiring, reviews, and payment (as applicable);</li> </ul>	<ul style="list-style-type: none"> <li>• Legal research on domestic and international law;</li> </ul>

<ul style="list-style-type: none"> <li>• Oversight of operational issues, including case identification, selection, and access issues; meeting with court officials; and re-directing case selection as necessary;</li> </ul>	<ul style="list-style-type: none"> <li>• Regular secondary reporting (internal);</li> </ul>
<ul style="list-style-type: none"> <li>• Responsibility for ensuring regular field support to monitors, including periodic training and educational materials.</li> </ul>	<ul style="list-style-type: none"> <li>• Preparation and drafting of public and other external reports.</li> </ul>

In practice, the above division of responsibilities may not always be so rigid given the interrelation between some functions. This is especially true with regard to the responsibility for overseeing operational issues and field support, which may be apportioned differently depending on the local context. Some overlap of responsibilities may also be desirable, as this provides a measure of protection against exigencies such as personnel changes. However, the sharing of responsibilities or other reapportionment should never blur the basic division between programme management and legal reporting, which is critical to ensuring adequate capacity for all facets of the programme.

#### 4.2.1 *Best practices for staffing a supervisory unit*

- At a minimum, a full-time trial-monitoring programme should staff two distinct posts responsible for supervisory functions: a programme co-ordinator (or head of unit) and a legal analyst. The division of labour between programme management and legal reporting responsibilities ensures the capacity to fulfil all programme functions, and also facilitates a sharing of other responsibilities as needed. Programmes that staff one individual for all supervisory functions also run the risk of a shutdown of activities if that individual departs. For longer-term programmes, dual positions also support better continuity upon turnover of personnel.
- For OSCE and/or ODIHR project programmes, the post of programme co-ordinator should best be filled by an OSCE staff member even if monitors and legal analysts are engaged as contractors. Such standing provides a better basis for the programme co-ordinator to discharge advocacy responsibilities related to the programme. These responsibilities may include conducting meetings with local officials, liaising with other organizations, securing the access required for monitoring, and representing the programme publicly when conveying official findings and recommendations.

### 4.3 Staffing legal analysts

Legal analysts should be staffed in a manner to reflect external reporting requirements, as well as the other specific responsibilities assigned to legal analysts. Most important in this regard is the frequency with which programmes intend to release reports. By way of example, the OSCE Legal System Monitoring Section (LSMS) in Kosovo has consistently staffed the lowest ratio of monitors to legal-analyst staff. In turn, the LSMS has engaged in the most regular and prolific reporting, producing 15 periodic public



reports, as well as issuing regular monthly public reports. Over this time period, the Mission in Kosovo has engaged between six and twelve monitors corresponding with two to four legal analysts, thereby maintaining a ratio of approximately one legal analyst for every three full-time monitors. Conversely, programmes that seek to publish reports less frequently or only at the completion of a lengthy monitoring term may not require as many analysts to monitors.

As programmes become larger and reporting requirements more complex, information management and other organizational demands will increase. In larger programmes, some supervisory responsibilities may need to be delegated to legal advisers. Such responsibilities may include oversight of court access issues, the preparation of training modules, drafting of policy papers, and engaging with local officials. In turn, a division of responsibilities may also be made among individual legal analysts by subject matter, issue, or task according to skill set or programme needs. Sharing of responsibilities may also be a function of structure. In the Mission to Bosnia and Herzegovina, for example, the division of the mission into four regions and the large number of monitors (24) are conducive to two levels of internal reporting with six monitors in each of the four regions reporting to a regional legal adviser who in turn reports to a team of legal advisers at the head-office level.

#### *4.3.1 Best practices for staffing legal analysts*

- On average, programmes that seek to engage in regular public reporting should staff at least one legal analyst for every six full-time monitors. This ratio is based on the experience of field operations engaged in full-time monitoring with the expectation of reviewing 15-24 case reports weekly in addition to providing substantive feedback, engaging in regular secondary (internal) reporting, and drafting external reports on a semi-annual basis.
- Additional factors that should be taken into consideration include: 1) the complexity of reporting (see Chapter 6.3, “Selecting a case reporting system”); 2) the frequency with which the programme aims to release public and other reports; and 3) other duties assigned to legal analysts, including legal research, involvement in organizing training sessions, and/or other field support responsibilities.
- In recruiting legal analysts, primary emphasis should be placed upon evaluating the candidate’s legal reasoning and writing skills. Previous experience as a practicing lawyer is preferred, as analysts not only have to dispense legal guidance to monitors, but they must also formulate the programme’s legal findings and conclusions. Candidates should also be familiar with both the local system of justice and applicable international law and standards. In addition to an in-person interview, a written test should be administered, requiring the candidate to draft a short memorandum on a relevant legal question or problem requiring legal reasoning and the application of facts. Where one candidate cannot fulfil all these roles, legal analysts should be staffed with complementary backgrounds.

## 4.4 Staffing monitors

### 4.4.1 *Size of monitoring team*

The number of monitors required by a programme should be determined by the focus and methodology of the programme and the programme objectives. For instance, the aims of a given programme might require staffing monitors in representative courts or jurisdictions throughout the host state, staffing monitors to cover an anticipated number of priority cases, or engaging a surplus of monitors for the purpose of training and capacity-building. The number of cases to be monitored is also of primary concern in determining how many monitors are required in any given programme. In practice, the size of a monitoring team may also be driven by budgetary considerations, as well as by the availability of qualified candidates.

In the OSCE, programmes have been organized with a wide variance in relation to the number of monitors. For example, the Mission to Bosnia and Herzegovina has operated with 25 full-time monitors; the LSMS in the Mission in Kosovo with six full-time criminal-case monitors; and the Mission to Croatia with 20 Rule of Law staff monitoring war-crimes trials as a departmental priority but with other obligations. Likewise, project programmes have also differed in size, ranging from eight monitors in the Tajikistan programme to 22 monitors for the programme in Moldova.

A final consideration is whether a programme establishes single monitors or monitoring teams or pairs. A number of OSCE field operations, including those in Kazakhstan, Kyrgyzstan, Moldova, and Tajikistan, pair monitors, so that two monitors work as a team observing cases and writing the report. While pairing monitors will naturally decrease the monitoring capacity of the team, it may provide other operational benefits (see Chapter 7.5.4, “Monitor-pairing”).

### 4.4.2 *Recruitment*

Trial-monitoring is an activity that involves assessing the work of a professional and often experienced judiciary. In recruiting monitoring staff, both individual qualifications and the perception of domestic actors must be taken into account. Experience dictates that, for programmes seeking to engage as a serious partner in a judicial reform process, programmes should preferably seek monitors that have attained a full legal degree. Such experience provides monitors with the requisite background to engage in legal reporting, as well as provides the necessary level of competence from the perspective of the local judiciary. However, it is not a necessity that monitors have significant practical prior legal experience. In fact, lack of practical experience in the system has sometimes been demonstrated to be advantageous, especially where reforms have radically changed the functioning of the legal system. In the past, a number of programmes, such as those run in the OSCE field operations in Moldova, Bosnia and Herzegovina, and Kazakhstan, have found that newly admitted lawyers are well placed to monitor new reforms and absorb new concepts and principles, including fair-trial standards. Conversely, programmes have experienced problems in hiring law students, given competing priorities with regard to time and wavering levels of interest. Also, while it is true that exceptional individuals without a formal legal background may be

trained to be excellent trial monitors, hiring such individuals should be the exception, not the rule.

When hiring, the programme should ensure that a qualified candidate has no conflict that would compromise monitoring, such as also practicing in a court or before a judge that will be monitored. Pre-existing relationships with legal actors or court personnel must also be addressed. While some familiarity with court personnel or legal actors is often helpful to obtain access, a monitor should not have a special relationship that would compromise their independence. Where project programmes engage lawyers associated with NGOs that have done specific advocacy in the past, the interview process should investigate the nature of the advocacy to determine whether the candidate will be perceived as sufficiently independent with regard to the focus of the monitoring programme.

Since having to replace a monitor may often mean lack of coverage for a particular jurisdiction or court, a thorough hiring process is necessary to ensure the requisite maturity, disposition, and skill set. Therefore, the recruitment process should include not only a face-to-face interview, but, given the importance of reporting, the collection of a writing sample or administration of a written exercise should also be considered.

#### *4.4.3 Contract obligations*

For project programmes involving contracted monitors, the contract is essential to clarifying mutual obligations and providing terms of reference for both the programme and each individual. At a minimum, contracts should include the following items: the name of the project and duration (contract period); the timing, terms, and conditions of payment; the obligations of the monitor to adhere to all programme requirements and guidelines, including a code of conduct; and the status of monitors as independent contractors and not employees or officers of the organization. In drafting the contract, it is not necessary that a contract itself contain all programme guidelines. Instead, the contract may specify that the monitor has received copies of all applicable programme materials and instructions, and accepts all duties and responsibilities as the terms of engagement.

#### *4.4.4 Nationality of monitors*

In the OSCE, trial-monitoring was initially conducted exclusively by international monitors (monitors with citizenship other than that of the host state). Today, however, national monitors conduct the vast majority of all trial-monitoring performed by the OSCE. Currently, national staff perform almost all criminal justice trial-monitoring in the field operations in Albania, Bosnia and Herzegovina, Kosovo, and Serbia, and war-crimes monitoring in Croatia is done in part by national staff. National monitors also staff the project programmes in Kazakhstan, Kyrgyzstan, Moldova, and Tajikistan. Project programmes currently being organized in Montenegro, Georgia, and Azerbaijan also anticipate the use of national staff. As a result, today within the OSCE context the decision to engage in trial-monitoring presupposes the decision to employ or engage national monitors.

The reasons for this shift are varied. First, as ethnic tensions have reduced in the Balkans, the trend in the OSCE field operations in South-Eastern Europe has been to

gradually shift responsibilities from international to national posts. Second, experience in the South-Eastern European field operations has shown that both international and national monitors can achieve excellent results as monitors (as well as legal advisers). Project trial-monitoring programmes have also opted to contract national monitors as a means of fulfilling one of their primary aims of building local capacity. In turn, both project and staff programmes have also realized the cost savings and decreased demand for logistical support by using local lawyers who are already situated in the region and do not require interpreters.

Despite this shift and the above considerations, the organizer must still undertake an assessment in each monitoring context to determine whether international or national monitors should be utilized for trial-monitoring. Experience reveals two situations where trial-monitoring operations might benefit from the engagement of international monitors. First, where trial-monitoring serves a heightened confidence-building purpose involving post-conflict ethnic tensions, or other politicized issues, national monitors may be perceived as subject to bias by virtue of their identification with a particular group. In such cases, the value of an international organization providing an independent monitoring presence may be compromised where identification with local groups will be perceived as partial.

Second, when trial-monitoring involves cases where security concerns are prominent, an international monitor is more insulated from threats or other pressures. Specifically, war-crimes cases, organized-crime and corruption prosecutions, and other high-profile matters may put extreme pressure on all judicial actors, as well as monitors. Participation in the case, in particular if privy to investigative materials, closed hearings, and other information, may subject monitors who live permanently in the community to additional pressures. In such cases, an international monitor affiliated with an international organization may be freer to report, engage, and even criticize actors without concern for their safety.

**CHART 5 OVERVIEW OF OSCE EXPERIENCE WITH THE NATIONALITY OF MONITORS**

Consideration	National monitor	International monitor
<b>Monitoring Experience and Knowledge of Applicable Laws</b>	<ul style="list-style-type: none"> <li>• Less likely to find candidates with monitoring experience. Will have to be trained on programme methods and requirements;</li> <li>• More likely to be familiar with domestic law and practice.</li> </ul>	<ul style="list-style-type: none"> <li>• More likely to have monitoring experience but will still have to be trained on programme methods and requirements;</li> <li>• More likely to be familiar with international trial standards.</li> </ul>
<b>Language</b>	<ul style="list-style-type: none"> <li>• Fluency allows direct observation of hearings and facilitates document review.</li> </ul>	<ul style="list-style-type: none"> <li>• Requires language skills or an interpreter.</li> </ul>
<b>Cost</b>	<ul style="list-style-type: none"> <li>• Less expensive, as already resides in local area and paid at local rates.</li> </ul>	<ul style="list-style-type: none"> <li>• More expensive to hire and support.</li> </ul>

<b>Perception of Impartiality</b>	<ul style="list-style-type: none"> <li>• Where monitoring involves post-conflict cases involving war crimes, ethnic violence, or other sectarian issues, less likely to be viewed as unbiased.</li> </ul>	<ul style="list-style-type: none"> <li>• More likely to be viewed as an impartial observer within the goals of the programme. However, bias may still be attributed.</li> </ul>
<b>Susceptibility to Pressure</b>	<ul style="list-style-type: none"> <li>• More likely to be deterred by access limitations or other pressure not to report critically.</li> </ul>	<ul style="list-style-type: none"> <li>• Less likely to be deterred by access issues given no permanent connection to local actors.</li> </ul>
<b>Capacity-Building/ Long-Term Commitment</b>	<ul style="list-style-type: none"> <li>• Will most often remain in-country with acquired knowledge and skills;</li> <li>• More likely to continue monitoring for longer periods and/or subsequent projects.</li> </ul>	<ul style="list-style-type: none"> <li>• Will not be a permanent part of local legal community;</li> <li>• Less likely to engage in monitoring after completion of project or contract term.</li> </ul>

#### 4.4.5 *Best practices for staffing monitors*

- The organizer should undertake an estimate of the number of cases and/or hearings that need to be monitored based on programme scope and methodology. For monitoring that intends to make systemic conclusions, the size of the team should be sufficient to foster confidence in the methodology and provide for a representational sampling of courts and cases. For priority case monitoring, an estimate of cases may be obtained by counting the number of such cases currently ongoing from court or prosecutors' records.
- A full-time monitor may be expected to monitor and report on an average of 3-4 hearings a week. Factors affecting this range include: the methodology of monitoring (e.g., hearing observation or hearing observation with file review); the specifics and complexity of reporting requirements; access to cases; and the assignment of other monitoring responsibilities such as gathering secondary information or other weekly reporting.
- The benefits of pairings are most pronounced at the early stages of a programme when the monitoring procedure and reporting are new and/or resistance exists in courts to the presence of monitors. As monitoring procedures become standardized and access issues decrease, the break-up of pairings will greatly increase the coverage capacity of a monitoring team.
- It should be expected that a number of monitors will be insufficiently skilled or otherwise unlikely to remain on staff. It is therefore useful to slightly overstaff with the expectation that there will be some attrition.
- International monitors are best suited to monitor cases when there is a politically charged domestic context that implicates the independence or the impartiality of the entire judicial process. However, the purpose of such monitoring will usually not be to seek judicial or systemic reform as a primary goal but to respond to

serious concerns regarding the protection of human rights and lack of an independent judiciary in the first instance.

#### 4.5 Programme partnerships

Partnerships with other organizations when organizing a trial-monitoring programme are a strategy to build local monitoring capacity, as well as to raise the profile and effectiveness of trial-monitoring by creating a coalition of groups engaged in activities and advocacy. From an operational point of view, partnerships are also a mechanism to share organizational responsibilities for programme management. In the OSCE, project programmes have compensated for a lack of staffing by partnering with other organizations to fulfil basic programme functions such as drafting training materials and manuals, providing training, and writing reports.

When forming partnerships, programmes should formalize the relationship by entering into a memorandum of understanding (MoU) to set out mutual obligations and programme aims and outputs. MoUs serve as a reference for operations and set out timelines for activities and responsibilities. When choosing a partner for a programme, it is important to come to agreement on the programme's purpose, methodology, and time frame. The act of discussing and negotiating an MoU is an important part of this process.

##### **THE MOLDOVA PROGRAMME:**

##### **USING PARTNERSHIPS TO SUPPORT TRIAL-MONITORING OPERATIONS**

In organizing its project-based trial-monitoring programme in 2006, the OSCE Mission to Moldova joined forces with two primary implementing partners, both of which made significant contributions to the organization of the programme. First, the programme partnered with ABA-CEELI, an international NGO that has engaged in legal and criminal law reform in Moldova for several years. As a partner in the programme, ABA-CEELI contributed with both expertise and resources, including preparing the programme's monitoring guidelines and providing office space for the OSCE project co-ordinator. It is also anticipated that ABA-CEELI's staff will assist in the process of drafting trial-monitoring reports and recommendations in the future.

The Moldova programme also partnered with the Institute for Penal Reform (IPR), a leading Moldovan NGO in the field of criminal law and criminal law reform. With the assistance of IPR's director, a criminal law expert, IPR helped with the drafting of the programme's legal manual, as well as organized and led the competitive process by which national monitors were hired. The director of IPR also served as an expert trainer on fair-trial standards during the initial trial-monitoring training sessions. Overall, the sharing of programme responsibilities not only widened the participation of civil society in monitoring, but allowed for a sharing of managerial responsibilities subject to ultimate OSCE responsibility for the programme, thereby greatly reducing the need for OSCE staff.

**Section III**

# Implementation





## CHAPTER 5

# Access

Access issues may be generally divided into two types: issues related to case identification and issues related to case monitoring regarding the progression of individual cases. The challenge related to case identification is to achieve a regular system of access that permits the fullest identification of those cases or proceedings relevant to monitoring. The challenge related to case monitoring is to achieve a level of access that permits the monitoring of hearings and the collection of case information as required by the focus of the programme.

Securing regular access permits a programme to identify cases and systemize monitoring methodology, thereby improving the quality and consistency of monitoring results. Simply put, the greater the access, the more thorough and effective monitoring will be. As a result, all programmes must proactively and comprehensively address securing access. This requires analysing the domestic legal framework for provisions that govern public access to trials, laying the groundwork for monitoring activity with officials at all levels, and establishing internal procedures and strategies to maximize access. This chapter provides an overview of access issues, methods to increase access, and strategies to secure access to criminal proceedings and information related to individual cases. Strategies relating to gaining access to court documents and observing closed judicial hearings are also addressed as a means of expanding monitoring activities where consistent with the purpose and focus of programmes.

### 5.1 Identifying the legal framework

The initial step in securing access for trial-monitoring activities is identifying the legal framework supporting trial-monitoring in applicable international and domestic law. Once the legal framework is identified, the legal status of the programme's activities should be grounded in these obligations and commitments. Where monitoring is conducted in OSCE participating States, this is usually a two-part process.

First, in the OSCE context, for some field operations such as those in Kosovo or Bosnia and Herzegovina, trial-monitoring is explicit in their mandate, while for other operations the mandate may refer more broadly to the promotion of OSCE commitments or support for judicial reform. As stated in Chapter 1.2, all OSCE participating States committed themselves to allow monitoring of trials under para. 12 of the Copenhagen Document in furtherance of their underlying commitments to ensuring the right to a fair trial. Therefore, OSCE trial-monitoring programmes may rely either on a specific mandate of the respective field operation or, even without a specific mandate, on the commitments made by all participating States to allow trial-monitoring by OSCE monitors, non-governmental organizations, and other interested persons.

Second, whether monitoring is conducted by the OSCE or not, programmes may always look to the fundamental right to a public trial as provided in international law, as well as domestic legislation to ground trial-monitoring in the applicable legal framework and obligations of the host state. The fundamental right to a public trial is enshrined in Art. 14 (1) of the ICCPR, as well as in relevant regional treaties, such as Art. 6 (1) of the ECHR. Therefore, the vast majority of states will be subject to international legal obligations that allow access to public trials and thereby their monitoring. In addition, trial-monitoring programmes should also review all domestic legislation for provisions consistent with these protections, including any provisions that expand or limit the right to attend public criminal proceedings or that provide or restrict access to documents such as indictments, verdicts, or other court documents.

Identifying the legal framework is only the first step in a comprehensive approach to ensuring the access needed to effectively monitor trials. Even if the legal framework supports monitoring, practical barriers often exist that make monitoring and information collection difficult. For instance, the existence of a mandate will not ensure access to information where such information is not systematically managed, disseminated, or when local authorities hinder such access. As a result, international law, domestic law, and the OSCE mandate are only a starting point for a comprehensive approach to access. Once the legal framework is identified, all programmes must take proactive steps to give expression to these rights and secure necessary access to monitor trials.

## 5.2 Three methods to increase overall programme access

OSCE trial-monitoring operations have utilized three general methods in the past to increase overall programme access to criminal proceedings and case information. All three of these strategies aim to broaden access by increasing awareness and understanding of monitoring. In this way, the strategies function not only as a means to increase access, but do so in a manner that builds consensus regarding the purpose of monitoring and the underlying rule-of-law and human-rights values that are served by monitoring trials. When utilized together, these methods seek to involve and inform local actors at all levels of the criminal justice system from the institutional officials to those legal actors involved in the specific case under observation.

### 5.2.1 *Memorandum of understanding*

An MoU is a formal agreement setting out rights and obligations between the monitoring organization and relevant local institutions such as the Ministry of Justice or Supreme Court. Overall, an MoU should not be viewed as a legal prerequisite to conduct trial-monitoring, but as a method to secure and maximize access, as well as an opportunity to build relationships with, and buy-in from, the local authorities. Meetings regarding the MoU provide an opportunity to build trust and understanding with local officials and explain the programme's purpose and methods. Programmes should also respond to official concerns and identify criminal justice issues that may be significant to monitor from their perspective. This may include issues regarding resources, or other issues related to the functioning of the courts. In this way, the MoU process furthers the principle of agreement at the operational level. Thus, while an MoU is not

a legal precondition to monitoring public trials, it may serve as an official authorization of a trial-monitoring programme in the eyes of judges and local officials. Therefore, it is a practical mechanism to broaden access and increase co-operation. While the exact content of the MoU will differ depending on the specific circumstances, the MoU should seek to include the following elements:

- A statement of the legal basis for monitoring, including reference to the OSCE field operation's mandate, OSCE commitments, the right to a public trial as set forth in international and/or domestic law, and/or other agreed basis;
- A statement specifying the scope and purpose of monitoring, including what courts and proceedings will be monitored;
- A detailed specification of the right of access, including access to closed hearings, specific court documents, and other files, if possible;
- Other obligations and reasonable concerns of the parties.

In the OSCE, programmes have negotiated MoUs that provide additional means of co-operation between the parties in addition to what may be provided by law, thereby increasing co-operation and buy-in to the programme's goals, and expanding access. The following are some examples of specific obligations that have been included in MoUs by OSCE programmes:

- The obligation of the Supreme Court to notify all courts of monitoring in writing and request their full support for trial-monitoring (former Yugoslav Republic of Macedonia);
- The right to directly request files through the Ministry of Justice in the event files cannot be obtained from trial courts (Croatia);
- The obligation of the prosecutor-general to identify cases involving domestic violence to the trial-monitoring co-ordinator (Moldova).

In these ways, MoUs have provided a mechanism at the highest institutional level to secure access not only to public criminal proceedings, but to identify cases and obtain documents that may not otherwise be obtainable. Conversely, reasonable obligations undertaken by the OSCE in MoUs have included: the duty to assume a non-interventionist role with respect to individual cases; the duty to issue and disseminate a public report on its findings; and the obligation to maintain confidential information obtained in the course of monitoring.

Even if authorities are unwilling to sign a formal MoU, informal consent may often be obtained and, at a minimum, the relevant authorities have been advised in advance of the purpose and methodology of monitoring. Consistent with diplomatic protocol, an MoU should also be negotiated by a representative of the monitoring organization commensurate in rank with the representative of the local authority.

### *5.2.2. Contact with court presidents*

In practice, regular access to court dockets, hearing schedules, and case information depends greatly on the willingness and ability of local courts and officials to work with the programme. Even where local courts are open to monitoring, access is often limited by insufficient case-tracking systems or other scheduling or posting practices that

preclude any organized method to systemize case identification and selection. Letters to court presidents and meetings provide an important means to introduce the programme at the individual local court level and to attempt to come to arrangements that will overcome these issues.

Letters to court presidents should be sent to each court where monitoring will occur once the programme has determined its methodology. The letter should explain the basis and purpose of monitoring, as well as make reference to the existence of any MoU. The letter should also politely request the support of the court, including notification to all trial judges of the programme. Lastly, letters should also request a meeting with the court to discuss the programme in more detail, answer questions, and address any issues or concerns.

Initial meetings should next be scheduled with court presidents. Given the status of the court president, it is important to have the co-ordinator or another supervisor conduct this initial meeting. Meetings, like letters, may be used to introduce the programme, including its purpose and methodology. If a specific monitor is assigned to the court, the meeting should be used to make this introduction. Like meetings with officials, meetings with court presidents should seek to build a good working relationship and obtain buy-in regarding the goals of monitoring. Finally, meetings should also be used to establish an agreed methodology for identifying cases in the courthouse and obtaining documents, if consistent with the programme's methodology (see Chapter 5.3, "Securing access to identify cases").

### *5.2.3. Identification and informational materials*

The experience of trial-monitoring programmes is that access progressively improves as monitoring continues and legal actors become more familiar and comfortable with the role of monitors. Initially, it is not unusual for courts and other actors to not fully understand the nature of the programme until after issuance of the first report. As a result, initial access and co-operation may be greatly increased by presenting identification and informational materials such as a copy of the MoU, any letters issued by local authorities to the courts regarding co-operation, or letters issued by the programme to court presidents or other officials describing the programme.

To best ensure access to each individual hearing, monitors should also be ready to present all official documents regarding the programme each time they present themselves for monitoring. In addition to these basic documents, OSCE trial-monitoring project programmes in Kazakhstan, Kyrgyzstan, and Moldova have prepared informative brochures. The brochures are meant to introduce the programme to judges, court officials, and other legal actors. To increase transparency, brochures have also contained information regarding the programme's purposes and scope, as well as identification of the implementing partners and names of the individual monitors.

To help gain physical access to courtrooms, programmes have also had positive experience with identification badges or identification cards stating the name of the monitor and affiliation with the programme. Such cards may be particularly helpful when monitors are not OSCE staff and where physical access to courthouses or courtrooms is particularly difficult. In project programmes, identification materials provide a measure of confidence to the monitor through identification with the monitoring programme.

Once inside the courtroom, identification materials alert all actors and participants as to the existence and identity of the monitor.

### 5.3 Securing access to identify cases

Identifying cases for monitoring may be difficult for a variety of reasons and is an issue programmes must always address even when there is no access barrier to monitoring hearings. For example, cases may not be centrally tracked once assigned to a judge, hearings may not be noticed, or case-tracking systems may be antiquated. Further, as in all court systems, custody hearings and other proceedings may be held on short notice or rescheduled without notice. It should also be expected that, within any host state's legal system, individual courts may track cases differently, necessitating different arrangements for different courts.

Establishing a system that permits the fullest identification of those cases and proceedings relevant to monitoring is essential to ensuring that a programme is able to systematically identify cases. This is especially critical for programmes that monitor specific types of criminal cases or special proceedings. Given the wide difference between how individual courts are managed, programmes will have to make individual arrangements to identify cases and to obtain hearing dates and times. In the past, these arrangements have been made at the central, regional, or local level and will ultimately be a function of the programme's organization and individual responsiveness of local officials and actors. When possible, arrangements should be formalized by letter. Arrangements may also be informal, however, reflecting the fact that the existence of a good relationship between the monitor and court clerk is sometimes all that is needed to obtain regular information on the scheduling of cases in a particular court.

Given the additional demands that may be placed upon court staff with respect to identifying cases, it is important to be flexible and meet court officials more than half-way. Although trials may be public, the manufacture of special lists regarding specific cases, faxing of schedules, or other special arrangements may entail work beyond what is required by law or the official's professional responsibilities.

In programmes where monitors are charged with the identification and selection of cases, supervisors also need to remain aware of their case identification methods with individual courts and the origin of cases monitored. There is a tendency for some courts to more regularly provide the case schedules of model or "A" judges. In addition, there is a natural tendency among monitors to seek out judges who more easily provide hearing schedules or are more sympathetic to monitoring. Regular oversight will best ensure representative case selection consistent with the case selection methodology of the programme and allow for the opportunity to address systemic practices limiting access.

Administrative regulations may also support efforts to have court officials provide hearing information and such laws should be reviewed as part of a comprehensive approach to access. In many systems, administrative regulations or court rules exist that explicitly require the public posting of hearing schedules and other information by courts. However, it is often in the interest of individual judges to maintain control over their case schedules, and there will often be strong internal resistance against

consolidation of scheduling information within the court. By raising such rules to the court president or registry official in connection with trial-monitoring, programmes may provide the court with external support for seeking better consolidation of ongoing case schedules from judges in furtherance of their obligations. This may have an impact not only on improving case identification methodology, but may also directly improve court practices in relation to expanding the right to a public trial.

### *5.3.1 Best practices for identifying new cases and obtaining schedules*

- When meeting with court presidents, suggest that a central official at the court be designated to provide registry and case hearing information to the monitor or other programme staff responsible for case identification.
- Seek to establish a regular day and time for docket review with the prosecutor's office and/or court registrar.
- If distance is an issue, seek to make special arrangements with the court registrar, prosecutor's office, or other officials to get notification of cases. In the OSCE, this has included co-operation with officials who agree to fax lists of new cases with hearing schedules.
- Alternative means of identifying cases should be sought, including: regular review of newspapers and other media; information-sharing arrangements with other international organizations or NGOs; or if consistent with the programme's focus, random selection of cases.
- When monitors assume primary responsibility for case identification and case selection, programme guidelines or instructions should be provided on these responsibilities.

## **5.4 Securing access to proceedings and case information**

This section addresses specific access issues that may be confronted by a trial-monitoring programme and provides general principles and best practices that may be employed by programmes to secure improved access to case information.

### *5.4.1 Securing access to the courtroom and hearings in individual cases*

In seeking access to court hearings, monitors may be confronted with a range of obstacles from policing practices in courthouses to informal barriers such as lack of courtrooms necessitating that hearings take place in a judge's private chamber. Consistent with international law, however, monitors are in fact effectuating the defendant's fundamental right to a public trial, the rejection of which is a violation of a fair-trial standard. Accordingly, the process by which monitors seek access to hearings is not only a logistical issue to be overcome, but should be viewed as part of a wider strategy to exercise and expand the right to a public trial. For both of these reasons, it is important that programmes adhere to certain principles and best practices.

#### *5.4.2 Best practices for securing access to court hearings*

- Monitors should arrive in advance of a hearing to gain sufficient time to locate and enter the courtroom (or judge’s chamber) so as to not unnecessarily complicate entry by late arrival.
- Monitors must be prepared and able to clearly articulate the legal basis, purposes, and objectives of the programme to all court officials and legal actors.
- If access is denied by court staff or officials, monitors must be prepared to show applicable programme documents and identification, as well as explain the legal right to monitor trials, as well as the purpose and objectives of the programme.
- If access is still denied, the monitor should request a meeting with the judge to explain the legal basis, as well as the purpose and objectives of the programme.
- If access is not granted by the judge, the monitor should inquire as to the specific legal basis or reason why the right to a public trial in the case does not exist.
- Monitors should report and analyse the reasons for denial of access to the judicial hearing as required by the reporting methods of the programme.
- Monitors should never demand or threaten court officials, but should remain professional at all times in exercising their responsibilities.

#### *5.4.3 Securing access to documents*

Court case files often provide important information on proceedings that occurred prior to a monitored hearing, as well as provide another primary source of information on cases. For instance, case files may provide information on: the date and circumstances of arrest and detention hearings; the conduct of investigative hearings; the existence of witness statements; and other proceedings that occurred prior to the trial. While document collection and review is not necessitated by the scope and focus of every programme, it may be important for programmes seeking additional information related to the case or to develop certain issues that arise in the stages prior to monitoring of the public trial. For example, documents may provide additional information on whether the defendant’s rights may have been violated in pre-trial stages, including the right to a defence lawyer at the custody hearing, the right to be promptly brought before a judge, and other issues (for more on how access impacts issues that may be monitored, see Chapter 2.3.2, “Access and focus”).

The ability to obtain documents will be strongly influenced by the mandate of the programme, as well as by domestic law and practice. For instance, the mandate for some programmes, such as the LSMS in the Mission in Kosovo, provides for “unhindered access” and therefore the right to review all documents. In many OSCE participating States, however, the court file, indictments, and court decisions are not public in the sense that they cannot be obtained by anyone except the parties involved

in the case.<sup>7</sup> For programmes operating in such states, monitoring will not depend on document review. Given these variables, the ability to access documents will differ greatly between programmes, and programmes must consider how the access to specific documents will affect the scope and focus of monitoring.

#### *5.4.4 Best practices for securing access to documents*

- Whenever possible, the right to access to documents should be raised and included in an MoU, as well as addressed with court presidents at the inception of monitoring. A methodology for obtaining documents, including who is responsible for the provision of them, should also be specified as far as possible.
- For the convenience of the court, documents should be obtained in a systemized manner.
- Where monitoring methodology includes review of court documents, case files should ordinarily be reviewed in advance of the hearing to allow the monitor to become familiar with the relevant aspect of the case.
- If photocopying of court documents is not permitted or possible, another possibility may be the inspection of documents at a convenient time in the courthouse.
- Since case files may be kept by individual judges, to respect the principle of non-intervention, monitors should try to avoid direct contact with the judge, and first request case files from the registry and/or other court staff.

#### *5.4.5 Securing access to closed hearings*

International law provides permissible exceptions for the exclusion of the public from hearings in certain specified circumstances.<sup>8</sup> Despite such exceptions, attendance at closed hearings may be important to identify issues related to the specific focus of some programmes. For instance, this may be the case where monitoring seeks to focus on juvenile-justice issues, cases involving vulnerable or protected witnesses, victim's rights, or other issues that may arise in cases where the public is legitimately excluded. Further, monitoring is generally the only method to assess the exercise of fair-trial standards in closed hearings. Again, for some programmes, the mandate of a particular programme may provide sufficient support for monitoring a closed hearing even where the public is excluded. In other domestic contexts, a programme may have to negotiate this right generally, or make an application to the judge on a case-by-case basis.

<sup>7</sup> It should be noted that the right of the defendant to documents is different from the right of the monitoring programme. The former is supported by international standards related to the principle of equality of arms and the right of the accused to prepare a defence, while the latter is related more broadly to the separate interest of the defendant and the public to a public and open trial proceeding.

<sup>8</sup> Pursuant to Art. 14 (1) of the ICCPR, exclusion of the press and public may be appropriate for "reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary ... in special circumstances where publicity would prejudice the interests of justice".



Where access to closed hearings is necessitated by the purposes and focus of the programme, it must also be recognized that such access presents additional operational challenges that must be addressed. First, in cases involving closed hearings, an obligation of confidentiality is imposed upon the monitor and programme as a result of the court's order to exclude the public. This will require that the programme establish clear information-sharing controls and may require special steps to ensure the confidentiality of reporting. Where such controls are not established, or where confidential information is released, programme credibility, as well as the judicial process, may be compromised (see Chapter 8.5.2, "Establishing information-sharing controls"). Despite the obligation of confidentiality, however, it should be noted that such confidentiality only extends to the protection of the information that warranted the application of a closed hearing under international or domestic law in the first instance. It does not apply to collateral issues involving court procedures, including an analysis of the validity of the court's order to exclude the public in the first instance. Therefore, despite potential restrictions on the release of information that formed the basis for the court's order to restrict the public, programmes should retain the right to report more generally on procedural or other issues that do not relate to the subject matter sought to be protected by the court order.

A second operational challenge where closed hearings are monitored relates to the heightened security concerns that arise where a monitor is privy to confidential information. This may include the identity of protected witnesses or other non-public information that warranted preclusion of the public. In cases involving organized crime, war crimes, or other high-profile criminal matters, the personal safety of the monitor may be threatened. Programmes should therefore give careful consideration to both the benefits and challenges of monitoring closed hearings when determining if such monitoring will be performed.

#### *5.4.6 Best practices for securing access to closed hearings*

- Monitors must be prepared to provide official documents, including a copy of the specific OSCE mandate, MoU, and/or official letters providing authorization to monitor closed hearings.
- Monitors must be prepared to explain the confidentiality policy of the programme and that such information will not be disseminated to the public.
- Monitors must agree as part of their code of conduct to be bound by any court order prohibiting the public release of information, i.e., identity of witnesses, substance of specific evidence, and other information that formed the basis for the exclusion of the public.
- If access is granted, monitors must report such information consistent with the reporting methodology of the programme, including special procedures regarding reporting confidential or sensitive information (see Chapter 6 for a broader discussion of programme confidentiality).

- If access is denied, monitors should report and analyse the denial of access to the judicial hearing as required by the reporting methods of the programme, and seek to obtain any redacted or other transcript that the court might release.

## CHAPTER 6

# Internal reporting systems and information management

Case reporting is the way in which information and analysis is provided by monitors following their observation of individual hearings or cases. An effective case reporting system must address the content and organization of case reports so that reporting consistently provides information and analysis in line with the focus of the programme. Information management is a broader concern that involves how a programme maintains and uses this and other information and analysis to meet its objectives, including the publication of reports. The challenge of information management is to organize the entirety of an internal reporting system to enable the regular collection, compilation, and synthesis of information to meet the programme's goals.

The first part of this chapter is structured to help the organizer create an effective case reporting system to meet the needs of a particular programme. Topics covered include: an overview of the challenges of legal reporting; the basic components of a case report; types of case reporting systems; and other issues related to simplifying and systematizing case reporting. The second part of this chapter addresses information management and provides methods by which a programme can manage information through secondary reporting and other management systems, including computer databases. Since the demands of information management increase with the size and scope of the programme, this chapter is especially important for large-scale monitoring operations. However, programmes of all sizes will also benefit from incorporating these general principles and strategies.

### 6.1 Accuracy, consistency, and compilation

As a programme's primary source of information, case reports require a high level of factual accuracy and clear legal analysis in all trial-monitoring programmes. For large-scale programmes such as those organized by the OSCE that seek to make systemic conclusions about the functioning of the criminal justice system through monitoring hundreds of cases, reporting involves additional challenges. Such programmes may be required to analyse and synthesize reports related to hundreds of different cases that involve unique procedural histories, wide-ranging issues and analysis, and that develop progressively over time. Further, all programmes, large and small, must compile and synthesize reports drafted by individuals of differing legal skills, experience, and perspectives. As a result of these challenges, all programmes should develop a standard reporting format to manage internal reporting. In developing a reporting format and

form, organizers should keep in mind three basic challenges facing any reporting system.

### *Accuracy*

The credibility of an entire programme may stand or fall on the accuracy of the information contained in public reports. Accuracy requires that case information be: 1) clearly presented; and 2) supported by observations made during the legal process or extracted from court documents. Accuracy with respect to legal analysis also requires that conclusions be clearly stated, as well as supported by reference to the applicable legal provisions or standards. If a monitor obtains information from secondary sources such as interviews, then case reports must reflect this in order to ensure that caution is used regarding the use of such information for public reports or other external use.

### *Consistency*

Consistency requires that monitors: 1) report on the same issues (issue coverage); and 2) use an identical legal framework for analysis. To achieve consistent issue coverage, the subject matter or focus of reporting must be well defined, and reporting must target these issues. To achieve a consistent framework of analysis, monitors must understand and similarly apply the same legal standards in their analysis.

### *Compilation*

Even if individual reports are accurate and monitors use a consistent approach, case reports should have a standardized format that allows for compilation of information among cases. This maximizes the ability for legal analysts to make meaningful use of all reported data and to compile reports, where appropriate. Compilation involves aggregating reports of cases to draw wider conclusions about systems or practices. Compilation is especially important for programmes that seek to make systematic findings based on a high number of cases monitored.

## **6.2 Basic components of a case report**

In organizing a standard case reporting template, it is useful to divide legal reporting on criminal cases into three main components: 1) case information; 2) fact reporting; and 3) legal analysis and findings. Understanding the difference between these components will allow flexibility when structuring a case reporting form and will help to organize information in a manner that will enable easier identification, analysis, and compilation of data.

### *Case information*

Case information is a fundamental component of every trial-monitoring case report. It is usually included at the beginning of a report to identify the particulars of the criminal proceeding. Most commonly, basic case information includes: the name of the court; case file number; names of the accused; names of legal actors, including the judge, prosecutor, and defence lawyer (if any); name(s) of the victim(s); relevant procedural dates, including the date of arrest, custody, indictment, and hearing monitored; criminal

charge(s); a brief summary of allegations; and other basic case or hearing information deemed relevant to monitoring, such as dates, motions, orders, and verdicts. As with other components of a report, programmes should limit case information to what is actually required based on the focus of the programme so as to not unduly complicate reports.

The provision of basic case information serves two main purposes. First, it serves to independently and publicly document the particulars of a case for purposes of identification. Second, within the context of a reporting system, it introduces the reader to the substance and particulars of the case as a starting point for analysis.

Since case information does not require analysis, but is objective data, the most direct method of getting case information is usually to obtain it from the court file. Programmes without access to case files may have more difficulty obtaining complete case information where such information is not revealed in the course of court proceedings. Even without complete case information, however, conclusive findings and legal analysis may still be made regarding the application of domestic procedures and rules, international fair-trial standards, and other issues monitored throughout the proceedings. This is especially true for programmes aiming to make systemic findings based on monitoring a high number of representative cases.

### *Fact reporting*

Fact reporting relates to the provision of information or evidence regarding the circumstances of the alleged crime, specifically evidence that either provides support for the allegations of the prosecution or support for the defence case. Such reporting may involve or contain:

- Recitations or summaries of witness statements;
- In-court testimony;
- The content of documents, e.g., police reports or the specific allegations in a complaint; or
- Other evidence presented in the case either in favour of the prosecution or defence, or related to the underlying crimes, allegations, or defence.

The importance and emphasis on fact reporting will differ significantly depending on the purpose and focus of the monitoring programme. Since reporting on evidence, including testimony, is extremely time-consuming, programmes must carefully consider whether to emphasize or even to include such reporting. Chapter 6.4.2 below addresses factual reporting in more detail with a view to simplifying the reporting of facts.

### *Legal analysis and findings*

Legal analysis and findings are the centre of most case reports, as these constitute the conclusions of monitors on the specific issues defined for monitoring. In discussing legal analysis and findings, it is important to recognize that analysis and findings not only differ between programmes on subject matter or issues, but also in the manner that such findings and conclusions are reported.

First, legal analysis and findings may concern different issues depending on the focus and purpose of the programme. In OSCE trial-monitoring programmes, for example, these issues have included:

- Compliance with fair-trial standards;
- Implementation of domestic laws and reforms;
- Functioning of the court system, including delays;
- Issues related to facilities and resources;
- Sentencing practices;
- Professionalism of legal actors involved in proceedings;
- Issues related to the functioning of collateral justice institutions such as juvenile, mental health, or correctional services;
- Court police and warrant procedures;
- The right to liberty and detention issues;
- Judicial independence and impartiality (e.g., with regard to the prosecution of minority or ethnic groups); and
- Issues related to the administration of justice regarding specific crimes such as war crimes, trafficking, corruption, and cases involving underlying human rights violations.

However, even where different programmes have a similar focus, the manner of presentation of analysis in case reports may differ. For instance, depending on reporting methodology, findings may be conclusive (e.g., “the defendant was not provided with adequate instructions as to the right to an attorney”) or detailed, including a narrative description of the judge’s instruction, the defendant’s response, and an analysis of how the instructions complied with relevant provisions of domestic law and/or international standards. As a result, the presentation of legal findings and analysis may be structured in a number of different ways depending on the case reporting system.

### 6.3 Selecting a case reporting system

Overall, there are two basic types of standardized case reporting forms or reporting systems. In general, the presentation of legal analysis may be classified into an “open” (or narrative) system or a “closed” (or questionnaire) system. In turn, the terms open and closed reflect different methodologies in analysing and reporting legal findings. Importantly, the differences relate to how legal analysis is reported, and not to the way case information or facts are reported, which may be similar in both systems.

In the OSCE, both types have been employed by programmes reporting on identical issues. Therefore, the choice of a reporting system is primarily a function of methodology that is not directly dependent on the focus or subject matter of monitoring. The following subsections describe and compare these two basic reporting systems.

#### 6.3.1 *Open (or narrative-type) reporting systems*

A reporting system is open when the case report template provides little structure to the monitor and invites a narrative approach to presenting legal findings and analysis. By its very nature, this system allows a greater degree of monitor discretion in

reporting, as reports are loosely structured, thereby inviting analysis by the monitor on issues as they arise. As a result, monitors are required to issue-spot. This means that, as a monitor observes a relevant issue in a given case, the monitor describes the nature of the problem in detail. For instance, such reporting might include a recitation of relevant procedural history, a discussion of the application of domestic law, and conclusions regarding the application of fair-trial standards. In this way, the open system is conducive to in-depth treatment of specific issues or problems as they may arise. Conversely, under an open system, it is unlikely that a monitor will systematically report or provide analysis on issues or practices where no problems are identified or are observed. An example of an open reporting template, a tracking memo from the LSMS in the Mission in Kosovo, is provided below.

**Legal System Monitoring Section**  
**Tracking Memo**

To: Chief of LSMS  
Cc: LSMS Legal Analysts  
From:  
Date:  
Re: Case Name

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**I. Case Information**

<ul style="list-style-type: none"> <li>• Defendant(s), date of birth, ethnic group(s)</li> <li>• Court</li> <li>• Prosecutor</li> <li>• Defence counsel</li> <li>• Injured party (parties), date of birth, ethnic group(s), representative</li> <li>• Pre-trial judge</li> </ul>	<ul style="list-style-type: none"> <li>• Confirmation judge</li> <li>• Trial or retrial panel</li> <li>• Charge(s)</li> <li>• Dates of detention and of release</li> <li>• Verdict</li> </ul>
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**II. Stages of the Proceedings**  
Each time you mention a case in dailies, you have to systematically copy and paste it in this form in order to have all information related to the case in the same document.

1. Police custody
2. Detention
3. Investigation pre-indictment
4. Indictment
  - Summary of indictment
  - Date of the indictment
5. Confirmation hearing
6. Trial
7. Verdict
  - Date of announcement of the verdict
  - Date of the filing of the written verdict
8. Appeal/Supreme Court
9. Retrial
10. While serving sentence

**III. Concerns/remarks**  
(For use if the information does not fit into any of the above-mentioned stages.)

In open systems such as the above, monitors are usually aided in providing legal analysis by a master list or checklist of issues to be monitored for reference and guidance. Such checklists usually take the form of questions regarding the application of specific laws or fair-trial standards organized by stage of criminal proceeding for ease of reference. These questions are not to be answered directly as such, but serve as a point of reference to help alert the monitor to issues or problems that might arise during the observation of hearings or review of files. In the above example, the monitor's legal analysis would be provided in the relevant part of Section II or III.

### 6.3.2 *Closed (or questionnaire-type) reporting systems*

A closed or questionnaire type of reporting system requires monitors to answer a set of specific standardized questions in relation to the case being monitored. The system is closed in the sense that the reporting form is highly structured and provides little discretion for the monitor on the types of issues reported in each case. When compiled, these questionnaires allow for findings to be more easily compiled and quantified in specific types of cases or proceedings.

As an example, a questionnaire employed by the ODIHR trial-monitoring programme in Kazakhstan provides the following questions related to *the presumption of innocence and the right not to be compelled to testify or confess guilt*:

24. Was the defendant handcuffed during the hearing?
25. Was the defendant held behind bars (a cage in the courtroom where the defendant is often held during the trial)?
26. Where was the bailiff during the hearing?
27. Was the defendant's right not to testify against himself explained? Did the defendant exercise this right?
28. Was it explained to the defendant that he is not bound by a confession made during the pre-trial stages?
29. Did the prosecutor or other party put pressure on the defendant during the examination?
30. Did the judge pressure the defendant to confess guilt? If yes, how?

As the above questionnaire illustrates, in closed reporting systems, questions may range greatly in complexity and function. Some questions, like Nos. 24-28, serve as direct observations of specific conditions or practices. Compiled later, such information can provide both a statistical overview of specific practices in relation to local procedural codes, as well as serve as an objective indicator of broader standards being monitored. In this way, practices may be documented in a systematic fashion because they are significant in themselves, or provide support for system-wide conclusions regarding application of broader standards generally (also see Chapter 6.4.3, "Hearing-based monitoring").

Questionnaires therefore may be useful where certain practices or conditions are important to document systematically and quantification is desired. It should also be noted that some questionnaires do not ask the monitor to draw an overall legal conclusion. For instance, in the above example, "was the presumption of innocence violated?". Instead, questionnaires often rely on specific objective indicators to raise questions or



concerns more generally as to systemic practices affecting compliance with local procedural codes and international standards generally. On the other hand, other questionnaires may seek such legal conclusions from monitors. However, when questionnaires are utilized, they usually cover a wide range of issues, sometimes requiring monitors to respond to over a hundred questions for an individual proceeding. As a result, even if conclusions are sought, there will be less opportunity for in-depth analysis characteristic of open reporting systems given the wide scope of issues that are usually required to be covered by the monitor using a closed reporting system.

### 6.3.3 A comparison of open and closed reporting systems

In choosing a reporting system, each system has both advantages and limitations that may make it more or less useful and effective given the purpose and focus of a programme in a given context. Chart 6 compares open and closed types of reporting systems in relation to specific operational and reporting issues that programmes may face.

**CHART 6 COMPARISON OF OPEN AND CLOSED REPORTING SYSTEMS**

Issue	Open (narrative) report	Closed (questionnaire) report
<b>Depth of analysis in individual cases</b>	<ul style="list-style-type: none"> <li>• Allows for in-depth focus on particular issues in individual cases, including the treatment of problems, mitigating issues, and detailed analysis;</li> <li>• More qualitative focus may provide a greater level of detail for public reporting where serious fair-trial or human-rights violations occur in individual cases.</li> </ul>	<ul style="list-style-type: none"> <li>• Less focus on providing in-depth narrative analysis in individual cases;</li> <li>• May be organized to provide specific information and analysis on application of domestic laws and fair-trial standards that is conclusive in individual cases.</li> </ul>
<b>Ability to provide quantification of problems throughout justice system</b>	<ul style="list-style-type: none"> <li>• May be difficult to aggregate findings on numerous issues, as reporting discretion tends to focus on specific problems related to individual cases;</li> <li>• As open reports become more structured and focused, there is more capacity to quantify the nature or extent of problems (see Chapter 6.3.4, “Hybrid formats – open organized format”).</li> </ul>	<ul style="list-style-type: none"> <li>• Structured to enable compilation of information regarding systematic practices impacting the application of domestic laws and fair-trial standards more generally;</li> <li>• Format requires responses on all issues allowing for a quantitative or survey-type approach regarding practices over all cases monitored;</li> <li>• Quantitative focus may provide a strong basis for conclusions on the need for systemic reforms.</li> </ul>

<b>Access limitations</b>	<ul style="list-style-type: none"> <li>Restrictions on access to court proceedings, documents, and files may provide less opportunity and information to perform in-depth analysis of issues characteristic of open reports.</li> </ul>	<ul style="list-style-type: none"> <li>Questionnaire format provides a capacity to compile reliable information across many cases to make conclusions on specific issues without access to the entire record of an individual case.</li> </ul>
<b>Number of reports</b>	<ul style="list-style-type: none"> <li>As reports increase, conclusions may be more definite, but management of all information becomes more difficult with greater chance that case information will not be utilized.</li> </ul>	<ul style="list-style-type: none"> <li>As reports increase, information management is less problematic as more data directly increases the credibility of findings.</li> </ul>
<b>Short monitoring time frame/few cases</b>	<ul style="list-style-type: none"> <li>Detailed analysis of individual cases and highlighting of problems may provide a basis for reporting in emergent situations.</li> </ul>	<ul style="list-style-type: none"> <li>Conclusions based upon quantitative analysis require a longer time frame to monitor a sufficient number of cases to make reliable findings.</li> </ul>
<b>Monitor experience</b>	<ul style="list-style-type: none"> <li>Requires more monitoring experience to spot issues and independently apply standards to formulate conclusions.</li> </ul>	<ul style="list-style-type: none"> <li>Questionnaire provides more structure for monitors resulting in more consistent issue coverage.</li> </ul>
<b>Strengths/weaknesses</b>	<ul style="list-style-type: none"> <li>Excellent where programme seeks to take an in-depth look at proceedings in individual cases or focuses on a narrow set of issues with a high level of analysis;</li> <li>Making systemic conclusions may not always be supported by methodology;</li> <li>Greater tendency that monitors may focus on different issues given wider discretion in reporting;</li> <li>Danger regarding undue focus on problem issues to exclusion of good practices, as monitors focus on reporting violations.</li> </ul>	<ul style="list-style-type: none"> <li>Objective survey approach may provide quantifiable findings regarding how a system functions;</li> <li>Allows collection of data on widespread and select issues during a monitoring term;</li> <li>Danger regarding a lack of depth of analysis and that nuances may be lost;</li> <li>Difficult to assess quality of data on some issues;</li> <li>More difficult to provide in-depth and complete public reporting on individual cases.</li> </ul>

#### 6.3.4 Hybrid formats – open organized format

An open organized format is open in the sense that, like an open report form, it requires the provision of narrative analysis on issues based upon the discretion of the monitor. As opposed to a pure open report, however, an open organized template is more tightly organized around discrete issues, permitting more consistent issue coverage and easier compilation of findings on such issues. Such a format may be helpful for a programme that wishes to retain the possibility of in-depth case analysis while also monitoring a

high number of cases to make systemic conclusions using quantitative techniques or other statistics culled from monitoring. An example of an open organized template is provided below from the OSCE Mission to Bosnia and Herzegovina. The organization of discrete issues requiring narrative analysis is found in Section IV of the report template.

### DAILY HEARING REPORT

<b>Date:</b>	
<b>To:</b>	
<b>Cc:</b>	
<b>From:</b>	
<b>Re:</b>	<b>Name of Case</b>

#### I. CASE INFORMATION

Hearing date:  
 Nature of hearing:  
 Defendant name(s):  
 Court file number:  
 Indictment number:  
 Charge:  
 Date indictment confirmed:  
 Plea:  
 Date of plea:  
 Date of court-ordered custody:  
 Date first preliminary motion made and type:  
 Defendant/victim ethnicity (*if relevant*):  
 Court:  
 Judge(s):  
 Prosecutor:  
 Defence lawyer (indicate if private, or *ex officio*):  
 Date of appointment of defence lawyer:  
 Next hearing date:  
 Verdict and sentence:

#### II. SUMMARY OF INDICTMENT

---

#### III. SUMMARY OF HEARING

(*e.g., start/end time, who was heard, final outcome, etc.*)

---

#### IV. ANALYSIS OF CPC IMPLEMENTATION AND ADHERENCE TO FAIR-TRIAL STANDARDS

- A) Compliance with CPC deadlines and delays
- B) Order and review of custody
- C) Judicial independence, impartiality, and competence
- D) Defence lawyer/issues relating to appointment and effectiveness
- E) Evaluation of performance of prosecution, judges, and defence/adversarial reforms
- F) Other fair-trial/ECHR issues
- G) Other CPC issues relating to hearing monitored
- H) Application of witness-protection measures

## 6.4 Strategies to organize, simplify, and systematize reporting

### 6.4.1 Using instructions to ensure a clear reporting methodology

Reporting instructions or guidelines on the completion of case reports are critical to ensuring consistency in reporting and to enhancing the programme's capacity to manage and synthesize information. Without clear reporting instructions, monitors may focus on disparate issues, or conversely bury relevant analysis among pages of extraneous facts and issues. Providing written instructions specifically tailored to a reporting template is an invaluable way of assuring consistency in issue coverage and adherence to a common reporting methodology and standard of legal analysis. Such instructions may provide:

- An explanation or overview of the issue to be reported;
- The applicable international standards and domestic laws to be applied; and
- A list of relevant questions to help provide guidance in addressing the issue.

While reporting instructions are similar to a checklist in that they raise issues to be monitored and help a monitor to issue-spot (see Chapter 6.3.1, "Open reporting systems"), instructions go further in that they are linked directly to the particular reporting format. This in turn helps ensure not only consistency in issue coverage, but consistency in reporting methodology in terms of how issues are reported and analysed. The following provides an example of reporting instructions for the completion of parts of Section I and Section IV of the sample reporting form provided in the preceding section.

#### *Reporting Instructions*

#### **DAILY HEARING REPORT\***

\* For ease of reference, the instructions on the form are in italics. Due to space restrictions, the entire form with instructions has not been produced.

#### **I. CASE INFORMATION**

*This section introduces the reader to the particulars of the case and provides a framework around which the analysis of the hearing will be developed in the remainder of the report. It is essential to complete all information each time a new report is made. Note: Do not leave any entry blank. If there is no appropriate entry, indicate "none" or use the abbreviation "n/a" to assure the reader that the lack of an entry is intentional.*

**Hearing date:** *(the date of the monitored hearing corresponding to this report)*

**Type of hearing:** *(plea, trial, sentencing hearing, etc.)*

(...)

#### **IV. ANALYSIS OF CPC IMPLEMENTATION AND ADHERENCE TO FAIR-TRIAL STANDARDS**

*This is the heart of the report, and the analysis set forth here is the key to the success of the entire programme. The collection and compilation of information from the following sections will produce a picture of how the criminal procedure code is being implemented statewide, as well as an assessment of how practices comply more broadly with international fair-trial standards.*

*This section is divided into sub-headings to enable the evaluation of proceedings to be organized into general subject areas relevant to the focus of monitoring. To provide reporting guidance on the subject matter of each sub-heading, explanations, CPC references, and relevant*

questions for analysis are provided below. When providing analysis of proceedings, reference should be made to specific CPC provisions to ground your analysis in the applicable code provisions. In some cases, serious breaches of CPC provisions or other practices may give rise to a potential violation of fair-trial standards or human rights. When this occurs, specifically identify the factual and legal basis for the breach of the international standard.

#### **A. Compliance with CPC deadlines and delays**

**Explanation:** The observance of procedural deadlines and avoidance of delays is essential to ensure the effective and fair administration of justice – justice delayed is justice denied. Results of trial-monitoring so far suggest that failure to meet specific procedural deadlines and delays in the completion of proceedings are common. The evaluation of this problem, including analysis of what actors and/or factors contribute to delays, will permit a better assessment of the reasons for delay. In identifying problems associated with the timing, keep in mind that delays may occur even where there is no breach of a specific CPC provision, e.g., when the court schedules staggered trial hearings every 30 days, or delays occur due to inadequate witness summons procedures. These delays result in systemic rescheduling of hearings and delayed proceedings even though no specific CPC deadline has been breached. In other cases, very significant delays or non-compliance with CPC deadlines may rise to the level of a violation of the defendant's right to trial within a reasonable time. Monitors should assess each delay or violation of a deadline in a critical fashion with reference to: the appropriate CPC provision(s), who or what circumstances are responsible for the delay, the remedies or sanctions available to the court against those who are responsible, and whether such remedies are exercised and to what effect.

#### **Relevant Criminal Procedure Code Provisions:**

13 RS/14 FBiH4	Right to trial without delay.
210 RS/226 FBiH	Prosecutor, defence lawyer, or legal representative of an injured party may be fined for prolonging the criminal proceeding.
236 RS/244 FBiH	Provides for a trial to be scheduled no later than 60 days from the entering of the plea of not guilty. An extension of up to 30 days may be granted in exceptional circumstances.
257 RS/265 FBiH	Reasons for adjournment of the main trial.
259 RS/267 FBiH	Reasons for recess of main trial.
292 RS/301 FBiH	Provides for a maximum delay of three days from the completion of the trial to the announcement of the verdict.
295 RS/304 FBiH	The written verdict must be prepared within 15 days (exceptionally 30 days) from the announcement of that verdict.
321 RS/330 FBiH	Appeal against first-instance verdict: If the accused is in custody, the appeal must be decided within three months of the court's receipt of the appeal documents.

**Relevant questions:** *Have deadlines been observed? If not, how significant are the subsequent delays? What actor (prosecutor/defence/judge/accused) is causing or contributing to the delay? Is the judge utilizing the court powers to sanction the prosecution/defence/witness for failure to appear and to order apprehension where appropriate? Are other factors contributing to delays such as the system for the service of court papers and summons? What is the basis for adjournment requests? Are staggered trial hearings scheduled and why? Does the delay merely affect court efficiency or does it rise to the level of violating the defendant's right to trial within a reasonable time, for instance when the accused is in custody or the delay prejudices the accused's ability to defend himself?*

Even if instructions are not specifically included on a sample reporting form as above, general reporting instructions should be issued to improve the consistency of reporting methodology, thereby enhancing the capacity to assess and compile reports. Instructions are equally important for closed reporting systems, which are also susceptible to divergent approaches to reporting despite the more structured format.

#### *6.4.2 Simplifying factual reporting*

The necessity of reporting the facts and evidence of a case is an issue that relates directly to the purposes of monitoring. For programmes monitoring trials solely from a procedural perspective, evidence related to the circumstances of the underlying crime is often irrelevant to an analysis of the application of domestic law, fair-trial standards, or other issues related to the functioning of the courts. When this is the case, detailed reporting regarding testimony, documents, and other evidence presented at trial has the potential to unnecessarily complicate or lengthen reports, as well as shift attention and focus from procedural issues or fair-trial rights to the merits of a case. For these reasons, in designing an efficient reporting system, programmes should seek to minimize the reporting of evidence as far as possible in line with the purpose of the programme. For programmes that seek to limit reporting evidence relating to the underlying crime, two situations should be kept in mind where reporting on evidence and facts may be important to the focus of monitoring.

#### *Reporting facts to illustrate the application of fair-trial standards or other issues*

Reporting facts and evidence may at times help illustrate the application of domestic laws or fair-trial standards. In particular, the right to confront witnesses, present evidence and witnesses, have effective defence counsel, and other fair-trial protections may be difficult to fully assess in some cases without some treatment or reference to the facts of the case. For example:

- Where a conviction is based on an unchallenged statement in the police file, reporting on the content and significance of the statement may illustrate the violation of the right to confront witnesses, or alternatively a problem with the effectiveness of a defence counsel who failed to cross-examine the witness;
- If a conviction is based upon illegally seized evidence, a compelled confession, or the testimony of a defendant who was not provided with instructions regarding their rights, discussion of the content and significance of evidence may help illustrate the nature of the right violated;
- Where monitoring seeks to assess adversarial trial rules that place the obligation to provide evidence on the prosecutor, a description of the significance of the evidence presented by the judge (as opposed to the prosecutor) may illustrate the extent to which the judge is engaging in the prosecution and therefore demonstrates the implementation of the new trial rule;
- Where monitoring seeks to document the need for, or effectiveness of, witness-protection measures, e.g., where earlier statements are recanted, a comparison between an earlier incriminating statement and the testimony at trial may highlight the need for effective witness-protection measures.

In reporting facts or evidence to illustrate the application of fair-trial standards or other rules, it should be stressed to monitors that the test for reporting on evidence is not whether testimony or evidence is relevant to the merits, but how the treatment of the evidence in the circumstances of the case illustrates the application of certain rules. Often, it will be the case that such evidence should have been presented, challenged, or excluded. Therefore, when reporting evidence for such reasons, it should be reported as part of the legal analysis with focus upon how the evidence relates to the application of specific laws or standards, and not as part of an overall treatment of the merits of a case.

*Analysis of impartiality and fairness through a comparative or statistical approach*

The right to an independent and impartial tribunal is an international human right and fair-trial standard.<sup>9</sup> Where the focus of monitoring is to assess the level of impartiality in a legal system, e.g., with regard to a class of defendants, the analysis and reporting of allegations, evidence, and the substance of indictments and judicial verdicts may provide objective evidence of bias using a comparative approach. In some OSCE programmes, such a comparative approach has been particularly useful in determining the existence

**THE OSCE MISSION TO CROATIA'S TRIAL-MONITORING PROGRAMME: REVIEWING ALLEGATIONS AND VERDICTS TO ASSESS IMPARTIALITY OF THE JUDICIAL ACTORS INVOLVED**

The primary focus of trial-monitoring in the OSCE Mission to Croatia has been to assess whether Croatian courts process war-crimes cases in a manner reflecting professionalism and impartiality with respect to the defendant's national origin. In drawing conclusions regarding the existence of disparities in prosecutions on the basis of ethnic origin, analysis and reporting have focused on allegations, evidence, and factual findings in a number of ways without necessarily assessing cases on the merits. For instance:

- By reference to underlying crime through analysis of whether the allegations contained in the indictment, as a legal matter, support the criminal charges;
- By demonstrating lack of impartiality with regard to sentencing by citing drastically different treatment of identical facts as mitigating and aggravating circumstances in cases involving different ethnic groups;
- By documenting the high rate of reversals by the Croatian Supreme Court of the verdicts of trial courts in war-crimes cases based upon the failure of courts to correctly establish facts. The programme has also cited these decisions to illustrate extreme examples of bias in judicial fact-finding.

In all these ways, the treatment and analysis of allegations, evidence, and factual findings have been used to illustrate a lack of impartiality without necessarily assessing the merits of the case. This approach has furthered the programme's aim to objectively assess whether Croatian courts process war-crimes cases in a manner reflecting professionalism and impartiality.\*

\* The OSCE Mission to Croatia has also been engaged in additional trial-monitoring activities.

9 Art. 14 (1) of the International Covenant on Civil and Political Rights.

of systemic prosecutorial or judicial bias in a post-conflict environment. Importantly, in using such a comparative approach, analysis and reporting of the underlying allegations and verdicts in criminal matters does usually not require analysis of the merits of individual decisions.<sup>10</sup> Rather, conclusions are based more broadly on a comparative approach to the treatment of similar allegations and facts in different cases.

#### *6.4.3 Hearing-based monitoring*

Hearing-based monitoring refers to a monitoring methodology that focuses on monitoring single hearings from many different cases rather than entire cases from start to finish. Through careful selection of the procedures and practices monitored in individual hearings, a hearing-based methodology has the capacity to provide an assessment of systemic practices. In this way, conclusions regarding the functioning of a justice system may be made, including whether such systemic practices are consistent with international fair-trial standards without having to follow individual cases from pre-trial stages through appeal over a period of months or years.

A hearing-based methodology may be especially useful where the purpose of monitoring is to support justice reform through an assessment of how specific procedures are implemented. It is also useful where access limitations or time constraints limit the complete monitoring of individual cases to completion. On the other hand, hearing-based monitoring will not support in-depth monitoring of individual cases for the purpose of making conclusions about the application of fair-trial standards at the final conclusion of a case, or be suitable for many special-purpose monitoring programmes (see Chapter 3.4, “Special-purpose projects”). Nevertheless, hearing-based monitoring is a logical outgrowth of the function of monitoring as a diagnostic tool to support justice reform and will be most appropriate in such monitoring contexts.

In practice, the key to successful hearing-based monitoring is to identify the procedures and issues in advance that will be systematically observed in specific hearings. Although not previously referred to as such, the case-reporting system of the Kazakhstan programme described earlier at 6.3.2 reflects a hearing-based monitoring methodology. For instance, none of the issues identified in Kazakhstan’s questionnaire seek to provide a definitive conclusion as to whether the presumption of innocence was violated in the case. Nonetheless, the monitoring of the specific procedures and practices will provide quantitative findings of practices in individual hearings that may not be consistent more broadly with a justice system that incorporates international fair-trial standards. Importantly, both open and closed reporting systems may be utilized for such monitoring.

Some issues that are particularly susceptible to hearing-based monitoring and that have been successfully monitored by past programmes using such an approach include:

- The frequency of defence counsel representation in proceedings, as well as in relation to specific types of crimes and defendants;

<sup>10</sup> Some trial-monitoring reports prepared by the OSCE Mission to Croatia have, however, cited the merits of individual decisions to illustrate extreme examples of bias in judicial fact-finding and weighing of facts.



- Whether instructions are provided to the accused regarding their rights at a plea hearing or at the first trial hearing;
- The frequency and use of custody in criminal cases, as well as the duration of pre-trial custody (note that this latter issue may require court documents);
- The ability of the public to access the courthouse or courtroom; and
- Any other procedures or practices that are mandated by procedure codes or otherwise proscribed in connection with a specific type of hearing.

In monitoring and reporting using a hearing-based approach, programmes must be careful not to draw conclusions that are not supported by the methodology (for instance, drawing conclusions regarding the effectiveness of defence counsel based on monitoring one hearing out of a long trial may be problematic). It is also true that monitoring a case from start to finish will increase both the scope of issues that may be monitored in a given case, and also provide a greater depth of analysis. Nevertheless, hearing-based monitoring, when carefully structured, provides a powerful methodology to make important findings regarding the administration of justice without having to make definitive conclusions regarding the application of fair-trial standards in individual cases.

## 6.5 Information management and internal reporting

Internal systems to manage information are critical to the capacity of a programme to synthesize case reports, make conclusions, and publish reports. As programmes grow in size and the volume and complexity of reporting increases, information management becomes increasingly important. A programme with 15 monitors may produce as many as 50 case reports a week. Smaller programmes will also accumulate significant reporting data over time. The ability of a programme to efficiently access case information, identify and quantify trends, and form meaningful conclusions to be published requires the creation of internal systems. Without an internal system to manage information, at best monitoring reports will be overlooked, and at worst conclusions may not reflect the body of monitoring data. This section provides an overview of information management techniques, including secondary internal reporting and other case management systems.

### 6.5.1 *Secondary internal reporting*

Secondary reporting allows programmes to regularly synthesize case reporting into public reports, as well as organize information for other purposes of the programme. Secondary internal reporting takes two basic forms: 1) internal reporting by legal advisers; and 2) other reporting by monitors.

#### *Internal reporting by legal analysts*

Internal reporting by legal analysts or advisers has a number of functions that should be considered by all programmes in determining the frequency and content of such reporting. These functions include ensuring:

- Regular review of monitors' work product (thereby improving quality control and ensuring that follow-up for information on cases will be timely);
- Regular oversight on the numbers and nature of cases monitored (so that problems with access and methodology will be addressed quickly, and adjustments may be made on a timely basis);
- That legal analysts are kept up to date on individual case developments;
- That legal analysts are able to identify trends and issues during the course of a project (thereby helping facilitate the process of compiling and synthesizing issues to organize thematic issues for external use as required by the programme).

In structuring a secondary reporting system, a programme should establish a regular reporting schedule from legal analysts based on the external reporting and other organizational goals of the programme. Programmes may also wish to establish a standard template for secondary reporting, or define what should be included in such reports. The following provides two examples of internal reporting systems used by OSCE programmes.

#### EXAMPLES OF INTERNAL REPORTING SYSTEMS

**LSMS, OSCE Mission in Kosovo:** Legal analysts provide compulsory bi-weekly reports to the chief of the LSMS on thematic issues researched and analysed by the legal analysts based on case reports compiled in the previous two weeks. Legal analysts' bi-weekly reports are to be no longer than two pages. After review by the chief, bi-weekly reports are used by the LSMS to prepare a semi-public monthly LSMS monitoring report that is disseminated to courts, prosecutors, and lawyers. The reports are also used as a resource in drafting longer periodic public reports. In this way, bi-weekly reporting not only enables the ongoing synthesis of information for periodic reports that will be issued semi-annually, but also provides a basis to report regularly to local authorities.

**Trial Monitoring Programme, OSCE Mission to Bosnia and Herzegovina:** Regionally based legal advisers prepare a standard bi-weekly report on cases that have been monitored in the legal adviser's geographic area of responsibility. These bi-weekly reports provide analysis of thematic issues under review, cite specific cases, and assess practices in particular courts or regions. Upon receipt of these regional reports, a legal adviser at the head-office level then prepares a monthly trial-monitoring report that synthesizes these reports. The monthly report focuses, among other things, on a single thematic issue, setting forth the nature and scope of the issue, citing representative cases, and formulating recommendations to address the issue. As completed, both the bi-weekly reports and the monthly programme report are circulated among all staff. In this way, reports serve to keep all staff informed of current issues, as well as identify and facilitate the development of major thematic issues for more complete treatment in periodic public reports.

### *Other reporting by monitors*

In addition to providing case reports concerning individual hearings, monitors may also provide secondary reporting to support the process of compiling and synthesizing information. This may support public reporting efforts for programmes that employ fewer supervisory staff, as well as serve a capacity-building role. Since monitors may often be assigned to a particular region or court, monthly reporting allows monitors an avenue to provide an overview of practices and issues observed in their court or region. This allows analysis of issues unrelated to a specific case, such as general conditions related to a monitored courthouse, including scheduling, delays, equipment or facility issues, and practices observed. Secondary reporting may help to provide further identification as to what practices are confined to a particular judge or case, and what practices may be endemic to an entire court or system. Secondary reporting also permits more detailed treatment of serious violations or problems that routinely occur systemically. From a capacity-building perspective, such reporting also provides an opportunity for monitors to perform legal writing outside the structured case-reporting format.

#### **EXAMPLES OF SECONDARY MONITOR REPORTING**

**Trial Monitoring Programme, Mission to Moldova:** In addition to case reports that are submitted jointly after each hearing by a monitoring pair, all monitors are individually required to submit a narrative report on a monthly basis. Such reports are required to contain a summary of the most frequent procedural violations identified by the monitor during the month, information that could not be fully reflected in the case report, and recommendations on how to eliminate any violations encountered. In the context of the Moldova programme, monthly reports not only assist the programme co-ordinator in identifying and analysing issues, but also further one of the primary purposes of the programme: to build the capacity of local monitors who are recently graduated lawyers.

**Trial Monitoring Project in Kazakhstan, ODIHR and OSCE Centre in Almaty:** In addition to regular case reports that are to be submitted each week by a monitoring pair, at the end of each month individual monitors must submit a special report on a topic designated in advance by the project co-ordinator. In drafting the monthly report, monitors are to apply domestic law and international standards and provide examples of practices from monitored cases. In addition to building the capacity of local monitors, the assignment of specific topics involves the monitors directly in analysis and compilation of cases relevant to the specific issues under observation. This in turn supports the capacity of the programme to synthesize information for public reports supporting the work of the project co-ordinator.

### *6.5.2 Case management systems*

All programmes require some type of centralized case management system to store and organize case information. At a minimum, case management systems allow programmes to quickly access reports, respond to emergent issues, and provide important institutional memory of the programme's activities. Case management systems also

facilitate the organization of monitoring reports so that they may be compiled and synthesized into final reports.

For programmes with limited cases, an adequate case management system may be as simple as keeping a ledger of cases and corresponding case filing system either electronically or in hard copy. Similarly, for programmes that monitor a limited number of priority case types, or seek to assess a limited set of issues, a well-organized file system and a spreadsheet may provide an adequate means to track and compile relevant information and analysis. This may be the case, for example, where monitoring is fact-intensive or involves detailed analysis of allegations and verdicts such as the trial-monitoring programmes involving war crimes in Croatia and Serbia. For these programmes, legal analysis is highly focused on the details or specific issues of individual cases rather than compilations and synthesis of practices and data across hundreds of cases.

As the volume and complexity of monitoring increases, the need for more powerful case management systems increases. Specifically, as the type of cases monitored broadens and the set of issues assessed at different stages of proceedings increases, the demands of analysis and compilation make information management critical. For such programmes, it is correct to think in terms of an *information management system* as opposed to a *case management system*. This is because such systems must not only enable the organization of individual case information, but must also enable the compilation and synthesis of discrete practices and issues to make conclusions about systematic practices across many cases. Therefore, as the volume and complexity of monitoring increases, a computer database system should be considered as both a more useful and inexpensive information management alternative.

### 6.5.3 Computer databases

A computer database is an advanced information management system that is able to store, organize, and compile case information in any number of combinations (called reports) for which it is programmed. Over longer spans, a computer database also provides institutional memory, including making older monitoring results readily accessible to new staff. The maintenance of past monitoring records is important where programmes seek to compare and measure changes over years, an appropriate period for judicial reform. Depending on the complexity of the system, a database may cost as little as 1,000 euros to design and establish. In the OSCE, a number of programmes have developed such databases.

#### *What can a database do?*

A database is a completely different tool from a simple spreadsheet in that it has the capacity to organize and compile case information and analysis in an unlimited number of ways. For example, while a spreadsheet may be helpful to do basic counting and create simple statistics, each new issue or inquiry requires the review of individual case reports and recounts. On the other hand, once a case report is entered into a database that has been structured to manage the components of case reports, the types of information, correlations, and reports that may be generated are only limited by the scope and organization of the elements of the case reporting form (see Chapter 6.2, “Basic components of a case report”).

As an example, one of the issues commonly monitored by programmes is the right to defence counsel. Over the course of a monitoring term, a large-scale programme may monitor a thousand hearings, involving hundreds of cases at different stages of proceedings where the issue of the right to defence counsel was assessed. One simple statistic that may be meaningful in providing a broad overview of the overall exercise of the right to defence counsel might be the frequency of appearance of a defence counsel generally in all cases monitored. Such information may be obtained perhaps through a review and hand count of the relevant section of the case report.

However, for programmes that want further analysis or statistics on the exercise of this right in specific contexts as circumstances change, re-counting hundreds or thousands of case reports each time a different set of data is required becomes burdensome. A database might, within seconds, provide the following types of statistics from the same reports:

- The number of cases involving serious crimes involving long-term imprisonment, where no defence counsel was present at trial (or the number of cases where defence counsel was present);
- The number of cases where no defence counsel was appointed to an indigent defendant (or cases where such counsel was appointed);
- The number of cases where no instructions were given to the defendant on the right to counsel and no counsel was obtained;
- The number of cases where no instructions were given to the defendant of the right to counsel, no counsel was obtained, and the defendant was convicted.

Further, in addition to generating statistics, a database is also able to produce issue lists or lists managing narrative information or analysis. For instance, for each example above where a defence counsel was not assigned (assuming the case report included this issue), a database might provide an issue report, including the monitor's conclusions on whether the absence of a defence counsel constituted a violation of domestic law and/or international fair-trial standards. Alternatively, an issue list for those cases where defence counsel was present could display the monitor's comments regarding the effectiveness of such counsel.

For example, an issue report run on cases where no defence counsel was present during a specific time period might look as follows if generated by a database.

**ISSUE REPORT: NO DEFENCE COUNSEL PRESENT [1/1/08 – 5/5/08]**

Defence counsel	Hearing date	Case name	Right to defence counsel
NO	1/3/08	Pusara	The accused advised the court he wanted a lawyer, but could not afford one. The preliminary-hearing judge did not respond and did not enter the request in the record. Given the serious ...
NO	1/3/08	Rodic	The judge failed to advise the accused of the right to a lawyer and warned the accused against discussing his financial circumstances during the hearing. This constituted a violation of the right ...
NO	1/3/08	Palameta	At the hearing, the accused appeared emotionally distressed and it was established that he had a history of mental illness. Despite the fact that it appeared that in the interests of justice due to a mental ...
NO	1/4/08	Sando	After being instructed of his rights, the defendant indicated that he did not need a lawyer and wished to represent himself at the trial. Since it ...

Despite the powerful information management capacity of a database, it can only enhance the ability of a programme to generate useful reporting where legal advisers continue to be engaged in all facets of reporting. Importantly, databases cannot take the place of legal analysts who must still review case reports, analyse issues, and provide secondary reporting. Therefore, though useful, a database is only an organizational tool. It is still the legal adviser who must oversee the quality of monitoring information and provide the legal and analytical framework for synthesizing information, including what information is accurate and useful.

## CHAPTER 7

# Programme procedures and field support

A trial-monitoring programme is an activity that involves a high level of co-ordination and consistency of methodology among monitors. Although trial-monitoring is a collective exercise with a team quality, the act of monitoring, including observation and reporting, is performed mainly as an individual activity or in pairs. Maintaining the integrity of a programme requires basic operational controls, including programme procedures and the provision of adequate field support. Guidelines and procedures related to the issues of access and reporting have been specifically addressed in previous chapters. This chapter provides an overview of those remaining areas where monitoring guidelines and procedures are useful to organize operations, including the provision of field support.

### 7.1 Code of conduct

A professional code of conduct for monitors and other staff safeguards the integrity of the monitoring programme, and in particular, how external actors and the public perceive monitoring and the programme. A code of conduct incorporates the principles of the programme into the working methods of the monitors and other staff by providing overarching standards of conduct. In this way, codes of conduct formalize general monitoring principles such as non-intervention and other operational values into a set of professional standards.

As an internal mechanism, a code of conduct also helps to ensure that monitors adhere to common procedures. Codes of conduct therefore provide a basis to establish monitor accountability. However, unlike monitoring guidelines or instructions, which address specific case monitoring and reporting responsibilities, a code of conduct applies broadly across all a monitor's activities.

Codes of conduct should be put in writing and may be included as part of a programme's written monitoring guidelines for the reference of all staff. Where monitors are contracted and not subject to OSCE staff rules and regulations, the code of conduct may also be annexed into the monitoring contract to further emphasize the monitor's professional obligations. Since programmes may adopt different operating principles, or apply principles differently, there is no one definitive professional code of conduct. In the OSCE, however, codes have been drafted that serve to further the three basic working principles below.

### *7.1.1 The duty of non-intervention and appearance of impartiality*

As discussed in Chapter 1, the principle of non-intervention in the judicial process is an overarching principle that serves to support and ensure the independence of the judiciary, a fundamental requirement for the rule of law. Related closely to the principle of non-intervention is ensuring the appearance of impartiality regarding the outcome of the case. The appearance of impartiality as to the merits of a case helps ensure that all legal actors understand that the monitoring programme is not biased regarding the merits of individual cases.

While the principle of non-intervention applies most directly to contact with the judiciary, the appearance of impartiality applies in a similar manner to interaction with all legal actors and participants. In practice, each programme differs in the extent to which contact is made with legal actors and case participants in trials. For instance, some programmes may rely on prosecutors and lawyers for specific information about a case, to access to documents or schedules, or they may prohibit contact altogether. Whatever the nature of the interaction, however, certain general rules should be incorporated in a code of conduct regarding contacts with all legal actors and participants.

To the extent that monitoring methodology relies on informal information-gathering from parties or participants, the appearance of impartiality may be difficult to maintain. This is especially true where one party becomes aware of interaction with the other party in a case. If a programme methodology must include such contacts, one way to avoid this appearance of impartiality is the rule of mutuality of contact: if contact is required with one party (for documents or to obtain information), there should be similar contact with the other party so it is clear to both sides that the monitor is not siding with a party regarding the outcome of the case, but merely obtaining information. In contacting both sides, however, the monitor must not share information, as this would serve to engage the monitor in the judicial process.

OSCE monitoring programmes have adopted almost identical rules for codes of conduct related to the principle of non-intervention and impartiality. The following are best practices that have been developed:

- Monitors must never interrupt a trial proceeding or speak with legal actors or participants during the trial.
- Monitors must never intervene in a trial or attempt to influence the outcome of trial proceedings in any way.
- Monitors must never ask legal actors their opinion on a case or advise them with regard to a course of legal action to take.
- When asked questions about, or invited to actively engage in, the judicial process, monitors must explain their role as an observer of the process, the principle of non-intervention by which monitoring is conducted, and the purpose of monitoring, and they must decline to comment.
- Monitors must maintain strict impartiality in the conduct of their duties and shall at no time express any bias or preference in relation to the parties in a case.
- Monitors sit apart from the prosecution and defence in the courtroom if physically possible, to avoid the appearance of support or partiality.



- When engaging with actors or participants for the first time who are not familiar with the monitor's role, monitors must explain their role as an observer of the process, as well as the principle of non-intervention by which monitoring is conducted.

### 7.1.2 *The duty of professionalism*

Given the professional nature of the judiciary and the importance of the judicial process, monitors must always be held to a high standard of professionalism in carrying out their responsibilities. As the public face of the programme, the conduct of monitors directly reflects on the extent to which the programme takes its responsibilities seriously. Internally, monitors should also be held to a high standard regarding their knowledge of the local legal system and applicable domestic and international law.

A code of conduct should be provided in relation to appropriate conduct in court. In the OSCE, codes of conduct have provided the following best practices with respect to monitors' professional obligations:

- Monitors shall always arrive promptly at court;
- Monitors shall wear appropriate clothing;
- Monitors shall behave in a dignified manner;
- Monitors shall treat all court officials and actors with dignity and respect;
- Monitors shall be diligent and prepared for court. This means monitors must provide full attention to the proceedings and take comprehensive notes even where the hearing appears to be recorded;
- Monitors shall be familiar with all programme guidelines and procedures, and take their continuing-education responsibilities seriously.

### 7.1.3 *The duty of confidentiality*

Confidentiality is an operational value that protects the integrity of a monitoring programme by providing basic controls on the release of information by monitors. While the obligation to monitor confidentiality may at first appear to conflict with the right to a public trial and the interest in public debate regarding the fairness and findings of public trials, it serves two critical purposes in the context of a monitoring programme. First, the duty of monitor confidentiality protects the release of confidential information obtained by virtue of a programme's access to non-public information. The policy of the LSMS, OSCE Mission to Kosovo, set forth in an internal programme paper, captures this aspect of confidentiality:

LSMS has a very strong obligation of confidentiality. LSMS has access to confidential and sensitive information. LSMS's respect of a very high level of confidentiality is a necessary condition for LSMS access to court files and proceedings.

However, even when safeguarding non-public information is not an issue, the duty of confidentiality also serves strategic and operational interests of programmes. These operational interests include ensuring accuracy and consistency in presenting the findings of a programme by eliminating the ad hoc release of information prior to

appropriate review and analysis. Here, confidentiality protects the integrity of a monitoring programme, ensuring that a programme speaks with one voice regarding its findings and conclusions. In this way, confidentiality serves as an internal operating rule that allows for the programme to best achieve its ends through the public release of findings and information in an organized and strategic manner.

#### EXAMPLES OF MONITOR CODES OF CONDUCT RELATED TO CONFIDENTIALITY

- Project monitors are not authorized to make comments to court officials, parties to a case, or any other third party on their observations or findings in relation to the procedure or substance of a case, or the criminal system in general. See “**Confidentiality**” in the “**Guidelines for Trial Monitors**” prepared for the OSCE Mission to Moldova’s Trial Monitoring Programme.
- The observers are not allowed to give a statement of any kind of information related to specific cases to the media ... [and] if such information is requested from them, they should refer the representative of the media to the project co-ordinator who will further direct them to the spokesperson of the Coalition. See “**Confidentiality of Data**” in the Code of Conduct of the coalition All for Fair Trials, a domestic observer group in the former Yugoslav Republic of Macedonia.

While protecting against the premature release of case information, the duty of confidentiality does not prohibit monitors from providing information regarding the programme in general. Monitors should always be prepared to explain the purpose and methodology of the trial-monitoring programme, including its monitoring principles and code of conduct. Finally, as respects supervisory staff, the duty of confidentiality also applies to the information-sharing policy of the programme more generally.<sup>11</sup>

## 7.2 Monitoring instructions

The purpose of monitoring instructions is to provide guidance to monitors and other staff on basic job responsibilities. Instructions help ensure adherence to common standards, thereby enhancing the consistency of monitoring methodology, and also establish a basis for monitor accountability. Monitoring instructions may be broken down into areas covering the different aspects of trial-monitoring operations. Many of these areas have already been covered previously in the manual. Overall, however, the basic areas where guidelines or instructions should be provided are as follows:

- **Case identification methodology and case selection criteria.** These instructions identify who is responsible for identifying cases and provide guidance regarding the methodology of accessing information from relevant institutions and sources. Clear criteria should also be provided on selecting

<sup>11</sup> The topic of information-sharing and the requirement that programmes develop information-sharing controls for the release of information are addressed in Chapter 8.5, “Other information-sharing and non-public reporting”.

from among different cases, including identifying priority cases by name of the crime and relevant provision of the criminal code (see Chapter 5.3, “Securing access to identify cases”).

- **Case-monitoring methodology.** These instructions relate to procedures involving securing access and monitoring individual cases (see Chapter 5.4.1, “Securing access to the courtroom and hearings in individual cases”) and procedures related to documents and/or closed hearings (see Chapter 5.4 generally).
- **Reporting methodology.** These instructions provide guidance on the focus and content of reporting, as well as on how to complete reporting forms (see Chapter 6.4.1, “Using instructions to ensure clear reporting methodology”).
- **Other instructions, policies, and/or responsibilities.** These instructions may include guidelines on the protocol for information-sharing (see Chapter 8.5.2, “Establishing information-sharing controls), security of monitors, and other responsibilities.

The security of monitors is an issue of concern for many programmes operating in post-conflict or other unstable contexts and because monitors have access to confidential information. Programmes rightly come down on the side of safety in balancing the security of the monitor against the collection of information. This may require temporarily discontinuing trial-monitoring and advising supervisors where there is any subjective concern regarding intimidation. With this approach, supervisors may then take appropriate action, including the possibility of assigning another monitor or taking additional safety precautions based on an assessment of the threat. This approach is articulated by the following safety instructions to monitors in the Moldova programme.

**EXAMPLE OF GUIDELINES CONCERNING SECURITY OF MONITORS**

“It is essential that monitors take no action which might put their own safety and security at risk in any way. In this regard, monitors should:

“• Discontinue monitoring and immediately leave the court if they feel intimidated, at any point for any reason, or if any threat is made against them and inform the National Coordinator ...

“• Report all security-related incidents to the National Coordinator immediately, even those that may appear to be minor.” See **“Security of Monitors” in “Guidelines for Trial Monitors” prepared for the OSCE Mission to Moldova’s Trial Monitoring Programme.**

In addition, some programmes have specified further monitoring responsibilities, including minimum work requirements to achieve monitor accountability. This may be especially helpful in project programmes to define monitoring responsibilities where monitoring is a contract activity, and not a staff or full-time activity. The following

illustrates the extent to which the Moldova project programme found it useful to specify monitor responsibilities.

#### EXAMPLE INSTRUCTIONS ON MINIMUM MONITORING OBLIGATIONS

##### Monitoring obligations:

Monitors are expected to monitor at least two court hearings per week ... Monitors must carry out their responsibilities in pairs. Each monitor should keep his or her own notes, but each team will work together to prepare and submit a single report to the national coordinator. Any report prepared by one monitor will not be accepted unless the monitor has obtained prior approval ... The report to be submitted ... shall be in the form of an appropriately completed checklist ... The checklist will have to be submitted in completed form within two days after the date when the hearing was monitored.

In addition to the checklist report, monitors will also have to prepare and submit a narrative report on a monthly basis. This report will have to be submitted by each monitor individually. It should contain a summary of the most frequent procedural violations observed by the monitor during that month, as well as any other pertinent information that was not fully reflected in the checklist-report. See **“Instructions to and Responsibilities of Monitors” in “Guidelines for Trial Monitors” prepared for the OSCE Mission to Moldova’s Trial Monitoring Programme.**

### 7.3 Legal reference materials

Legal reference materials, including legal codes, secondary sources of law and commentary, and other legal materials and articles are often difficult to obtain in a post-conflict context or where resources are scarce. In some settings, the applicable law may also change with regularity. To build and maintain monitoring capacity, monitors must be directly provided with legal reference materials.

Legal reference materials provide general reference on both primary and secondary sources of law and relevant legal conditions and issues.<sup>12</sup> Such materials should include:

- Copies of international and or regional fair-trial standards, including secondary reference materials such as commentaries;<sup>13</sup>

12 The provision of legal reference materials must be distinguished from reporting instructions, which also may contain legal citations and reference to specific rules for purposes of systemizing internal reporting (see Chapter 6.4.1, “Using instructions to ensure a clear reporting methodology”).

13 Many such documents exist for general education, e.g., Amnesty International’s “Fair Trials Manual”, available online at <<http://www.amnesty.org/ailib/intcam/fairtrial/fairtria.htm>>; *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (New York and Geneva: United Nations, 2003), <[http://www.unhcr.ch/pdf/train7\\_a.pdf](http://www.unhcr.ch/pdf/train7_a.pdf)>; Nuala Mole and Catharina Harby, *The right to a fair trial: a guide to the implementation of Article 6 of the European Convention on Human Rights* (Belgium: Council of Europe, 2001), Human rights handbooks No. 3, <[http://www.echr.coe.int/library/DIGDOC/DG2/HRHAND/DG2-EN-HRHAND-03\(2006\).pdf](http://www.echr.coe.int/library/DIGDOC/DG2/HRHAND/DG2-EN-HRHAND-03(2006).pdf)>; Monica Mocovia, *The right to liberty and security of the person : a guide to the implementation of Article 5 of the European Convention on Human Rights* (Strasbourg: Council of Europe, 2002) Human rights handbooks No. 5, <[http://www.echr.coe.int/library/DIGDOC/DG2/HRHAND/DG2-EN-HRHAND-05\(2004\).pdf](http://www.echr.coe.int/library/DIGDOC/DG2/HRHAND/DG2-EN-HRHAND-05(2004).pdf)>.

- Copies of the applicable domestic substantive and procedural criminal codes applicable to the cases that will be monitored;
- Copies of administrative laws relevant to monitoring, including laws regulating the posting of case schedules, obligations of court presidents, or other administrative laws;
- Information on the domestic legal system, including organizational and jurisdictional structure of the courts, prosecutors' offices, and other relevant legal organs such as bar associations;
- Other materials, articles, and reports on relevant local legal issues and/or practices published by international and/or national organizations.

Given that copying of such materials may often place a strain on resources, programmes may wish to consider maintaining legal reference materials at central locations or providing them online if possible. However such materials are distributed, all monitors and staff should be aware of their existence and of how to quickly and easily access such materials as needed.

### *7.3.1 Creating a legal reference manual*

Where resources and time permit, programmes may also consider the creation of a legal reference manual that is specifically tailored to the purpose and focus of monitoring in the local context. Such manuals provide the advantage of having all legal reference materials collected in one place, and also allow a programme to organize and edit materials in a manner that reflects the specific legal focus of the monitoring programme. In the OSCE, this has included incorporating cases of local origin into the presentation of international and domestic fair-trial standards to identify how such standards have been applied locally. In addition, a legal reference manual may summarize and highlight important procedures and rules in domestic laws, including treatment of potential gaps or ambiguous procedures.

Additional cost and time will be necessary for the creation of such a manual, but it should be considered for a number of reasons. First, the research required to compile a manual often represents a starting point for identifying gaps and areas where domestic laws are not compliant with international standards. This is a process that must be undertaken regardless of whether a manual is produced. Second, the creation of a manual provides an opportunity to consult and obtain input from domestic legal experts and other organizations, expanding the reach of the programme beyond the organization and obtaining additional feedback that draws on local legal knowledge. Third, programmes that have created a manual have the benefit of a permanent resource that will streamline the process of orienting and training new staff.

The creation of a legal reference manual need not be unduly time-consuming. On the one hand, where the manual will only collect and organize relevant laws, secondary sources, and other materials, it may be created relatively quickly. Where more comprehensive treatment of applicable case law is undertaken (including original research on relevant international and domestic case law), the process may take several months. If it is decided that a legal reference manual will be used, the process of creating the manual should be one of the first activities undertaken in organizing the programme.

### 7.3.2 *A manual as a resource to build local capacity*

In addition to providing a useful resource for a programme, a legal reference manual may also be shared with other local institutions where it may serve more widely as an educational tool for the local legal community. This may be extremely beneficial in settings where legal resources and educational materials are in short supply. In this way, a manual may help build awareness of fair-trial standards and other legal issues among interested legal professionals and civil society groups that would not otherwise have access to such information.

#### **EXAMPLE: TRIAL MONITORING MANUAL OF THE TRIAL MONITORING PROGRAMME, OSCE MISSION TO MOLDOVA**

More than six months in advance of implementation in March 2006, the Moldova Trial Monitoring Programme commissioned the drafting of a comprehensive, 300-page trial-monitoring manual. Consistent with the purpose of the programme, the manual provides an in-depth overview of international fair-trial standards, including specific focus on European Court of Human Rights decisions involving Moldova and relevant domestic case law and criminal procedures. In addition, the substantive provisions of the criminal code are presented for the priority cases monitored by the programme, as well as other background information relevant to the right to a public trial and monitoring generally.

The manual was drafted primarily by an international expert on international fair-trial standards, with additional input from local experts and OSCE Mission staff who contributed to conforming it to the local context. The manual is intended to be both an educational resource for the local legal community, as well as a reference for monitors in the day-to-day observation and analysis of fair-trial standards. It has therefore been shared with local NGOs, interested officials and individuals, and is used as a primary legal resource for monitor training sessions.

## 7.4 Training sessions

Regular training sessions are essential to ensure that monitors have the requisite legal knowledge, observation, and reporting skills to provide reports to meet the needs of the programme. In general, comprehensive training should be given at the inception of a programme to provide instruction to all monitoring and other staff. Thereafter, training should be provided each time the programme changes the substance and methodology of monitoring. At a minimum, for longer-term programmes, comprehensive training sessions should be organized once a year. Some project programmes have also scheduled follow-up training sessions 3-4 months after the inception of a programme to get feedback, adjust monitoring methodology, and clarify reporting. The following provides guidance in organizing trial-monitoring training based upon the experience of OSCE programmes.

#### *7.4.1 Training based on programme materials*

First, programme materials should be finalized in advance of training and provide all necessary information and instructions on the programme's purpose, monitoring and reporting methodology, and responsibilities, as well as legal reference materials. If possible, programme materials should be provided in advance of the training so that monitors and other staff may review them. Training sessions should then be structured around these materials with the goal of familiarizing monitors with these materials. This includes making monitors aware of where information is located and comfortable accessing information as needed.

Initial training sessions should, at a minimum, address the following three areas:

- **Substantive legal knowledge.** Training should focus on the specific substantive legal standards, laws, and issues that will be observed and assessed in monitoring. International standards should not be discussed in the abstract. Instead, they should be raised and related to local laws, procedures, and practices to provide grounding in the local context and ensure appropriate application and analysis.
- **Monitoring methodology and responsibilities.** Training should clarify monitoring methodology, including case identification and selection; access and monitoring protocol; code-of-conduct issues; reporting requirements, including instructions; and other facets of monitoring, anticipating the issues that may arise based upon the level of access or other conditions. Training should clarify the monitor's specific responsibilities with respect to the programme.
- **Monitoring skills:** Training should build the skills needed to perform monitoring, including reviewing documents, observation, and reporting: Mock exercises in which courtroom proceedings and reports are written are an excellent way of building observation skills and familiarity with reporting forms. Where relevant to the programme's focus, case-file materials may be prepared to provide a case history and to illustrate how such materials will be used to supplement the monitoring of hearings on specific issues. Skills training should be active, involving staff directly in activities, and also permit follow-up discussion.

#### *7.4.2 Using external trainers and experts*

The programme co-ordinator (or head of unit), with the support of the legal analysts, should determine the content of all training sessions and tailor them to meet the needs of the particular programme. Given internal constraints, programmes may often have to rely on external trainers to provide training in specific areas, such as the substantive law, methodology, and monitoring skills. In organizing training sessions and using experts, programmes are presented with a number of options.

International trial-monitoring experts may be particularly useful to train on international fair-trial standards and basic monitoring skills such as observing hearings in court. As programmes develop their own focus and methodology, however, external trainers must be required to adapt the content of their training to meet the needs of individual programmes. In using international experts, programmes should inquire as to the expert's familiarity with the local context and/or willingness to tailor training courses to local problems and issues. When hiring an international expert, programmes should work closely with experts on preparing appropriate content for training, taking into account the domestic context and methodology of the programme. Without such planning, training may at best be uninformative and at worst present methodologies or approaches inconsistent with those of the programme.

Local experts may also make excellent trainers or speakers for programmes where such expertise exists. Local experts, including judges, prosecutors, law school professors, and lawyers involved with local organizations possess significant expertise on domestic law and practice. These professionals are already familiar with current law, practices, and issues, and may provide insight into particular issues and problems that may be encountered. Programmes should take advantage of such resources, as well as the opportunity to build connections with the local legal community. In preparing training sessions, such experts should also work closely with the project co-ordinator or legal analyst to tailor training specifically to those issues relevant to monitoring.

Working partners may also provide support and expertise in organizing training (see Chapter 4.5, "Programme partnerships"). Project co-ordinators and legal analysts should also take an active part in supporting training, as they will be most familiar with a programme's monitoring methodology and the responsibilities of monitors and other staff.

## **7.5 Other field support activities and mechanisms**

Given the time required to prepare training sessions, most programmes will only have the capacity to schedule training once or twice a year. In the interim, however, a monitoring field operation will require a high level of co-ordination and continuous support that will need to be provided to monitors who may be working alone in geographically disparate areas. The following feedback mechanisms will help ensure regular co-ordination, maintain consistency, and improve the quality of monitoring. These techniques will also help to promote a positive attitude among monitoring staff in the periods between training sessions.

### ***7.5.1 Regular feedback on monitoring and reporting***

Regular and periodic feedback to monitors on case reports by legal analysts has been shown to improve the quality of reporting, as well as hasten the professional development of monitors. Such feedback is critical at the inception of a programme when the methodology of monitoring and reporting is being assimilated and the potential for divergent analysis and methodology is greatest. It is important that feedback be both positive and critical, and that it identify both good practices and problematic ones. In addition, regular feedback also ensures that case reports are thoroughly read and



assessed by legal analysts. The discussion of case reports helps legal analysts clarify reporting that may not be clear, and the process often raises additional issues that may not have been included in the report. As monitoring and reporting activities become more regularized, feedback should continue. Legal analysts may also choose to rotate their feedback, for instance, by concentrating on the reporting of a different monitor each week.

### *7.5.2 Regular team meetings*

In larger-scale programmes, another co-ordination tool are monthly meetings among all monitors or monitors in a particular region to discuss issues relevant to monitoring. To be effective, such meetings should be regularly scheduled and be presided over by a legal analyst or other supervisor. Such meetings bring a team together in an informal and constructive atmosphere and serve as a management tool to allow information to be imparted and issues to be raised. Meetings can also serve to supplement training with discussion of specific legal issues and problems, as well as identify limitations in methodology. Where circumstances, including geography, make monthly meetings of all monitors difficult, meetings may also be organized on a regional level to avoid extended travel.

As an example, the LSMS, OSCE Mission in Kosovo, regularly schedules such monthly meetings for all monitors and monitoring staff. Meetings are used to highlight specific legal issues, to re-direct the focus of monitoring, and to provide training as necessary. These meetings bring together the team and allow for sharing and comparing experiences, as well as discussion of national or local legal developments. In this way, meetings provide the LSMS with a regular venue to exchange information and build consistent practices.

### *7.5.3 Report-sharing*

Monitoring programmes, like other types of field activities with an information-gathering component, are structured hierarchically to provide information to a centralized point. As such, programmes must consistently seek to compensate for the natural tendency of information to flow upward. In addition to the compilation of regular internal reports, the direct sharing of case reports among monitors may serve to counter this tendency. In this way, report-sharing serves as a method to improve monitoring and reporting skills through the exposure of monitors to other practices. A number of programmes facilitate the sharing and review of case reports among monitors.

As an example, the trial-monitoring programme of the OSCE Mission to Bosnia and Herzegovina has encouraged sharing of reports among monitors on an informal basis through e-mail. Reports are also available in a computer database accessible by all monitors, subject to the protection of confidential information that is not accessible. In whatever manner reports are shared, the process allows monitors to compare their monitoring and reporting to other monitors. This allows insight into the issues identified by colleagues and a means to make their own monitoring and reporting more thorough. In these ways, sharing case reports is also an inexpensive and efficient way to facilitate better consistency in reporting methodology.

#### *7.5.4 Monitor-pairing*

Assigning monitors to work in pairs is a method of organizing a monitoring team that has been found to provide support to inexperienced monitors. Specifically, pairing provides additional support against external pressures especially where there is institutional resistance to monitoring in the early stages of a programme. In addition, pairing also allows for a sharing of monitoring responsibilities, including observation of cases and report writing. In the early stages, joint responsibilities may also support more thorough monitoring and allow a fuller consideration of issues. As monitors achieve the necessary level of experience and skill, however, the benefits of pairing may become outweighed by the costs of duplicating efforts at the expense of wider monitoring coverage.

#### *7.5.5 Monitor rotation*

In many large-scale programmes, monitors are assigned a particular court or region to monitor as a result of geographic considerations. On the one hand, there are advantages to having a monitor become familiar with a specific court. This may promote increased knowledge of local practices and enhanced working relationships with court officials that permit access. Especially in rural areas or smaller courts, however, such assignment may also result in the monitoring of a limited spectrum of cases, or repeat appearances before the same judge. Over a longer period of time, this may result in underexposure to specific cases or issues, or too close a relationship developing between the monitor and local legal actors. To allow for wider monitoring experiences that will better ensure continued monitor independence and development, programmes should consider rotating monitors where possible among different regions and courts.

#### *7.5.6 External educational opportunities*

International and domestic organizations engaged in justice-system reform in a host state may often conduct informative conferences, seminars, or training sessions on issues related to programme activities. Programmes should take advantage of the opportunity to include monitors and other staff in these activities. Not only are such events opportunities to provide continuing education to staff, but conferences and other forums are opportunities for staff to share monitoring results more widely, subject to the programme's information-sharing and confidentiality policies.

### **7.6 Best practices for organizing programme procedures and field support**

- Prior to the commencement of the programme, the organizer should develop programme procedures and materials, including a code of conduct, monitoring instructions, legal reference materials, and training materials.
- In drafting a code of conduct, the organizer should incorporate the principles of the programme into the working methods of the monitors and other staff, including the duties of non-intervention, professionalism, and confidentiality.

- Monitoring instructions should provide guidance on basic responsibilities, including: case identification and selection criteria, case-monitoring methodology, reporting methodology, and instructions related to the security of monitors.
- All monitors should be provided access to both primary and secondary legal reference materials.
- An initial training session tailored to all facets of a programme's specific monitoring methodology should be provided to all staff in advance of monitoring. For longer-term programmes, training should be organized at least once a year and whenever there is a change in the focus or methodology of the programme.
- Programmes should provide regular field support as part of ongoing management. Field support activities include: feedback on reporting; team meetings; report-sharing; monitor-pairing; monitor rotation; and providing opportunities for continuing education.



**Section IV**

Public reporting  
and other advocacy  
activities



## CHAPTER 8

# Public reporting and information-sharing

Public reporting may be viewed as both the first and last step of a process in which trial-monitoring serves as a tool to support the development of the rule of law consistent with a state's domestic and international legal obligations and commitments. On the one hand, reports, as the culmination of monitoring efforts, are the tangible final product of the trial-monitoring programme and the physical vehicle to providing the findings and conclusions of monitoring. On the other hand, the issuance of a report is only a first step in a wider strategy related to the underlying purpose and role of a monitoring programme in a given domestic context. As a result, reports must always be viewed as part of a wider advocacy strategy that seeks not only to inform, but also to engage and influence local authorities and other stakeholders on the need for, and direction of, future reforms.

This chapter provides an overview of different types of reports issued by OSCE programmes. Strategies related to the preparation of reports are also addressed, including operational issues related to the drafting of reports and best practices for ensuring regular reporting and making reports more effective. Issues related to other forms of information-sharing are also discussed, including information-sharing controls and non-public reporting.

### 8.1 Public reporting

Within the OSCE framework, a primary output of trial-monitoring programmes is the production of public reports that contain the findings and conclusions of trial-monitoring, as well as recommendations. Though reports are public in the sense that they are freely available, the legal nature of trial-monitoring reports means public reporting is not usually aimed at the general public, but at those bodies and individuals that have official responsibilities for the functioning of the legal system, as well as organizations and individuals interested in justice-sector reform. Such groups include legislators, justice ministry officials, the judiciary, prosecutors and police, local lawyers, and other local institutions involved in the criminal justice process. Reports also serve to inform international and national organizations engaged in supporting reforms, including international and local NGOs, international treaty-based and political organizations, and donor organizations. Depending on the purpose of monitoring, the media may also be a secondary target of reporting.

The wide distribution of public reporting among all these diverse and interested groups serves the important function of providing a common foundation of objective information on the functioning of the criminal justice system to all stakeholders. Specifically, trial-monitoring reports provide a unique resource to support the reform process by:

- Documenting practices, problems, and/or abuses within the system, thereby eliminating the need to rely on incomplete or anecdotal information;
- Educating all stakeholders on respective legal responsibilities and domestic and international standards, thereby increasing the accountability of local institutions and actors; and
- Providing a starting point to consider reform that is based upon a foundation of fact regarding the current functioning of the system and a direction for future reforms based upon international standards of criminal justice.

OSCE trial-monitoring programmes have issued a wide range of public reports. While not all reports fit easily into a specific type, reports may generally be classified as one of three basic types: general reviews of the justice system, thematic reports, and reports focusing on specific crimes or prosecutions related to discrete crimes or events. The following sections provide a brief overview of each, as well as identify examples of specific types for further reference.

### *8.1.1 Comprehensive reports related to the functioning of the justice system*

Reports providing an overview of the functioning of the justice system make generally applicable findings in support of enhancing the effective and fair application of the law. Reports of this type usually focus on the application of local law and local practices, including an assessment of compliance with international fair-trial standards. While such reports may address the entirety of criminal proceedings, it is more often the case that reports will focus on the public stages of criminal proceedings as access and monitoring permit. Since the majority of OSCE trial-monitoring programmes have been organized with the express goal of improving the overall functioning of the criminal justice system, many programmes have issued such reports.

The key to reports that make a systemic review is the monitoring of a broad range of case types in order to make generally applicable conclusions and recommendations to improve the functioning and fairness of the entire criminal justice system. While certain types of cases may be prioritized for monitoring, too narrow a selection of case types may compromise the ability to make generally applicable findings regarding the criminal justice system as a whole. For instance, monitoring only politically sensitive or complex cases to make systemic conclusions about the functioning of the judicial system may distort judicial practices where ordinary cases that make up more than 95 per cent of a court's docket are not also monitored. This flaw in methodology will be evident to local actors where such reports are intended to lay a foundation for systemic reforms. Therefore, to provide a credible methodology, reports making findings on broad systemic practices in aid of overall reform should be based on a broad systemic approach to monitoring.



#### EXAMPLES OF REPORTS PROVIDING AN OVERVIEW OF THE CRIMINAL JUSTICE SYSTEM

- 1) "Review of the Criminal Justice System", LSMS, OSCE Mission in Kosovo (2000, 2001, 2005, and 2006)
- 2) "OSCE Trial Monitoring Report on the Implementation of the New Criminal Procedure Code in the Courts of Bosnia and Herzegovina", OSCE Mission to Bosnia and Herzegovina (2004)
- 3) "Final Report, Countrywide Observation of the Implementation of Fair Trial Standards in Domestic Courts and the Assessment of the Functioning of the Judiciary", coalition All for Fair Trials, a domestic observer group of the former Yugoslav Republic of Macedonia (2004)
- 4) "Ensuring Fair Trials Through Monitoring", OSCE Centre in Dushanbe (2005)
- 5) "Fair Trial Development Project, Interim Report", OSCE Presence in Albania (2004)
- 6) "Report from the trial monitoring project in Kazakhstan 2005-2006", ODIHR and OSCE Centre in Almaty (2007)
- 7) "6-Month Analytic Report, Preliminary Findings on the Experience of Going to Court in Moldova", OSCE Mission to Moldova (2007).

Comprehensive reports should seek not only to identify problems with the application of laws, but should seek to identify the source of such problems. This may include providing analysis of the scope and components of a problem to assess whether the practice at issue is caused by legislative/statutory, structural, resource, budgetary, and/or other systemic or specific reasons. Such analysis may also involve a quantitative or statistical element to put a problem into perspective. However, for a report to be considered a monitoring report (and not a legal review), the findings and conclusions must be based upon the practices monitored in specific cases.

Reports providing a broad system overview tend to be the most complex and demanding both in monitoring methodology and in report-writing. However, they are also an excellent place to start for programmes that intend to establish a long-term approach to monitoring. This is the case because they provide a good starting point by identifying fundamental issues involving the functioning of the entire system. As such, they broadly engage and support the work of all institutions and actors involved in the criminal justice system. This not only raises the profile of the programme among the greatest number of actors, but strongly identifies the programme with a systemic, rule-of-law approach to justice reform. Such identification may be important later as a programme focuses on narrower issues where legal actors may not have such commonality of interest.

#### *8.1.2 Thematic reports related to the functioning of specific aspects of the justice system*

Thematic reports focus on specific aspects of the judicial system in an effort to support rule-of-law reform and enhance the protection of fair-trial standards in these specific areas. As such, thematic reports are variants of comprehensive system reports in that they concern the functioning of the criminal justice system and its ability to deliver justice fairly and effectively. In turn, thematic reports will focus on local practices and

the application of local laws, including assessing these practices in relation to international fair-trial standards. Similar to comprehensive reviews, thematic reports are not concerned with the prosecution of specific types of cases, but more broadly with the procedure and the functioning of the justice system. However, as opposed to comprehensive reviews, thematic reports are more narrowly focused on the functioning of a discrete aspect of the system.

Thematic reports may focus on specific institutions, specific types of proceedings, or components of the criminal justice process. In general, thematic reports should be considered for discrete areas of the justice system that may be viewed as particularly problematic or are sufficiently distinct to benefit from special treatment. Thematic reports have the advantage of focusing the reader on the specific issue and providing in-depth treatment of a problem. Another advantage to issuing a thematic report is that they may be completed in less time than comprehensive reports. However, despite the limited scope of thematic reports in terms of subject matter, conclusions and recommendations may still be relevant to a wide range of actors. Therefore, wide dissemination is often appropriate for thematic reports as well given that even very specific issues and themes will often be applicable to a wide range of legal actors and institutions.

#### EXAMPLES OF THEMATIC REPORTS BY THE OSCE

- 1) "Themes: Independence of the Judiciary, Detention, and Mental Health Issues", LSMS, OSCE Mission in Kosovo (2002)
- 2) "The Administration of Justice in the Municipal Courts", LSMS, OSCE Mission in Kosovo (2004)
- 3) "Crime, Detention, and Punishment", LSMS, OSCE Mission in Kosovo (2004)
- 4) "Plea Bargaining", OSCE Mission to Bosnia and Herzegovina (2005)
- 5) "The Presumption of Innocence Report", OSCE Mission to Bosnia and Herzegovina (2007)

#### 8.1.3 Reports on specific types of cases

A third type of report is designed to address particular types of prosecutions, crimes, or cases. The common denominator among such reports is the focus on a discrete type of case or cases related to a particular type of crime or event. Despite this commonality, the wide difference in purpose and focus of such reports in the context of specific programmes makes further generalizations difficult. In the past, OSCE reports on specific case types have addressed issues such as the application of substantive criminal law, enhancing victims' rights, witness-protection issues, and statistics and information generally regarding prosecutions and sentencing of the specific crime at issue.

Often, where reporting focuses on specific types of cases, it is because, in the particular domestic context, such cases are important from the perspective of transitional justice or relate to broader security-related interests. For instance, in the OSCE such reports have involved war-crimes prosecutions related to conflicts in South-Eastern Europe during the 1990s. Such reports often provide statistical or comparative analysis regarding specific cases. This may include comparative case analysis of differing standards of criminal accountability in charging, trying, and sentencing different ethnic or

political groups, or broad statistical analysis highlighting an imbalance in the number of arrests, prosecutions, dismissals, or verdicts.

Where monitoring and reporting focus on particular types of cases, it often relates to specific concerns regarding the potential for violations of fair-trial standards. Here, reporting on such cases may provide documentation of abuses within the criminal justice system. In this setting, reports on specific cases often also serve as political reporting, thereby ensuring that fair-trial abuses do not go unnoticed by the international organizations providing support for political pressure to be applied to rectify these abuses.

#### **EXAMPLES OF CASE-SPECIFIC REPORTS**

##### **War Crimes:**

- “Kosovo’s War Crimes Trials, A Review”, OSCE Mission in Kosovo (2002)
- “War Crimes Before the Domestic Courts”, OSCE Mission to Serbia (2003)
- “Supplementary Report: War Crimes Proceedings in Croatia and Findings From Trial Monitoring”, OSCE Mission to Croatia (2004)
- “Background Report: Domestic War Crimes Trials”, OSCE Mission to Croatia (2005)
- “War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina”, OSCE Mission to Bosnia and Herzegovina (2005)

##### **Trafficking:**

- “Combating Trafficking in Human Beings through the Practice of the Domestic Courts”, coalition All for Fair Trials, former Yugoslav Republic of Macedonia (2005)

##### **Other, even more specific reports:**

- “Report from the Trial Monitoring Project in Azerbaijan 2003-2004”, ODIHR, OSCE Office in Baku (2005)
- “The Response of the Justice System to the March 2004 Riots”, OSCE Mission in Kosovo (2005)
- “The Successful Suppression of Election Regularities (The Election Cases)”, coalition All for Fair Trials, former Yugoslav Republic of Macedonia (2005)
- “Report from the OSCE/ODIHR Trial Monitoring in Uzbekistan - September/October 2005”, ODIHR (2006)

Although the monitoring of specific cases is usually primarily done for reasons other than justice-sector reform, such reports will also often provide conclusions and recommendations geared to enhance the even-handed application of justice and compliance with international fair-trial standards. This is particularly true for projects through which numerous cases are monitored rather than a single case. In this way, reporting not only provides findings related to such cases specifically, but may identify thematic issues that impact the justice system generally.<sup>14</sup>

<sup>14</sup> Such issues have included: the existence of adequate witness-protection measures; lack of regional law enforcement co-operation; insufficient prosecutorial resources; the adequacy of defence counsel; and other problems that may affect the effective and fair administration of justice more broadly.

Despite the fact that public reporting on specific cases may serve an important political role and publicly demonstrate serious problems with the judicial system, for a number of reasons these reports will often be less suited to support a comprehensive reform process of the criminal justice system. First, from the standpoint of methodology, the cases monitored will most often present special circumstances and challenges that, in part, formed the basis for monitoring in the first instance. As these cases usually represent only a small percentage of cases in the system, findings and conclusions cannot automatically be assumed to provide a thorough evaluation that applies across all cases and parts of the system. Also, as a practical matter, the subject matter of such cases is often tied to political or other issues that, from the perspective of local actors, may transcend the overall functioning of the justice system. This political reality infuses in such reports a political component that can limit its audience and impact how reform efforts are perceived in some quarters for purposes of comprehensive judicial reform. Therefore, while such reports, similar to thematic reports, may yield recommendations for reforms based upon international standards, both the methodology and political context make such reports a less suitable starting point for engaging local authorities on comprehensive reform.

## 8.2 Other public reporting

The three types of general public reports described above aim to provide in-depth treatment of particular subject matter based upon monitoring efforts and information that has been compiled over the course of an extended monitoring term. As a result, most large public reports require lengthy drafting, consultation, and production efforts. One way for programmes to supplement periodic public reporting is through the issuance of short monthly reports that allow for more regular contact and feedback to local actors and authorities.

Monthly reports may be especially useful for programmes that have established visibility and credibility through an initial public report and are engaged in a comprehensive reform process by providing a more regular means to provide information and raise awareness of issues. Monthly reports may also serve as informal professional newsletters in regions where professional periodicals or other training is limited. In such contexts, the monitoring results and other information in monthly reports may provide the only regular source of information on national practice received by all courts and legal actors.

### **EXAMPLE: REGULAR MONTHLY REPORTING AT THE OSCE MISSION IN KOSOVO**

Starting in January 2005, in response to the challenge of communicating more regularly with the local legal community, the OSCE's legal systems monitoring unit at the Mission in Kosovo began issuing short monthly practice reports in addition to its yearly reviews. Monthly reports are up to three pages long and hand-delivered every month by monitors to courts and judges. These reports include examples of both good and problematic practices relating to cases monitored during the period with reference to applicable local and international law. The experience of LSMS staff is that reports have both greatly raised the visibility of the programme and have increased positive interaction and information exchange with local judges, prosecutors, and lawyers who regularly read the reports.

### 8.3 Best practices for organizing public reports

OSCE reports most often take the form of public reporting to a wide range of institutions, officials, and international and national organizations. Such wide distribution of public reports serves the practical function of providing a common foundation of objective information on the functioning of the criminal justice system to all stakeholders. Although reports may differ in content, all reports aim to present monitoring results and conclusions in a manner that both informs and influences policy makers and officials, institutions, and legal actors to take specific actions. The following provides some specific guidance and best practices in connection with organizing basic components of a trial-monitoring report.

**INTRODUCTION.** The introduction is the first opportunity to inform the reader about the domestic legal context and the role of the monitoring programme. At a minimum, an introduction should provide:

- An overview of the domestic legal context, including international commitments, recent reforms or events, and other issues and events that provide the backdrop to monitoring;
- The purpose and role of monitoring with reference to this context, including who findings are addressed to, and what the report seeks to achieve by publishing the findings and recommendations;
- The legal basis for conducting monitoring, including the OSCE mandate, OSCE commitments, and/or the right to a public trial under domestic and international law;
- An overview of the structure of the report, including what topics will be covered.

**METHODOLOGY.** A description of monitoring methodology is critical to the credibility of findings. Trial-monitoring findings and conclusions will often be the only objective overview of what is occurring in the criminal justice system in places where information is often incomplete, anecdotal, or politicized. A report must thoroughly establish the validity of the methodology that produced the information in the report and apprise the reader that such information is reliable and objective. This should include:

- An overview of the scope of monitoring, including numbers and types of cases, courts, and hearings monitored;
- A description of monitoring methodology, including how the information was obtained and what proceedings were monitored. Further, it should be made clear what findings resulted from direct observation, from document review, or were obtained from secondary sources such as interviews or court statistics;
- A description of who performed the monitoring, including the qualifications and training of monitors.

**PRESENTATION OF FINDINGS AND LEGAL ANALYSIS.** Reports will differ in terms of the issues monitored, standards applied, and findings. The following are general considerations regarding structure and content that are useful for all reports:

- Introduce issues: Clearly define and delineate the scope of the topics and issues presented to illustrate the significance of each area that will be addressed;
- Present the findings within the applicable legal framework: Prior to presenting the findings of monitoring, clearly set forth the applicable legal framework for analysis, including the domestic law and international fair-trial standards.

**USING MONITORING DATA AND CASE INFORMATION.** Trial-monitoring reports derive their strength from monitoring actual cases as they proceed in the system. Monitoring reports are not legal reviews of the legislative framework or treatments of other aspects of a legal system. Therefore, monitoring data and case information must always provide the central support for findings. Monitoring data and case information may be presented in a number of ways:

- Illustrations of particular practices or problems: Using a detailed example from an individual case is an excellent technique for illustrating a particular problem. In providing examples, it should be representative. Errors or unjust results occur in individual cases in every system of justice and focusing on such singular cases does not serve a clear purpose and may be misleading. As a result, case examples should be presented only after first establishing and demonstrating that they are representative of a trend or part of systemic problem. In other words, examples should be illustrative of a larger general problem observed, not presented only to show that a problem occurred in a specific case;
- Use of case names: The decision to provide case names ultimately relates to the purpose of reporting. Citing an exemplar case by name is not always necessary when using a case to illustrate a particular issue in a thematic or systemic report seeking to identify general practices and trends. For such a report, reference to the particulars of the case and court may be sufficient to illustrate the problem without providing the name of the defendant or case. On the other hand, when monitoring focuses on specific cases, crimes, or events, it may serve the purpose of monitoring to provide the case name for political or other documentation purposes;
- Statistics: Statistics can have a powerful impact in illustrating the scope or severity of a problem for programmes using quantitative analysis. Official statistics may also help supplement qualitative monitoring or reporting of specific types of crimes, helping to illustrate imbalances in the numbers of arrests, prosecutions, dismissals, or verdicts. However, not all statistics are valuable statistics, and they must be used carefully. For instance, the percentage of defendants represented by counsel in all cases monitored may not be significant when many cases were minor offences. On the other hand, statistics regarding the number of defendants informed of their right to a defence counsel in these same cases would much better illustrate an issue relevant to fair-trial standards;

- Use of annexes: If in-depth monitoring information is valuable for illustrating the nature and extent of problems that require documentation, but is too voluminous for the body of the report, consider providing such information in annexes. Annexes may be used for, among other things, texts of indictments or verdicts, summaries of specific proceedings or interviews, and other information, including applicable code provisions or international standards;
- Less is more: Monitoring will provide more information than can ever be fully digested by the reader of a report. The drafter should keep in mind that less is more, and only the most significant issues for presentation and discussion should be selected. Attention should be focused on the most serious concerns and areas where reforms are most needed or possible.

**CONCLUSIONS:** Conclusions should be precise and flow directly from the cases monitored and legal analysis presented. In addition to formulating conclusions in the body of the report, conclusions should also be presented in an executive summary or other accessible area for readers who will not read the entirety of the report. Most importantly, reports must refrain from setting forth conclusions that are not supported by trial-monitoring.

**EXAMPLE: A CONCLUSION NOT SUPPORTED BY TRIAL-MONITORING AS OPPOSED TO A CONCLUSION SUPPORTED BY MONITORING**

A focus of reform efforts is often compliance of the provisions of domestic law with international trial standards (*de jure* compliance). For example, where domestic law does not require that a detained accused be brought in front of a judicial officer for review of detention, but allows the court to review custody solely based on the filings of the prosecutor (some ex-Soviet systems also permit prosecutorial review of detentions), then the domestic legal framework may be said to constitute a *de jure* violation of international fair-trial standards, which provide for such review. Trial-monitoring, however, is not needed to make this observation or argument. In fact, the issue may just as easily be identified and developed in a review of the domestic legal framework or other forum.

On the other hand, where trial-monitoring observes cases where the absence of judicial review results in the inability of an individual accused to present to a judge specific exculpatory evidence or other reasons why custody is not proper, the same conclusion will be bolstered by the circumstances of a monitored case. Now trial-monitoring is being used in its unique capacity to objectively demonstrate the actual unfairness and consequences of the domestic law in practice. A discussion with local authorities regarding the gaps or contradictions between domestic law and international standards may now proceed directly from actual cases and the consequences to real individuals. In sum, while conclusions regarding *de jure* violations are valid in their own right, other forums exist with respect to such legislative policy debates. The utility of trial-monitoring is the ability to present findings based on the direct observation of cases consistent with its unique function as a diagnostic tool able to assess the functioning of the system.

**RECOMMENDATIONS:** Recommendations are often the most difficult part of the report to craft. While conclusions may flow directly from monitoring, making recommendations on the timing, scope, and nature of systemic, institutional, or legislative reforms requires a completely different approach from monitoring cases. To help formulate recommendations, a wide range of actors should be brought into the process. In addition, like conclusions, recommendations should only extend as far as the subject matter and findings of monitoring. Despite the hazards of formulating recommendations, they remain an opportunity to stimulate a first step in the process of improving the current situation.

- Recommendations should be specific: If recommendations suggest amendment to a rule or law, the precise provision or part of the provision that is problematic or requires amendment should be identified with specificity. The language of the amendment needs to be specific. Similarly, if recommendations concern training, resource allocation, or that other actions be taken, it needs to be clearly articulated as to exactly what is required, and in what time frame.
- Recommendations need to be addressed at a particular actor: Identify the institutional actors by the institution to which recommendations are directed based upon their legal competency. If necessary, the basis of their legal competency along with the recommendation to clarify the authority of the actor to act on the recommendation should be provided;
- It is advisable to consult in advance with the recipient of recommendations: As the authority to implement recommendations is in local institutions, the monitoring programme cannot implement recommendations. Authorities may be hesitant or understandably reluctant to take direction from external sources especially when surprised or uninformed regarding the process. Through consultations in advance, they can be brought into the process.

#### 8.4 Best practices for getting reports done on time

Report-writing can be a time-intensive, detail-oriented, and labour-intensive activity. Before drafting even begins, the process often entails the synthesis of hundreds of field reports, assessment of information, and preparation of an analytical framework and outline. Once drafting begins, it is not unusual for limitations in information or methodology to become apparent, and for changes or additional data and synthesis to be required. After a final draft is completed, the process then requires the review, feedback, and approval of many individuals. The experience of OSCE programmes is that publication of a comprehensive report may take from three to six months from the point the drafting process begins.

Some strategies may be employed to help avoid unnecessary delays and short-circuit problems that may complicate the process of report-writing. The following steps have been found useful to organize and streamline the report-writing process, with some beginning far in advance of actual drafting:



- It is advisable to engage in regular, secondary internal reporting during the monitoring period. Legal analysts and/or monitors should prepare monthly reports on specific issues or trends, including specific analysis of individual cases. These reports will then help formulate the core issues or themes in the final report that may be supplemented with additional analysis and cases (see Chapter 6.5.1, “Secondary internal reporting”).
- Information should be compiled during the monitoring period with a view towards using it in a report. Statistics should be kept and updated regularly on relevant issues and cases should be organized along thematic issues, with illustrative cases flagged for potential use. While a database can be useful for this purpose, some programmes maintain a folder system in which folders are created on specific legal issues and relevant case reports filed therein (also see Chapter 6.5.2, “Case management systems”).
- Documents should be translated in advance during the period of monitoring. If indictments, verdicts, or other documents will be analysed in a report, these should be summarized and/or translated well in advance of drafting.
- It is advisable to assign one individual the responsibility of drafting the report and to provide clear, agreed-upon deadlines for completion of an outline, a first draft, and a final draft. When multiple drafters are used to compile a report, this may sometimes result in a lack of accountability for the final product, as well as a lack of coherence in the report. Other legal analysts may provide support for the drafter by providing legal or other memoranda on specific issues, and/or reviewing and commenting on drafts. Further, at each drafting stage, progress should be assessed, and issues related to content, methodology, or other problems addressed.
- A chronology and fixed time frames should be established for the remaining phases. A report preparation chronology should include time frames for review and revisions of the final draft within the monitoring programme; wider-mission review and clearance; external review and consultation as necessary; and for other steps such as translation, formatting/printing, and distribution. Importantly, if this is a first public report, the project manager should consult with working partners and mission authorities to determine what review procedures will be necessitated.
- It is useful to draw on all resources in connection with report-writing. In preparing reports, programmes have used available monitors to help with statistical compilation, as well as local experts to draft and review substantive legal issues. There is also no need to conduct new research on international fair-trial standards should these be included in a report. Such standards have been set out in length in reports of other OSCE programmes, as well as set out in other easily accessible texts available on the Internet.

- Other actors involved should be alerted well in advance of their responsibilities. Once the report is finalized within the programme, issuance will often require review by other authorities within the operation and/or external review or consultation depending on the approach of the programme. So that this process will be efficient, all of these actors should be advised well in advance of when they will receive the report. Advance notice allows reviewers to plan and schedule their time accordingly and make alternative arrangements so that good working relationships are maintained and the report is not delayed.
- It is useful to plan for the logistical aspects of issuing a report. Translation, printing, and distribution may all be time-consuming processes. Issuance of a report simultaneously in multiple languages allows all stakeholders to have access to information at the same time and facilitates a dialogue that is integral to follow-up. Translation should be completed as early as possible so that reports may be released at the earliest possible time. Likewise, reports may have to be formatted and printed by a printing house with its own procedures and schedules. Programmes must incorporate this process into their planning as well. Depending on geography, distribution must also be considered to make the report widely available.

## 8.5 Other information-sharing and non-public reporting

Some OSCE programmes also issue non-public reports on a regular or ad hoc basis. Such reports are not publicly disseminated and are usually provided to a specific recipient for a limited purpose. Such reporting allows monitoring programmes to serve additional purposes where the public release of information might compromise the ability of the programme to fulfil its main purposes or where the information might not benefit a wider audience. The most significant and regularized dissemination of such reports is presented below.

### EXAMPLE OF NON-PUBLIC REPORT: WAR-CRIMES REPORTING TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (ICTY)

Pursuant to Decision No. 673 of the OSCE Permanent Council, individual OSCE field operations in South-Eastern Europe have arranged to share war-crimes monitoring reports with the Office of the Prosecutor (OTP) at the ICTY. Under this arrangement, these field operations provide reports to the OTP ICTY on the progression of war-crimes cases transferred by the ICTY to the national jurisdictions pursuant to Rule 11 *bis* of the ICTY's Rules of Procedure and Evidence. Such monitoring is performed within the existing mandates of the relevant OSCE field operations. Although formats and content of such reports to the OTP ICTY differ, the purpose of monitoring is, *inter alia*, to assess the application of international fair-trial and other criminal justice standards to the proceedings.

### 8.5.1 Information-sharing practices generally

Monitoring programmes will often have current information regarding high-profile cases such as war crimes, trafficking, or other politically sensitive cases, as well as more general information and statistics regarding the functioning of the criminal justice

system. As a result, programmes often receive requests for information from a variety of actors, including international and national organizations. In this way, programmes are often called upon to support the activities of other organizations.

In considering whether to provide non-public reports to such actors and to share information more generally, programmes must, in addition to organizational policy decisions, take steps to ensure that the use of information does not compromise the programme's ability to deliver on its primary purposes.

### *8.5.2 Establishing information-sharing controls*

If, after careful consideration, a programme does determine that information-sharing will not compromise the overall purpose of monitoring, information-sharing controls must be put in place. This protects the integrity of the programme generally, as well as the release of confidential information that has been obtained by virtue of monitoring closed hearings and access to non-public documents.<sup>15</sup> To protect the integrity of the programme and confidentiality, programmes should consider the following methods when engaging in non-public information-sharing:

**MEMORANDUM OF UNDERSTANDING (MOU).** For information-sharing that occurs on a regular basis with a specific organization, programmes should consider entering into an MoU. The MoU may specify the type of information that is to be shared, the contemplated uses of such information, and the manner in which it is to be exchanged, including designating mutual contact points. The process of negotiating and entering into an MoU not only provides valuable assurances regarding how such information is to be used, but provides an opportunity for the programme to explain its methodology and purposes to another organization. Addressing the timing and method of information-sharing also allows for a regularized exchange that will not result in *ad hoc* requests and unanticipated burdens put upon staff.

**EDITING AND CLEARANCE:** To protect confidential information included in reports or legal opinions of monitors that may not be final or directly relevant to the other parties, programmes should consider removing such information from case reports if they are to be provided to external parties. Such extracts might include the basic hearing information and summary of testimony, but omit confidential information, as well as the monitor's legal analysis. Alternatively, a programme might consider releasing only secondary reporting to external parties that have been vetted and cleared.

**FORMULATING AN INFORMATION-SHARING PROTOCOL:** In general, a programme should adopt an information-sharing protocol that is consistent with the principle of confidentiality and the practical needs of the programme. Such a protocol eliminates uncertainty regarding information-sharing by establishing what may be shared, in what form, and with whom. In this way, an information-sharing protocol may be formalized

15 The principle of confidentiality and the corresponding duty of monitor confidentiality are discussed more generally in Chapter 7.1.3.

based upon a consistent and well-thought-out approach, and not decided ad hoc as external requests are made.

**EXAMPLE: INFORMATION PROTOCOL, COALITION ALL FOR FAIR TRIALS**

In September 2005, as a result of the interest in various domestic and international organizations for case information, the coalition All for Fair Trials, a domestic observer group in the former Yugoslav Republic of Macedonia, developed a rulebook for the retention and release of case information related to its monitoring project involving trafficking cases. This rulebook provides, in addition to general rules of confidentiality for all monitoring staff, clear guidelines regarding the type of case information that may be shared with external parties only by the programme's project co-ordinator.

The rulebook provides for a three-level confidentiality system. First, basic information relating to the existence of cases and number of cases monitored by the coalition is deemed accessible to any interested parties. Second, certain statistical data regarding defendants and other specifically defined information regarding victims may be released to specified actors for specified purposes. Finally, information obtained from court documents, closed hearings, or protected by court order may not be released by the coalition to third parties under any circumstances. In this way, the rulebook provides clear protocols to supervisors on the release of monitoring data in the regular course of programme activities in line with the overall purposes of the programme.

## CHAPTER 9

# Advocacy strategies

A trial-monitoring programme must adopt advocacy strategies that seek to inform, engage, and influence local authorities and other stakeholders on the direction of future reforms. This chapter addresses programme activities and strategies for how to engage stakeholders in the process of reform and how to promote positive responses to monitoring results and recommendations.

### 9.1 Strengthening working relationships through the process of reporting

The ability of a trial-monitoring programme to effect change is limited. Power to make reforms and take action resides with the relevant governmental authorities. If a trial-monitoring programme has no connection to the government institutions, authorities, or officials that have the power to make reforms or if the authorities have no interest in reform, then even the most accurate and incisive report will have little effect. A programme must therefore constantly strive to seek partnership and relevance to local authorities, institutions, and other stakeholders.

Trial-monitoring reports will often present critical descriptions of legal practice in the host state. This may include findings of a systemic nature, incompetence, or sometimes even professional misconduct. Although reports will usually not identify legal actors by name, they often indirectly question the competency of local authorities or institutions. Despite the need for such objective assessments, comprehensive justice reform will often require commitment and buy-in from some of these same legal actors.

The importance of building constructive partnerships with stakeholders at every step in the process cannot be overemphasized. As a programme seeks such relationships with local institutions and authorities, reporting and other monitoring activities must be seen as useful, as well as inclusive or even collaborative. An advocacy approach should not only engage local institutions and authorities in a dialogue regarding monitoring and the reform process at an early stage, but should give them a stake in the process and outcome.

The following sections address advocacy strategies that seek to more closely incorporate national authorities and actors in the work of the monitoring programme, including the formulation of recommendations. Such strategies range from methods to increase the impact of public reports directly, to creating linkages between the trial-monitoring programme and other complementary rule-of-law programmes or processes with the aim of supporting and influencing the direction of reforms.

## 9.2 Consultations prior to issuing reports

Consultations with the relevant authorities over the content of a public report prior to issuance may take a number of forms. Consultations may involve the mere disclosure of the report or provide an opportunity to comment. They may also extend to allowing local actors meaningful participation in the formulation of recommendations. In practice, consultations need not consist of providing the entire report to authorities, but may involve outlining the major conclusions and recommendations. In the end, the form consultations should take will depend on the programme's relationship with the authorities and what is likely to be accomplished in a consultation process.

In deciding what form consultations should take, a programme should consider what it seeks to achieve. At a minimum, consultations with the same authorities that are the target of findings or recommendations is a professional courtesy and can assist in maintaining a good working relationship especially where reports may be critical. Such authorities may include representatives from the Ministry of Justice, Supreme Court, legislative bodies, or other institutions. Another purpose of consultation is to provide assurance against publication errors and give local authorities a chance to respond to what they believe to be inaccuracies in the report. This process may identify new information or provide new perspectives on data, thereby allowing a programme the opportunity to correct errors and adjust conclusions as appropriate.

As the implementation of recommendations will require the commitment of local officials, consultations also provide an opportunity to get feedback from various institutions and actors on how to address specific problems. This process may not only help identify workable solutions from local perspectives, but may also create the necessary buy-in of local officials into the reform process, giving them an important stake in the success of the recommendations. Frank discussions during this process may also help programmes identify partners willing to assist in the reform process, as well as identify those interests that are indifferent or opposed to change. In this way, consultations provide an additional means to obtain information regarding stakeholder interests.

Although consultations cannot ensure that recommendations are implemented, there is also little harm that may come from discussing findings in advance of issuing a public report. Only where there is no hope of any productive response from any institution or official should consultations be avoided. For instance, this may be the case where it is clear that state actors are antagonistic to trial-monitoring or reform more generally. By virtue of the OSCE political commitment to trial-monitoring, however, OSCE trial-monitoring programmes have generally been able to build a level of consensus with different local actors on the aims and goals of trial-monitoring so as to make consultations productive.

## 9.3 Joint issuance of reports

A joint public report is a report that is issued in conjunction with another institution or organization. Although both organizations need not contribute to produce the report, both organizations publicly stand behind the report's content, conclusions, and recommendations upon publication. The issuance of joint reports may raise the visibility and

impact of reports, as well as the visibility of both organizations. In addition, they demonstrate a sense of partnership and commitment in connection with the subject matter of the report that gives additional weight to the recommendations.

In the OSCE context, project monitoring programmes, such as those in Central Asia and Moldova, aim to issue joint reports with their implementing partners, including international and national NGOs. Such reports are produced with the input of the implementing partner, thereby benefiting from local perspective. Upon issuance, such reports are also positioned to be more widely distributed through the networks of the involved organizations, thereby increasing the audience of the report, as well as the visibility of all partners.

A second variety of joint report is issued with a national institution or authority. By issuing reports with a national authority, a report assumes the added impact that derives from official state approval. Further, state approval not only extends to findings, but also to the viewpoints expressed and recommendations made in the report. Such joint reporting may have a powerful effect on local authorities and actors who then cannot ignore monitoring results after official government bodies have sanctioned findings and expressed a commitment to reform. Within the OSCE context, one field operation has succeeded in having reports issued with local authorities on several occasions.

#### **TRIAL-MONITORING BY THE OSCE MISSION TO CROATIA: WAR-CRIMES REPORTS ISSUED TOGETHER WITH THE MINISTRY OF JUSTICE**

Between 2003 and 2006, two of the various comprehensive war-crimes reports published by the OSCE Mission to Croatia were issued jointly with the Ministry of Justice of Croatia.\* At that time, the joint reports were prepared in full by the Rule of Law Section based on the mission's monitoring, before being provided to the Ministry of Justice for review. After comment by, and discussion with, the Ministry, the reports were published and a joint press conference was held to announce the report and recommendations.

According to the experience of the Mission, the joint issuance of the reports added to the credibility of the reports among the state authorities, including prosecutors and the judiciary. In turn, this increased the impact of the findings and awareness of international fair-trial standards among local courts. Conversely, joint issuance of reports also benefits the host state in that it is seen to be making reform necessary for EU succession.

\* Reports issued by the OSCE Mission to Croatia after 2006 were issued by the Mission only, and not jointly with the Ministry of Justice.

## **9.4 Roundtable events**

Roundtable events following the publication of reports have been used extensively as a mechanism to further expand the reach of reports, as well as to organize a process to implement recommendations. Roundtables organized among a wide range of stakeholders provide actors with information, a forum for discussion, and bring together different institutional and individual perspectives. Organizing roundtables around the findings of the report provides the benefit of a solid foundation of fact to discuss the current situation and from which to begin discussion about reforms. In the OSCE, roundtables have been organized at all levels of the justice system from among judges in

individual courts, to widely attended state-level roundtables, including representatives from all institutions with competency and interest in judicial reform. Further, while roundtables may be used as a discussion forum, they should also aim to extract commitments from competent officials that may be documented and followed up on later.

In addition to organizing roundtables after the completion of a report, roundtables may also be organized in advance of reports to help formulate recommendations. In this way, roundtables may serve more widely as an opportunity to get feedback from various institutions and actors on how to address specific problems. This process may not only help identify workable solutions from the local perspective, but may also create the necessary buy-in of local officials into the reform process, thereby giving them an important stake in the success the recommendations.

#### **PRE-REPORT ROUNDTABLES TO FORMULATE RECOMMENDATIONS WITH NATIONAL AUTHORITIES AND REPRESENTATIVES**

A novel approach to the process of formulating recommendations and engaging the local authorities was regularized in connection with trial-monitoring projects undertaken by the coalition All for Fair Trials in the former Yugoslav Republic of Macedonia. At the completion of the monitoring, the coalition and the OSCE invite institutional actors and other representatives of government to discuss the findings for the purpose of formulating recommendations in connection with the final report. In the past, such actors have included the highest representatives of the judiciary, the Ministry of Justice, the Ministry of Interior, the Association of Judges, the Association of Public Prosecutors, the National Judicial Council, representatives of the Ombudsman's Office, members of national commissions, and representatives of international and national organizations.

At such roundtables, the findings and conclusions of monitoring are presented. Local authorities are then given an opportunity to comment on the findings and to craft their own solutions and recommendations to address the issues identified by the monitoring. This process increases local participation and buy-in in the process of reform. Ultimately, while the coalition and the OSCE retain the right to control the content of the final report, the roundtable provides an important forum to have competent authorities discuss and consider the issues in depth. Such roundtables have resulted in the acknowledgement of systemic conditions, recommendations for further action, and the undertaking of commitments, including the creation of a permanent working group to monitor the implementation of the recommendations. Following these roundtables, recommendations and commitments are incorporated in the final report. Six months after the publication of the final report, a follow-up roundtable is convened to mark the progress of the commitments undertaken by the parties.

### **9.5 Press conferences and press releases**

Press conferences and press releases by the OSCE are a method of making the general public aware of the findings and conclusions of monitoring, as well as making the public aware of the existence and purpose of such monitoring in the local context. Given the legal nature of reports, both press conferences and press releases should summarize the conclusions of monitoring, eliminating technical language, explaining



the implications and significance of findings, and laying out what needs to be accomplished next. Likewise, given that it is unlikely that print and television media will fully read reports, fact sheets should be distributed at press conferences for later reference and to clearly convey information.

Consideration should also be given to inviting select members of the government and judiciary who are supportive of monitoring and implementing recommendations to participate in press conferences. Such a step may serve a number of purposes. First, it may enhance the profile of press conferences. Second, it will help legitimize and confirm the importance of monitoring from the local perspective. Third, in raising the public profile of reform-minded actors, it may help to secure commitments from national authorities to take specific follow-up action on the record. Finally, when including authorities in press events, it should be kept in mind that such events are not a forum for discussion or debate, but a public event aimed at providing a clear message regarding the findings of monitoring.



# Appendices

## **Trial-monitoring programme summaries of selected OSCE field operations\***

\* Other OSCE field operations have also been engaged in trial-monitoring activities but are not included in the appendices. In addition, the trial-monitoring activities portrayed in the appendices do not necessarily represent all trial-monitoring activities the respective field operation is engaged in.

## A. Fair Trial Development Project, OSCE Presence in Albania

<b>Model</b>	OSCE staff programme of the OSCE Presence in Albania and funded through the OSCE unified budget.
<b>Inception</b>	This is a multi-year project that commenced in 2004. The project has involved three focused phases: 1) serious-crime cases at the Tirana District Court and Court for Serious Crimes (2003-2004); 2) first-instance proceedings conducted before the District Court and the Court for Serious Crimes with a focus on domestic violence, pre-trial detention, transparency, and procedural delays, as well as the right to an efficient defence and witness-integrity issues (2005-2006); 3) criminal appellate proceedings (2007).
<b>Objectives</b>	<ul style="list-style-type: none"> <li>• To assess domestic law and practice for compliance with international standards;</li> <li>• To increase compliance with domestic law and international fair-trial standards through recommendations;</li> <li>• To enhance transparency and public confidence in the justice system, as well as increase access to justice for all users;</li> <li>• To identify critical areas for intervention through training or other capacity-building activities; and</li> <li>• To measure progress in the administration of the justice system over time.</li> </ul>
<b>Partners</b>	None
<b>Monitoring Staff</b>	Eight local OSCE staff perform monitoring from four regional field offices; an international project manager supervises monitoring and produces analytical reports.
<b>Reports</b>	“Interim Report (on the Prosecution of Serious Crimes)” (2005); “Analysis of the Criminal Justice System of Albania” (2006); “Analysis of Criminal Appellate Proceedings in Albania” (July 2007).
<b>Achievements</b>	<ul style="list-style-type: none"> <li>• A separate waiting room for witnesses has now been designated at the first-instance Court for Serious Crimes;</li> <li>• Due to monitoring, courts now regularly post public trial schedules;</li> <li>• Court secretaries have been trained to take proper minutes of hearings;</li> <li>• Increased access to court information, including provision of court decisions and documents;</li> <li>• Increased access to the investigative files of prosecutors;</li> <li>• Improved judicial practices regarding the review of the expiry of pre-trial detention periods as required by law;</li> <li>• Increased co-operation with national officials, including the minister of justice, who has requested that the project provide analysis and recommendations to address systemic delays of trials.</li> </ul>

**Of Note**

The Fair Trial Development project is the first trial-observation programme to focus exclusively on appellate proceedings. This phase assesses criminal appellate proceedings for compliance with international fair-trial standards and domestic law. The issues addressed in this phase include:

- The right to a fair hearing, including the right to a reasoned judgement and assessment of the quality and scope of judicial review;
- The right to be tried without undue delay, including compliance with appellate procedural deadlines and timely delivery of decisions; and
- Transparency-related issues and the right of the public to access judicial information and activities.

In September 2007, the Fair Trial Development Project began analysing the procedural framework and the courts' practices in the context of civil proceedings, including property and domestic-violence cases.

## B. Trial Monitoring Project in Azerbaijan, ODIHR and the OSCE Office in Baku

<b>Model</b>	ODIHR special-purpose programme organized in co-operation with the OSCE Office in Baku.
<b>Inception</b>	The project was organized following violent clashes between police and protesters after the October 2003 presidential elections. Criminal trials of the 125 people charged with election-related violence were monitored between November 2003 and November 2004.
<b>Objectives</b>	<ul style="list-style-type: none"> <li>• To serve as a confidence-building measure and to increase transparency in the administration of justice with respect to the trials in cases of election-related violence;</li> <li>• To train local monitors and build the capacity of lawyers to monitor and report accurately on international fair-trial standards;</li> <li>• To disseminate reports on compliance with national and international fair-trial standards and to make recommendations on improving the right to a fair trial.</li> </ul>
<b>Partners</b>	None
<b>Monitoring Staff</b>	Twenty-one local lawyers were selected and trained, and then served as contract monitors under the supervision of a local project co-ordinator. One international lawyer monitored the trials and appeals of seven prominent opposition leaders charged with criminal violence.
<b>Reports</b>	<i>Report from the Trial Monitoring Project in Azerbaijan 2003-2004</i> (ODIHR and OSCE Office in Baku, 2005)
<b>Achievements</b>	<ul style="list-style-type: none"> <li>• The project successfully identified and monitored the trials of all 125 people charged with election-related violence;</li> <li>• The findings of the monitoring were set out in a published report that was presented to the government in February 2005;</li> <li>• Specific findings were made in relation to the application of the right to liberty, as well as compliance with fair-trial standards. Findings and analysis were made as follows: the rights of persons in custody to be informed of charges against them; the right to be promptly brought before a judge; the right to notify others of detention; the right to a lawyer; the right to a public hearing; the right to an independent and impartial tribunal; and other related issues;</li> <li>• A series of recommendations were provided for both immediate government action and for longer-term implementation of Azerbaijan's criminal procedure code to better protect fair-trial standards in practice. Recommendations for immediate action included: redress of specific violations by commuting specific sentences and conducting retrials as appropriate; conducting investigations of mistreatment; and forming an official body to receive complaints against police officials.</li> </ul>

<b>Of Note</b>	As an initiative of the Azerbaijani Government, a formal expert group was convened with Azerbaijani experts and officials to address and discuss implementation of recommendations. A number of reforms were addressed, and the group committed to taking all steps necessary to provide detainees with access to a lawyer immediately upon arrest.
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## C. Trial Monitoring Programme, OSCE Mission to Bosnia and Herzegovina

<b>Model</b>	A staff programme of the OSCE Mission to Bosnia and Herzegovina funded through the OSCE unified budget, while a separate section monitoring the cases transferred from the ICTY (Rule 11 <i>bis</i> Section) is funded through extra-budgetary funds.
<b>Inception</b>	The Mission began monitoring war-crimes cases in 1996. A systemic, full-time monitoring programme was established in 2004.
<b>Objectives</b>	<ul style="list-style-type: none"> <li>• To monitor criminal cases and assess compliance with international standards, including human rights and fair-trial standards, with particular focus on the ECHR;</li> <li>• To monitor the implementation of the criminal procedure code to identify systemic issues relating to the effective and fair administration of justice in criminal cases;</li> <li>• To publicly report findings and make specific recommendations to assist national authorities with their institutional responsibilities;</li> <li>• To assess the application of international standards in war-crimes cases transferred under Rule 11 <i>bis</i> of the ICTY Rules of Procedure and support the process of transitional justice.</li> </ul>
<b>Reports</b>	“Implementation of the New Criminal Procedural Code in the Courts of Bosnia and Herzegovina” (2004); “War Crimes Trials, Progress and Obstacles” (2005); “Plea Agreements in Bosnia and Herzegovina” (2006); “The Presumption of Innocence Report” (2007); regular reports in cases transferred from the ICTY sent to the ICTY Office of the Prosecutor and shared with local actors.
<b>Partners</b>	None
<b>Monitoring Staff</b>	Twenty-six national staff monitor criminal cases in 38 designated trial and appellate courts throughout the county. Supervision is provided by 10 international and national legal advisers at the head office and in regional centres. The Rule 11 <i>bis</i> Section consists of one international legal adviser, two national monitors and one international monitor, and support staff.



<p><b>Achievements</b></p>	<ul style="list-style-type: none"> <li>• Development of a statewide monitoring team capable of providing systematic monitoring of the court system;</li> <li>• Reports that have provided support for wide-ranging criminal justice reform efforts, including: the drafting of legal commentaries by local legal experts; the amendment of the criminal procedure codes by the Ministry of Justice and State Parliament; and the development of curricula for judicial and prosecutorial training centres;</li> <li>• The assessment of the application of international standards in over 100 domestic war-crimes cases, including cases transferred under Rule 11 <i>bis</i> of the ICTY Rules of Procedure;</li> <li>• Undertaking a variety of advocacy actions, including following up on recommendations included in reports by the OSCE Mission to Bosnia and Herzegovina.</li> </ul>
<p><b>Of Note</b></p>	<p>For the last three years, the programme has been a key tool and information resource in Bosnia for supporting reform consistent with the rule of law and international fair-trial standards. Over this time, the focus of the programme has shifted from assessing the implementation of procedural reforms such as plea bargaining to evaluating how fair-trial standards such as the presumption of innocence are applied at trial and plea hearings. By keeping its focus on Bosnia’s ongoing justice-sector challenges, the trial-monitoring programme remains relevant to state authorities, judicial officials, and professional members of the judiciary and bar who seek information and guidance on improving the effective and fair administration of justice.</p>

## D. Domestic War Crimes Programme, OSCE Mission to Croatia

<b>Model</b>	A staff programme of the OSCE Mission to Croatia funded through the OSCE unified budget.
<b>Inception</b>	The Mission has been monitoring war-crimes procedures from arrest to appeal in a systematic manner and countrywide since 2002.
<b>Objectives</b>	<ul style="list-style-type: none"> <li>• To assess whether the Croatian courts are prosecuting war-crimes cases impartially with respect to the defendant's national origin;</li> <li>• To assess additional issues with regard to the impartial and fair prosecution of war-crimes cases, including witness security, inter-state co-operation, and adequacy of defence counsel;</li> <li>• To assess whether serious cases that have not been prosecuted are pursued by the authorities;</li> <li>• To assess the application of international standards in war-crimes cases transferred under Rule 11 <i>bis</i> of the ICTY Rules of Procedure.</li> </ul>
<b>Reports</b>	"Domestic war crimes trials" (annual reports 2002-2005); "War crime procedures in Croatia and findings from trial monitoring" (2004); "Background report on domestic war crime prosecutions, transfer of ICTY proceedings and missing persons" (2005).
<b>Partners</b>	Between 2003 and 2006, two annual reports were issued jointly with the Ministry of Justice (although the Ministry was never officially considered an operational partner).
<b>Monitoring Staff</b>	Approximately 20 national and international staff from the Mission's Rule of Law Unit monitor war-crimes cases (from arrest to the appeals stage) in their geographic area of responsibility.
<b>Achievements</b>	<ul style="list-style-type: none"> <li>• Monitoring and reports have identified and documented systemic disparities relating to ethnic bias in the prosecution of war-crimes cases;</li> <li>• Using a comparative analysis, bias has been objectively documented in the numbers of individuals prosecuted, the standards for criminal responsibility applied, the application of aggravating and mitigating circumstances in sentencing; and the numbers and reasons for reversals;</li> <li>• Some improvements in the trials of war crimes have also been observed, including a decrease in the numbers of absentia trials and increased efforts by domestic authorities to pursue all individuals responsible for war crimes;</li> <li>• The Mission's war-crimes reports have routinely been cited by other international organizations such as the UN (ICTY) and the European Commission.</li> </ul>

<b>Of Note</b>	<p>The findings of war-crimes reports, including evidence of continued disparities in the prosecution and trials of defendants on the basis of national origin, have been widely accepted by governmental officials, including the Ministry of Justice. The acceptance of the reports by state authorities has in turn increased the legitimacy of monitoring findings and recommendations among the prosecutors and judges charged with implementing the law. Reports have also served to provide information to assess Croatia's compliance with certain benchmarks relating to reforms necessary for EU accession, as well as co-operation commitments with the ICTY.</p>
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## E. Legal System Monitoring Section, OSCE Mission in Kosovo

<b>Model</b>	A staff programme of the OSCE Mission in Kosovo funded through the OSCE unified budget.
<b>Inception</b>	The LSMS commenced monitoring of the criminal justice system in 1999 as part of the institution-building pillar of the United Nations Interim Administration. Since 2005, the LSMS has been monitoring the civil justice system, and in 2006 the LSMS initiated a pilot project to monitor the administrative justice system.
<b>Objectives</b>	The LSMS mandate is to monitor cases in the justice system and assess their compliance with international standards, including human rights and fair-trial standards; to report on matters of concern; and to recommend sustainable solutions to ensure that these standards are met.
<b>Reports</b>	“Review of the Criminal Justice System” (2000), (2001); “Independence of the Judiciary, Detention and Mental Health Issues” (2004); “The Administration of Justice in the Municipal Courts” (2004); Crime, Detention and Punishment (2004); “Review of the Criminal Justice System 1999-2005” (2006); “Review of the Civil Justice System” (2006); “Review on the Administrative Justice System in Kosovo” (2007).
<b>Partners</b>	None
<b>Monitoring Staff</b>	The LSMS is part of the Mission’s Department of Human Rights, Decentralization and Communities. Six national and six international staff lawyers monitor criminal and civil cases. An LSMS chief and a co-ordinator of criminal monitoring provide supervision and strategic planning. Two international legal analysts and a local civil legal adviser draft monthly and thematic reports based on data reported by the LSMS court monitors.

<p><b>Achievements</b></p>	<ul style="list-style-type: none"> <li>• Reports have provided more than 200 recommendations for judicial reform, many of which have been implemented;</li> <li>• Institutional reforms have included the creation of a judicial training institute, judicial inspection unit, criminal defence resource centre, and probation service;</li> <li>• Legislative reforms have included new procedural and substantive criminal codes, a juvenile justice code, a law on the execution of criminal sanctions, and the issuance of justice circulars;</li> <li>• Participation of a greater number of ethnic minorities as justice-system officials, the staffing of international judges and prosecutors in politically sensitive cases, and improved practices related to the appointment of defence counsel;</li> <li>• The LSMS has issued 15 public reports, 7 semi-public reports, and more than 30 monthly reports analysing the justice system and providing recommendations for remedial actions. The LSMS has delivered the reports to judges, prosecutors, and other legal professionals. This has resulted in improved performance and increased professionalism by judges, prosecutors, and lawyers, and other legal professionals.</li> </ul>
<p><b>Of Note</b></p>	<p>Despite the positive institutional developments noted above, the LSMS continues to monitor significant deficiencies in the administration of justice in individual cases. With the anticipated transition in the status of Kosovo from UN administration, the LSMS will face the programmatic challenge of establishing a productive and co-operative working relationship with the new governmental institutions so that it may continue to play an effective role in reform processes. In the last few years, the LSMS has already begun to implement new working methods with national legal actors. Such methods include the issuance of semi-public monthly monitoring reports to courts, public prosecutors, and advocates, providing monitoring results, as well as regular meetings with local judges and prosecutors to discuss findings.</p>

## F. Trial Monitoring Project in Kazakhstan, ODIHR and the OSCE Centre in Almaty

<b>Model</b>	ODIHR project model organized in co-operation with the OSCE Centre in Almaty and financed by the European Commission, the Netherlands, Norway, and the United States.
<b>Inception</b>	Monitoring commenced in February 2005 after a six-month planning phase.
<b>Objectives</b>	<ul style="list-style-type: none"> <li>• To facilitate compilation of reliable information on practices of criminal justice to support ongoing reforms in Kazakhstan and to identify areas of concern to be addressed;</li> <li>• To train members of civil society in national and international fair-trial standards and trial-monitoring methodology within the framework of criminal proceedings; and</li> <li>• To obtain independent and impartial reports on criminal trials from the perspective of compliance with national and international fair-trial standards.</li> </ul>
<b>Reports</b>	“Report from the trial monitoring project in Kazakhstan 2005-2006” (2007)
<b>Partners</b>	No formal partners
<b>Monitoring Staff</b>	Twenty-five local project monitors included recent law-school graduates, young practicing lawyers, and members of NGOs; programme supervision was provided by a programme co-ordinator who was also a local lawyer.
<b>Achievements</b>	<ul style="list-style-type: none"> <li>• A formal letter of support was obtained from the Supreme Court of Kazakhstan that greatly increased access to courthouses and trials;</li> <li>• Publication of a public report providing specific findings on areas impacting the right to a fair trial, statistics, and a list of recommendation to local authorities;</li> <li>• Launch of the report at the Supreme Court, where the results of the project were discussed. Participants included parliamentarians, judges, public prosecutors, lawyers, and NGOs.</li> </ul>

**Of Note**

By monitoring 730 court hearings in courts in eight regions throughout Kazakhstan, the project was able to observe a wide range of court practices and obtain a broad overview of criminal justice practices throughout the state. A questionnaire reporting system permitted monitors to obtain much systemized information regarding trials despite access issues that often impeded the observation of cases from start to finish. Monthly analytical reports allowed monitors to supplement individual case reports on issues relevant to monitoring. Due to the success of the programme, including greatly increased access and awareness of problems facing Kazakhstan's justice system, the programme carried out a second round of monitoring in 2007 to assess the implementation of recommendations contained in the initial report. A second report is scheduled to be issued in 2008.

## G. Trial Monitoring Project in Kyrgyzstan, ODIHR and the OSCE Centre in Bishkek

<b>Model</b>	ODIHR project model organized in co-operation with the OSCE Centre in Bishkek and financed by the European Commission, the Netherlands, Norway, and the United States.
<b>Inception</b>	Monitoring commenced in February 2005 after a six-month planning phase.
<b>Objectives</b>	<ul style="list-style-type: none"> <li>• To facilitate compilation of reliable information on practices of criminal justice to support ongoing reforms in Kyrgyzstan and identify areas of concern to be addressed;</li> <li>• To train members of civil society in national and international fair-trial standards and trial-monitoring methodology within the framework of criminal proceedings; and</li> <li>• To obtain independent and impartial reports on criminal trials from the perspective of compliance with national and international fair-trial standards.</li> </ul>
<b>Reports</b>	“Results of Trial Monitoring in the Kyrgyz Republic 2005-2006” (2007)
<b>Partners</b>	No formal partners
<b>Monitoring Staff</b>	Twenty-five local project monitors included recent law-school graduates, young practicing lawyers, and members of NGOs; programme supervision was provided by two programme co-ordinators who were local lawyers.
<b>Achievements</b>	<ul style="list-style-type: none"> <li>• A formal letter of support was obtained from the Supreme Court that greatly increased access to courthouses and trials;</li> <li>• In December 2004, the trial monitors received their first training on trial-monitoring. Thirty-seven people participated in the first training session held in Bishkek. In July 2005, a second training session for Kyrgyzstan and Kazakhstan trial monitors was held in Almaty;</li> <li>• Trial-monitoring was conducted between February 2005 and April 2006;</li> <li>• Publication of a final report in 2007 providing specific findings on areas impacting the right to a fair trial, statistics, and a list of recommendations to local authorities.</li> </ul>



**Of Note**

Launch of the report was attended by 23 participants, including representatives from the Judicial Training Centre, the Commission for Human Rights, the American Bar Association, the Bishkek City and District Courts, and members of civil society. The trial monitors attended 1,134 first-instance court hearings open to the public in 821 criminal cases. These court sessions took place in 26 district and three regional (city) courts. Trial monitors carried out complete monitoring of 333 cases, and general monitoring of 488 cases. The court sessions attended by the trial monitors were presided over by a total of 105 judges.

## H. Coalition All for Fair Trials, a Domestic Observer Group in the Former Yugoslav Republic of Macedonia

<b>Model</b>	A domestic trial-monitoring network consisting of 20 NGOs organized under the laws of the former Yugoslav Republic of Macedonia.
<b>Inception</b>	The coalition was established in May 2003 with the support of the OSCE Spillover Monitor Mission to Skopje.
<b>Objectives</b>	<ul style="list-style-type: none"> <li>• To raise awareness of international fair-trial standards and strengthen public confidence in the legal system;</li> <li>• To ensure that international fair-trial standards are obeyed in the courts;</li> <li>• To identify problems with the judicial system in connection with the prosecution of certain crimes and to make recommendations;</li> <li>• To assess the implementation of new criminal procedural provisions and practices of institutions responsible for combating organized crime.</li> </ul>
<b>Partners</b>	None
<b>Monitoring Staff</b>	Observers are lawyers and members of the NGOs that are part of the coalition. Depending on the observation project, the number of contracted observers varies from 6 to 80.
<b>Reports</b>	<p>“Countrywide Observation of the Implementation of Fair Trial Standards in Domestic Courts” (interim report, 2004); “Final Report, Countrywide Observation of the Implementation of Fair Trial Standards in Domestic Courts and the Assessment of the Functioning of the Judiciary” (2004); “Combating Trafficking in Human Beings through the Practice of the Domestic Courts” (2005); “The Successful Suppression of Election Irregularities - Key factors for fair and democratic elections” (2005); “Defamation and insult in criminal procedures against journalists” (2006); “Criminal justice responses to organized crime” (2006); “Efficiency of the Courts When Dealing with Organized Crime” (2008)</p>

<p><b>Achievements</b></p>	<ul style="list-style-type: none"> <li>• Creation of a nationwide domestic monitoring network capable of providing coverage of all national basic courts through its members;</li> <li>• High visibility of the coalition and endorsement of the coalition by the president of the Supreme Court, the Ministry of Justice, the Republican Judicial Council and the Republic’s public prosecutor;</li> <li>• Publication of a series of reports providing quantitative and qualitative observations on problems facing the judicial system for consideration of national authorities;</li> <li>• Roundtable events where government officials have considered recommendations for reforms and made implementation commitments;</li> <li>• Establishment of a working group of state officials and legal experts to evaluate monitoring conclusions and make recommendations (was accomplished in 2003-2004).</li> </ul>
<p><b>Of Note</b></p>	<p>Since its inception, the coalition has undertaken a number of specific projects for the OSCE Mission, as well as with the Soros Foundation, Finland, and the US Embassy. Recently, the Swedish Helsinki Committee for Human Rights funded a project called “Assessment of the Courts’ Efficiency” in order to address delays, one of the most serious problems identified by the coalition in its initial observation project. After a number of years of experience in working with international organizations, the coalition is developing the capacity to independently engage in project development with donors without financial support from the OSCE. More information about the coalition’s operations may be found on its website at &lt;<a href="http://www.all4fairtrials.org.mk">www.all4fairtrials.org.mk</a>&gt;.</p>

## I. Trial Monitoring Programme in Moldova, OSCE Mission to Moldova

<b>Model</b>	OSCE programme organized by the OSCE Mission to Moldova and funded through ODIHR and the Mission as an extra-budgetary project.
<b>Inception</b>	Programme document completed July 2005; launched in March 2006.
<b>Objectives</b>	<ul style="list-style-type: none"> <li>• To build the capacity of local civil society to monitor and report on trials;</li> <li>• To monitor and disseminate information on the application of international fair-trial standards in criminal trials; and</li> <li>• To monitor the application of substantive legal protections in the areas of trafficking, domestic violence, and corruption.</li> </ul>
<b>Reports</b>	“6-Month Analytic Report: Preliminary Findings on the Experience of Going to Court in Moldova” (November 2006).
<b>Partners</b>	ABA-CEELI Moldova, Institute for Penal Reform
<b>Monitoring Staff</b>	Twenty Moldovan law-school graduates, young lawyers, and junior law professors serve as volunteer monitors (with a nominal stipend); the national co-ordinator (who is a local lawyer) supervises the monitors, and the senior programme assistant provides additional support.
<b>Achievements</b>	<ul style="list-style-type: none"> <li>• Produced a trial-monitoring manual, including a detailed legal reference manual containing international and national standards;</li> <li>• Developed detailed MoUs with national authorities, including an agreement with the Prosecutor-General’s Office to assist in the identification of cases relevant to monitoring;</li> <li>• Developed a computer database to manage monitoring data;</li> <li>• Trained trial monitors and select civil society representatives on trial-monitoring skills and methods, including international and national fair-trial standards (March and October 2006);</li> <li>• Published a report in April 2007 that included specific findings on the courts (court premises and facilities, public access to trials, delays and postponements, security and public order), and on the professionalism and performance of the main participants at trial (judges, prosecutors, defence lawyers, clerks, and victims and witnesses).</li> </ul>

<b>Of Note</b>	<p>Thorough planning has been the hallmark of the programme. Starting with the production of a comprehensive programme document in 2005 setting forth the aims, structure, and methodology of the programme, the programme also cultivated partnerships and working arrangements with local groups. Co-operation and strategies have included MoUs with local authorities and distribution of programme literature, which has led to increasingly better access. When monitoring commenced in April 2006, only a few hearings a week were monitored. By the end of the first phase in October 2006, an average of 50 hearings a week were monitored. In March 2007, the Superior Council of Magistracy voted unanimously to endorse the initial findings of the programme contained in the “6-Month Analytic Report”.</p>
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## J. Domestic War Crimes Trial Monitoring, OSCE Mission to Serbia

<b>Model</b>	A staff programme of the OSCE Mission to Serbia funded through extra-budgetary contributions from the Netherlands.
<b>Inception</b>	The Mission has monitored war crimes trials on an <i>ad hoc</i> basis since 2001, and permanently since 2003.
<b>Objectives</b>	<ul style="list-style-type: none"> <li>• To assess domestic war-crimes trials for compliance with international fair-trial standards;</li> <li>• To assess the application of international standards in war-crimes cases transferred under Rule 11 <i>bis</i> of the ICTY Rules of Procedure;</li> <li>• To track progress of regional co-operation efforts in the collection of evidence and prosecution of those indicted for war crimes;</li> <li>• To support judicial reform, including identifying legislative, training, and institutional needs, to help improve the fairness and effectiveness of criminal prosecutions.</li> </ul>
<b>Reports</b>	Published: “War Crimes before the Domestic Courts” (2003). Unpublished: daily and periodic reports on specific cases and issues distributed to the international community and local counterparts.
<b>Partners</b>	None
<b>Monitoring Staff</b>	Two national staff members of the Mission’s Rule of Law and Human Rights Department monitor war-crimes trials under a programme supervisor.
<b>Achievements</b>	<ul style="list-style-type: none"> <li>• The identification of a need to establish regional judicial and police co-operation with Croatia and Bosnia and Herzegovina;</li> <li>• The facilitation of regional co-operation mechanisms, including regional meetings of prosecutors and judges involved in war-crimes prosecutions;</li> <li>• The dissemination of reports on individual war-crimes cases to the ICTY, foreign embassies, and international organizations;</li> <li>• The publication of a public report assessing the application of international law and standards in war crimes such as ICTY jurisprudence related to command responsibility, the law of armed conflict, admission of evidence, and compliance with fair-trial standards.</li> </ul>
<b>Of Note</b>	As a Mission activity, monitoring war-crimes trials is also part of wider war-crimes programming aimed at assisting Serbia come to terms with the legacy of its recent wartime past. From this perspective, war-crimes prosecutions are viewed as an important part of a process of transitional justice in which justice is provided to victims. As a result, in addition to monitoring war-crimes proceedings to assess the fairness and effectiveness of trials, monitoring also aims to identify institutional obstacles to securing criminal accountability.

## K. Fair Trials through Monitoring in Tajikistan, OSCE Centre in Dushanbe

<b>Model</b>	OSCE project programme organized by the OSCE Centre in Dushanbe and funded through the OSCE unified budget.
<b>Inception</b>	Project planning began in 2004; trial-monitoring commenced in 2005.
<b>Objectives</b>	<ul style="list-style-type: none"> <li>• To obtain systematic and impartial information on advances and deficiencies in the judicial system from the perspective of Tajikistan's compliance with existing international fair-trial treaty standards;</li> <li>• To raise the level of knowledge and understanding among relevant stakeholders (judges, prosecutors, executives, lawyers, the public, etc.) on the right to a fair trial and violations thereof;</li> <li>• To raise public awareness and improve understanding of the role of NGOs in ensuring fair trials accessible to all citizens;</li> <li>• To identify opportunities for technical assistance to the judiciary and NGOs in the light of the identified gaps in the justice system.</li> </ul>
<b>Reports</b>	"Ensuring Fair Trials Through Monitoring" (2005); "Ensuring Fair Trials Through Monitoring in Tajikistan" (2006)
<b>Partners</b>	Human Rights Centre, law faculties of Dushanbe and Khujand Universities
<b>Monitoring Staff</b>	Eight local lawyers perform monitoring under contract with the OSCE Centre in Dushanbe. The lawyers are also members of local NGOs.
<b>Achievements</b>	<ul style="list-style-type: none"> <li>• Increased access of monitors to court hearings that monitors were initially prevented from attending upon programme inception;</li> <li>• Increased compliance with procedural rights that were totally ignored prior to monitoring;</li> <li>• Publication of an initial report identifying specific shortcomings in Tajikistan's system of justice;</li> <li>• Specific recommendations were made to national authorities to address problems observed by monitoring. Recommendations included: the need for educational programmes for judges, public prosecutors and lawyers on professional skills, international fair-trial standards, and judicial ethics; the need for a judicial appointment and oversight body; and broader public participation in the process of exercising fair-trial rights.</li> </ul>
<b>Of Note</b>	In 2007, a total of 103 trials were monitored at courts of first instance: 41 in Dushanbe (including 229 hearings) and 62 in Sughd (including 196 hearings). The majority of cases monitored relate to theft and illegal trafficking of narcotics. The territorial scope of the programme was increased during 2007 to include monitoring at the court in Isfara.

## L. Trial Monitoring in Uzbekistan, ODIHR and the OSCE Centre in Tashkent

<b>Model</b>	ODIHR special-purpose activity organized in co-operation with the OSCE Centre in Tashkent.
<b>Inception</b>	The project was organized following the violence on 13-14 May 2005 in Andijan. Between September and November 2005, the criminal trial of the 15 people charged with violent crimes and other serious offences against the state was monitored.
<b>Objectives</b>	<ul style="list-style-type: none"> <li>• To observe the trial of those charged with crimes committed in connection with events in Andijan;</li> <li>• To monitor the trial for compliance with international fair-trial standards and OSCE commitments at all stages of proceedings;</li> <li>• To establish and maintain a dialogue with the Government of Uzbekistan on issues related to fair-trial standards.</li> </ul>
<b>Partners</b>	None.
<b>Monitoring Staff</b>	Monitoring was performed upon invitation of the Ministry of Foreign Affairs of Uzbekistan by four ODIHR international staff members and two rule-of-law monitors seconded by the OSCE Mission to Bosnia and Herzegovina.
<b>Reports</b>	“Report From the OSCE/ODIHR Trial Monitoring in Uzbekistan – September/October 2005” (2006)
<b>Achievements</b>	<ul style="list-style-type: none"> <li>• Secured an invitation from the Ministry of Foreign Affairs to monitor the trials of 15 people before the Supreme Court of Uzbekistan;</li> <li>• Secured access to the courtroom for a majority of the trial hearings;</li> <li>• Publication of a report setting forth the findings of the trial-monitoring. The report contained findings regarding the following issues: the right to a public trial; the right to a lawyer in the pre-trial stages of criminal proceedings; the right to an effective defence counsel;</li> <li>• A series of recommendations were provided to the Government of Uzbekistan, which included, <i>inter alia</i>: retrial of the defendants to be fully compliant with international fair-trial standards; review of all safeguards for a fair trial in law and practice; review of the conduct of the state-appointed lawyers; access to persons convicted of crimes related to the Andijan events by competent international bodies.</li> </ul>



**Of Note**

Following review of the trial-monitoring report, the Ministry of Foreign Affairs of Uzbekistan issued a lengthy written response addressing the specific issues raised in the report relating to conduct of the prosecutions, including compliance with international fair-trial standards. The response denied any errors or deficiencies in connection with any aspect of any of the trials and stated that the criminal trials were carried out “in strict conformity with the procedural legislation of the Republic of Uzbekistan and universally recognized norms of international law”. One major issue in contention throughout the trials and raised in the ensuing report and response was the right of the monitors to access trial information, including court documents, and to speak to participants, including prosecutors, defence lawyers, and defendants in accordance with the criminal procedure of Uzbekistan.



# ABOUT ODIHR

The Office for Democratic Institutions and Human Rights (ODIHR) is the OSCE's principal institution to assist participating States "to ensure full respect for human rights and fundamental freedoms, to abide by the rule of law, to promote principles of democracy and (...) to build, strengthen and protect democratic institutions, as well as promote tolerance throughout society" (1992 Helsinki Document).

ODIHR, based in Warsaw, Poland, was created as the Office for Free Elections at the 1990 Paris Summit and started operating in May 1991. One year later, the name of the Office was changed to reflect an expanded mandate to include human rights and democratization. Today, it employs more than 120 staff.

ODIHR is the leading agency in Europe in the field of **election observation**. It co-ordinates and organizes the deployment of several observation missions with thousands of observers every year to assess whether elections in the OSCE area are in line with national legislation and international standards. Its unique methodology provides an in-depth insight into all elements of an electoral process. Through assistance projects, ODIHR helps participating States to improve their electoral framework.

The Office's **democratization** activities include the following thematic areas: rule of law, civil society and democratic governance, freedom of movement, gender equality, and legislative support. ODIHR implements more than 100 targeted assistance programmes every year, seeking both to facilitate and enhance state compliance with OSCE commitments and to develop democratic structures.

ODIHR promotes the protection of **human rights** through technical-assistance projects and training on human dimension issues. It conducts research and prepares reports on different human rights topics. In addition, the Office organizes several meetings every year to review the implementation of OSCE human dimension commitments by participating States. In its anti-terrorism activities, ODIHR works to build awareness of human dimension issues and carries out projects that address factors engendering terrorism. ODIHR is also at the forefront of international efforts to prevent trafficking in human beings and to ensure a co-ordinated response that puts the rights of victims first.

ODIHR's **tolerance and non-discrimination** programme provides support to participating States in implementing their OSCE commitments and in strengthening their efforts to respond to, and combat, hate crimes and violent manifestations of intolerance. The programme also aims to strengthen civil society's capacity to respond to hate-motivated crimes and incidents.

ODIHR provides advice to participating States on their policies on **Roma and Sinti**. It promotes capacity-building and networking among Roma and Sinti communities and encourages the participation of Roma and Sinti representatives in policy-making bodies. The Office also acts as a clearing house for the exchange of information on Roma and Sinti issues among national and international actors.

All ODIHR activities are carried out in close co-ordination and co-operation with OSCE institutions and field operations, as well as with other international organizations.

More information is available on the ODIHR website ([www.osce.org/odihhr](http://www.osce.org/odihhr)).

